Neutral Citation Number: [2023] EWHC 3112 (Admin)

Case No: CO/2033/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04 December 2023

Before :

MR JUSTICE CALVER

- -

Between :

DAVID OWUSU YIANOMA	**Claimant/ Appellant**
- and –	
BAR STANDARDS BOARD	**Defendant/ Respondent**

- -
- -

Selva Ramasamy KC (instructed by **Kingsley Napley LLP**) for the **Appellant**
Joanne Kane (instructed by **Bar Standards Board**) for the **Respondent**

Hearing dates: Thursday 2 November 2023

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REASONS FOR RULING ON COSTS

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 15:00 on Monday 4th December 2023.

Mr Justice Calver:

1. On 13 November 2023 I gave my ruling on the costs of this appeal, namely that each party shall bear their own costs in respect of the appeal[1]. I stated that I would give my reasons later, by way of a short written ruling. This is that ruling.

2. By my judgment and order dated 7 November 2023 I varied the Bar Tribunals & Adjudication Service ("the Tribunal")'s order by substituting a suspension of 6 months concurrent on each of the 3 charges found to be proved by it, instead of the 12 months suspension imposed by it. To that extent and that extent only, I quashed the Tribunal's decision.

3. The Supreme Court has recently reviewed the approach of courts to costs orders in a regulatory context in *Competition and Markets Authority v. Flynn Pharma and Pfizer Inc.* [2022] UKSC 14. At [57] Lady Rose referred to the analysis of Sir Igor Judge in *Baxendale-Walker v Law Society* [2007] EWCA Civ 233 at [39] as follows:

> *"Unless the complaint is improperly brought, or, for example, proceeds as it did in Gorlov's case [2001] ACD 393, as a 'shambles from start to finish', when the Law Society is discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs follow the event. The 'event' is simply one factor for consideration. It is not a starting point. There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow. One crucial feature which should inform the tribunal's costs decision is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage*."

4. Furthermore at [60] Lady Rose added this:

> *"The "no order as to costs" principle applied in proceedings before the first instance professional tribunal does not apply to any appeal from that decision. In Walker v Royal College of Veterinary Surgeons [2008] UKPC 20 the Privy Council had allowed Dr Walker's appeal against the order of the Disciplinary Committee of the Royal College of Veterinary Surgeons ordering his removal from the register. The Board substituted an order suspending him for six months. Dr Walker applied for an order that the Royal College pay the costs of his appeal to the Board. The Royal College resisted the order citing Booth, Gorlov and Baxendale-Walker. The Board stated that that principle was not relevant to appellate proceedings; the principle applied only to*

[1] The Court was not asked by the Claimant to disturb the costs award of the Tribunal but only to award it the costs of this appeal (and its cost schedule accordingly contains only its costs of the appeal in the sum of £48,157).

costs before disciplinary tribunals or before a court upon a first appeal against an administrative decision by a body such as a police or regulatory authority[2]*. The Disciplinary Committee had made no order as to costs of the proceedings before it and no one had challenged that. The Royal College was ordered to pay Mr Walker his costs of the appeal to the Board." (emphasis added)*

This appeal is, of course, a first appeal against an administrative decision by a regulatory body.

5. At [97]-[98] Lady Rose considered the proper application of this principle to the facts of a particular case and concluded as follows:

97. In my judgment, there is no generally applicable principle that all public bodies should enjoy a protected status as parties to litigation where they lose a case which they have brought or defended in the exercise of their public functions in the public interest. The principle supported by the Booth line of cases is, rather, that where a public body is unsuccessful in proceedings, an important factor that a court or tribunal exercising an apparently unfettered discretion should take into account is the risk that there will be a chilling effect on the conduct of the public body, if costs orders are routinely made against it in those kinds of proceedings, even where the body has acted reasonably in bringing or defending the application. This does not mean that a court has to consider the point afresh each time it exercises its discretion in, for example, a case where a local authority loses a licensing appeal or every time the magistrates dismiss an application brought by the police. The assessment that, in the kinds of proceedings dealt with directly in Booth, Baxendale-Walker and Perinpanathan, there is a general risk of a chilling effect clearly applies to the kinds of proceedings in which those cases were decided and to analogous proceedings.

98. Where I depart from the CMA's argument and from the decision of the Court of Appeal in this case is in making the jump from a conclusion that in some circumstances the potential chilling effect on the public body indicates that a no order as to costs starting point is appropriate, to a principle that in every situation and for every public body it must be assumed that there might be such a chilling effect and hence that the body should be shielded from the costs consequences of the decisions it takes. An appeal is not sufficiently analogous to the Booth line of cases merely because the respondent is a public body and the power to award costs is expressed in unfettered terms. Whether there is a real risk of such a chilling effect depends on the facts and circumstances of the public body in question and the nature of the decision which it is defending - it cannot be assumed to exist. Further in my judgment, the assessment as to whether a chilling effect is sufficiently plausible to justify a starting point of no order as to costs in a particular jurisdiction is an assessment best made by the court or tribunal in question, subject to the supervisory jurisdiction of the appellate courts.

6. Lady Rose then went on at [122] to distinguish the position where a regulator, such as the Solicitors Regulation Authority Limited ("SRA"), is funded predominantly by the

[2] See *Walker v Royal College of Veterinary Surgeons* at paragraph [3].

profession it regulates via practising certificate fees, from that of the CMA which under the Competition Act 1998 is entitled to offset its litigation costs against any penalties it receives. She pointed out that although, following *Baxendale-Walker*, the SRA is not usually subject to an adverse costs order where the solicitor is successful, it does usually recover its costs from the unsuccessful solicitor when the Disciplinary Tribunal upholds the complaint. These costs can be considerable and if they were not recovered by the SRA from the unsuccessful solicitor, the costs would have to be borne by the profession.

7. Lady Rose expressly recognised the importance of the *Baxendale-Walker* authority for the continued proper functioning of the SRA and she made clear that she did not regard her judgment as casting any doubt on the correctness of that decision.

8. Before me, Ms Joanne Kane for the Defendant ("BSB") explained that the Defendant's 2023-2024 business plan is publicly available and it shows that the practising certificate fee derived from barristers accounts for 85.0% of the Respondent's total funding. I accept that the position of the BSB is analogous to that of the SRA and that any order of cost made against it would have to be borne by the profession. I consider that the court should accordingly have regard to the approach taken by the court in *Baxendale-Walker* when considering the exercise of its discretion to award costs pursuant to *CPR 44.2*.

9. On the facts of this case, I consider that the following factors are particularly relevant in determining the issue of costs in the instant case:

    (1) The BSB is entrusted with wide and important disciplinary responsibilities for the profession;

    (2) When the BSB is addressing the question whether to investigate possible professional misconduct, or whether there is sufficient evidence to justify a formal complaint to the Tribunal, the ambit of its responsibility is far greater than it would be for a litigant deciding whether to bring civil proceedings. Disciplinary proceedings supervise the proper discharge by barristers of their professional obligations, and guard the public interest, by ensuring that high professional standards are maintained, and, when necessary, vindicated;

(3) The exercise of the BSB's regulatory function places it in a different position to that of a party to ordinary civil litigation. The normal approach to costs decisions in such litigation, that properly incurred costs should follow the "event" and be paid by the unsuccessful party, does not necessarily apply to disciplinary proceedings against a barrister;

(4) A crucial feature which informs the exercise of this court's discretion as to costs is that these proceedings were reasonably brought by the BSB in exercise of its regulatory responsibility, in the public interest and for the maintenance of proper professional standards. The proceedings were brought and the appeal was resisted in a measured and justifiable way by Miss Kane on behalf of the BSB, in respect of admittedly serious misconduct on the part of the Claimant;

(5) The charges against the Claimant were admitted by him only the day before the hearing commenced (as to his recklessness). This court has found that he was rightfully suspended by the Tribunal, save only that the suspension should have been for 6 months not 12 months. That corresponds to the sanction which the BSB itself proposed to the Tribunal, namely that the case fell within the *middle* range of seriousness to reflect culpability and harm;

(6) For the BSB to be exposed to the risk of an adverse costs order simply because this court made a limited variation to the sanction imposed by the Tribunal, in proceedings which were properly brought by the BSB, might very well have a chilling effect on the exercise of the BSB's regulatory obligations, to the public disadvantage;

(7) The appeal was not wholly successful in any event. This court refused to substitute a sanction lower than suspension, contrary to the Claimant's submission on appeal (see paragraph 13 of his detailed grounds of appeal). To that extent therefore, the appeal did not succeed.

10. Bearing in mind these factors, in the exercise of my discretion I consider that the fair order is that each party should bear their own costs of the appeal.