Neutral Citation Number: [2024] EWHC 2883 (Admin)

Case No: AC-2024-LON-000809

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/11/2024

Before :

MR JUSTICE RITCHIE

- -

Between :

Wayne Lewis	**Claimant**
- and -	
The Bar Standards Board	**Defendant**

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- -

Doctor Anton van Dellen and Doctor Liam Wells of counsel (instructed pro bono) for the **Appellant**
Mr Barnaby Hone of counsel instructed by **The Respondent**

Hearing date: 5th November 2024

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Approved Judgment

This judgment was handed down remotely at 14:00pm on Tuesday 12th November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Ritchie:

The Parties

1. The Appellant is a barrister who was called in 1982. The Respondent is the regulatory body for barristers.

The Appeal

2. The Appellant faced 5 misconduct charges at a 4 day hearing which started on 4.12.2023 and ended on 15th February 2024. He was found guilty of all charges and the sanction imposed was 18 months suspension from practice with costs against him of £5,443 including VAT. The charges all arose out of the Appellant acting on a direct professional access (DPA) retainer for KW in her ancillary relief proceedings (the money dispute arising from her divorce). His fees were payable under a damages based agreement (DBA). The fees were not calculated at an hourly rate for the work he did, but instead were agreed at 15% of the sums which KW recovered. After the dispute was settled, the matrimonial home was sold and the net proceeds of sale and a lump sum, which together came to over £300,000, were due to be paid to KW. The Appellant advised her to have those sums paid into one of his bank accounts to ensure that his fees (over £52,000) were paid. KW agreed and the sums were paid into an account at Barclays Bank held by a company bearing his name: *Wayne Lewis Ltd.* He then took his fees from the sums. The problems with this arrangement were manifest. Firstly, as a barrister, he was not permitted to accept or retain his client's money. He was only entitled to accept his fees. Secondly, he did not provide a client care letter for this arrangement. Thirdly, he did not pay the money back on demand. He retained about £17,000 of it, drip paid and gave a huge range of excuses over the course of 3 years and 10 months, both to KW and the Legal Services Ombudsman, before finally paying the last tranche back in August 2023.

3. On 8.3.2024 the Appellant filed his notice of appeal against sanction but not the findings of misconduct. Then, on 18.4.2024, the Appellant applied to amend the grounds of appeal to include an appeal against the findings of misconduct. By consent permission was granted.

Bundles

4. For the hearing I was provided with an Appellant's Bundle, a Respondent's Bundle; a joint Authorities Bundle; skeleton arguments and a costs schedule. The original Tribunal Bundle and the Bar Handbook containing the relevant standards at the time were also provided during the hearing.

The Issues

5. This appeal raises the following issues.
   5.1 Were the details of the charges insufficiently particularised such that they caused unfairness to the Appellant?

5.2 Was the Tribunal wrong to find that the Appellant owed a professional duty of care to KW as a client when the proceeds of sale of the matrimonial home were paid over, held and handled by the Respondent?

5.3 Did the Tribunal fail to give sufficient reasons for some of its findings?

5.4 Was the sanction too harsh in the circumstances?

Charges

6. The charges can be summarised as follows. **Charge 1:** failing to provide a **client care letter** for the work he had agreed to perform and hence acting in a manner likely to diminish the trust and confidence of the public in him or the profession and/or failing to act in the best interests of the client (breaching Core Duties 2 and 5 and rC125.1).

7. **Charge 2: receiving, controlling or handling client money**: £322,989.18; paying it into a bank account over which he had control; using the money to make unauthorised payments which were not on the client's behalf and hence failing to act in the client's best interests and/or failing to act with integrity and/or acting in a manner likely to diminish the trust and confidence which the public placed in him or the profession (breaching Core Duties 2, 3 and 5 and rC8 or rC73).

8. **Charge 3: handling client money** (£250,000), by transferring it into his personal bank account on 17.10.2019 and hence failing to act honestly or with integrity and/or acting in a manner likely to diminish the trust and confidence of the public in him or the profession and/or failing to act in the best interests of the client (breaching Core Duties 2, 3 and 5 and rC8 or rC73).

9. **Charge 4: failing to repay** the client money to his client and hence acting in a manner likely to diminish the trust and confidence of the public in him or the profession and/or which could be seen by the public to undermine his integrity (breaching Core Duties 2, 3 and 5 and rC8).

10. **Charge 5: misleading the Legal Services Ombudsman** on 16.3; 22.6; 15.7 and 28.7.2021, by informing the LSO that he would repay the client £14,000 when he knew or ought to have known he was unable or unwilling to do so and hence failing to act in the client's best interests and/or failing to act with honesty or integrity and/or acting in a manner likely to diminish the trust and confidence which the public place in him (breaching Core Duties 3 and 5 and rC8 or rC9.1).

The BSB Handbook v 4.8

11. The relevant parts of the Handbook are:

> **"B The Core Duties**
>
> …
>
> **CD2** You must act in the best interests of each client.
>
> **CD3** You must act with honesty, and with integrity.

…
CD5 You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession."

"**rC8** You must not do anything which could reasonably be seen by the public to undermine your honesty, integrity (CD3) and independence (CD4).
rC9 Your duty to act with honesty and with integrity under CD3 includes the following requirements:
.1 you must not knowingly or recklessly mislead or attempt to mislead anyone;"
"**rC73** Except where you are acting in your capacity as a manager or employee of an authorised (non-BSB) body, you must not receive, control or handle client money apart from what the client pays you for your services."
"**rC125** Having accepted public access instructions, you must forthwith notify your public access client in writing, and in clear and readily understandable terms, of:
.1 the work which you have agreed to perform;
.2 the fact that in performing your work you will be subject to the requirements of Parts 2 and 3 of this Handbook and, in particular, Rules rC25 and rC26;
.3 unless authorised to conduct litigation by the Bar Standards Board, the fact that you cannot be expected to perform the functions of a solicitor or other person who is authorised to conduct litigation and in particular to fulfil obligations arising out of or related to the conduct of litigation;
.4 the fact that you are self-employed, are not employed by a regulated entity and (subject to Rule S26) do not undertake the management, administration or general conduct of a client's affairs;
.5 in any case where you have been instructed by an intermediary:
.a the fact that you are independent of and have no liability for the intermediary ; and
.b the fact that the intermediary is the agent of the lay client and not your agent;
.6 the fact that you may be prevented from completing the work by reason of your professional duties or conflicting professional obligations, and what the client can expect of you in such a situation;
.7 the fees which you propose to charge for that work, or the basis on which your fee will be calculated;
.8 your contact arrangements; and
.9 the information about your complaints procedure required by D1.1 of this Part 2."

> "Definitions: "Client" means, the person for whom you act and, where the context permits, includes prospective and former clients"

The Tribunal's Judgment

12. The tribunal was chaired by His Honour Judge Meston KC and consisted of five members, two of whom were barristers and two of whom were lay members (the Tribunal). The reasoning was dated the 19th of February 2024 and can be summarised as follows. Although in his witness statement the Respondent admitted breaching his duty of care to KW in relation to Charge 2, the Tribunal treated all the charges as denied because that was the Respondent's approach at the hearing. The Tribunal found that the Respondent did mainly direct professional access work (DPA) out of Access Lawyers Chambers. In 2017 he ran a company called Wayne Lewis limited trading as "Access Lawyers" but he resigned as a director in January 2018, stayed on as company secretary and his former wife was a director of that company. On the 7th of December 2017 he issued a client care letter (CCL) to KW to represent her in a dispute over finance arising from her divorce and in particular for a forthcoming hearing for a fee of £5,000 plus VAT. Thereafter he was to review the proceedings and to issue a further letter if further work was needed. One of the terms of the CCL was that barristers do not handle clients' money (clause 7) and he expressly stated he had training and certificates to conduct litigation. The Tribunal found that on the 28th of December 2017 the Respondent entered a damages based agreement (DBA) with KW under which he would be paid 15% of the amount received in the financial dispute if the settlement or award was more than what was currently on the table at that date. The Tribunal found that the financial dispute was settled on the 30th of July 2018 on terms involving the sale of the matrimonial home and the balance of the proceeds being paid to KW together with a lump sum of £25,000. One year later, on the 2nd of July 2019, the matrimonial home was sold and the conveyancing solicitors who had been jointly instructed were instructed by KW on the 3rd of July 2019 to pay the proceeds into a Barclays Bank account of Wayne Lewis limited trading as Access Lawyers. So, £322,989.18 was paid into that account. The Tribunal found that from that sum the Respondent's fees were deducted, which amounted to £52,950, leaving a balance owing to KW of £295,039.18. The Tribunal noted that in her witness statement KW stated that she and the Respondent had agreed that the Respondent's employee, Mrs Raana, would do the conveyancing for her planned future purchase of her next house and on that basis she agreed that the proceeds would go into the Respondent's bank account. Thus, on the 14th of August 2019 the Respondent confirmed to KW that he was holding the money in what he called his "business client account" (BCA). She needed this information for her purchase. Just stopping there for a minute. Those words "client account" used by the Respondent were a falsity. It was not a client account, as the Appellant admitted, it was a business account for the company. The sums were not held on trust for clients in that account.

13. In early October 2019 the Respondent withdrew £38,000 from the BCA and thereafter he had insufficient funds to pay what he owed to KW. On the 16th of October 2019 KW required payment of the suns owing to her by the Respondent. The next day

£250,000 was paid out from the BCA to the Respondent's personal account. The Tribunal found £277,709 was then paid to KW on the 22nd of October 2019 leaving an outstanding balance of £17,539.18. The Tribunal found that the Respondent provided confusing evidence about what happened thereafter. He begged for time to pay on many occasions and KW became angry. The Tribunal set out various part payments made by the Respondent until December 2020 when KW complained to the Legal Ombudsman Service. On 16th March 2021 the Respondent gave an explanation involving his company being closed down and him overspending in which the Respondent accepted that he had let KW down and that it was his fault and offered to pay £14,000 to settle the sums owing within 28 days and to "save his career". The Tribunal found, in their judgment, that this letter did not accurately present the facts namely that the Respondent had removed £38,000 from the BCA on the 3rd of October 2019. The Tribunal noted a few more payments and then that the Respondent negotiated with the Ombudsman. On the 15th of July 2021 the Ombudsman referred the Respondent to the Bar Standards Board. The Respondent then accepted that he owed £14,000, including £1000 of compensation, to KW and said he would pay that so on the basis of this offer the Ombudsman closed his file considering the offer to be reasonable. The Tribunal noted that the Respondent did not make the payment offered but made smaller part payments and then stopped paying in September 2021. As a result KW wrote to the Ombudsman asking him to reopen the case. It was reopened and an investigator was appointed and the Respondent asked for more time again. The Ombudsman finally decided on 27th of February 2022 that, having made some further smallish payment, the Respondent owed £12,350 including compensation and ruled that the Respondent was a barrister who had "intermingled client money" with his own money and recognised this was poor service and made a final decision that £12,350 was owing. The Respondent was required to pay by the 14th of March 2022 and failed to do so. The Ombudsman requested he paid by the 23rd of March but he failed to do so. Thereafter, the Respondent made various part payments. The Respondent's first explanation to the BSB was provided on the 9th of May 2022 and it involved asserting that his company was being wound up so it was for that reason that that he transferred £250,000 to his personal personal account, to "protect" KW. He could not explain the shortfall. He did not explain why £38,000 had been removed from the BCA on the 3rd of October 2019 and the bank statements he provided did not show what happened to those sums. The Tribunal noted that various other part payments to KW were made in 2022 and 2023 with the final sum being paid on the 15th of August 2023.

14. The Tribunal assessed the evidence they had heard from KW, Mr. Williams of the Ombudsman service and the Respondent. They considered that KW was a credible witness. They considered that the Respondent was not credible, was evasive, blamed others and had a poor grasp of his duties. They preferred the evidence of KW.

15. On charge 1 the Tribunal rejected the Respondent's defence that KW was no longer his client when he held her money. The Tribunal found that KW signed an agreement to instruct Access Lawyers to do her conveyancing but no copy had ever been provided.

The Tribunal refused to find that there was no client care letter in view of the finding that an agreement for conveyancing had been signed. However, separately, the Tribunal found under charge one that KW entrusted the Respondent with the proceeds of sale of the matrimonial home when she was his client and the Respondent had this sum paid into the bank account of Wayne Lewis Limited at a time when KW was his client or at least a former client. In those circumstances the Tribunal found the Respondent had a duty of care to safeguard the funds and to keep them separate from his own and the Tribunal found that KW and the Respondent had an ongoing professional relationship. In relation to the definition of the word "client", the Tribunal found that the BSB Handbook defined "client" as "a client or former client where the context so permitted". The Tribunal found that the Respondent treated KW like a client. He wanted the sums paid to him to ensure payment of his fees under the DBA. He had duties under rules rC73 which prohibited a self-employed barrister handling client's money save for his own fees which he broke. Under rule rC125 (the rule relating to direct access clients, the Tribunal found that the Respondent should have told KW he could not act in the purchase of next property, the purpose for which he would hold her money and what she as a client could expect. The Tribunal held that he had a duty to keep accounts and records in relation to her money which he held. The Tribunal found KW continued as the Respondent's client after he was paid for the finance dispute work and as such he had continuing obligations which he breached and therefore they found charge 1 proven.

16. On charge 2, the Tribunal found that the Respondent held and controlled and handled KW's money and made unauthorised use of KW's money by withdrawing £38,000 from the account and refusing or failing to explain how he used it. On the basis that the Respondent was no longer a director the Tribunal pointed out that if he no longer had control of the funds when he paid them into Wayne Lewis Ltd's BCA account then he lost control of KW's accounts from then on.

17. On charge 3 the Tribunal found that the Respondent had given various different explanations for the transfer of £250,000 into his own personal account. They noted this transfer occurred after KW asked for the money to be returned and they noted the Respondent never informed KW that her money was "at risk" in the company "BCA" bank account. They found charge 3 proven. They did not find that the Respondent had been dishonest but instead that transferring money into his own account would undermine trust in the profession therefore establishing charge 3.

18. On charge 4, failure to repay, the Tribunal found this charge established and found that it was aggravated by repeated failure to repay on demand. The Tribunal found that the Respondent knew that he would need a loan to pay but did not get a loan. The Tribunal found this showed a significant lack of integrity and was conduct likely to diminish trust in the profession.

19. On charge 5 the Tribunal found that the charge was proven and that the Respondent's offers to the Legal Service Ombudsman lacked integrity and likely to diminish trust in the profession.

20. In relation to sanction the Tribunal took into account that the Respondent had no previous misconduct charges and that he asserted he did not believe that KW was his client and so was more casual with her, but considered that his conduct fell into the category group D, with high seriousness, involving abuse of a position of trust; considerable experience; the reliance that KW placed on the Respondent; the Respondent retaining money to avoid his own financial issues; recklessness; substantial failures; putting his interests above a vulnerable client's interests; the emotional harm suffered by KW as well as the financial disadvantage and the increased stress and the undermining of public confidence in the profession and of integrity. In relation to mitigation the Tribunal took into account that the Respondent had 40 years of experience and that the charge only related to one client but found that the risk that this could recur with other clients could "not be disregarded" and that no measures had been put in place to avoid repetition despite the Respondent having an extensive direct access practice.

The Grounds of Appeal

21. **Ground one, vagueness.** The Appellant asserted that the charges had inadequate particulars. The Appellant asserted that the charges did not make clear which part of the client care letter was unsuitable and in relation to charges 1-2 and 4 the dates of the alleged breaches were not set out. It was asserted under ground 1 that if KW was a former client when the sums were received then the Respondent could not be guilty of the charges as drafted because charges 1, 2, 3 and four all used the words "his client". Thus, it was argued, if KW was the Respondent's "former client" at the relevant dates the charges were bound to fail.

22. The Appellant relied on Article 6(3)(a) of the *European Convention on Human Rights* (ECHR) which required that defendants are to be informed in detail of the nature and cause of the accusations made against them. The Appellant asserted that the vagueness of the charges led to unfairness in that the Appellant could not fully address the charges in his defence.

23. **Ground two, the company held the money, not me.** The Appellant asserted that a separate legal entity, Wayne Lewis Ltd, held the money and the Tribunal had in some way pierced the corporate veil without setting out any rational reasons how the corporate veil had been pierced, thus the decision was wrong in relation to receiving holding and dealing with client money. Under this ground the Appellant asserted Mrs Raana was employed the company not by the Respondent.

24. **Ground three, end of retainer, findings of fact on receipt and use of funds.** In this ground the Appellant repeated the assertion that KW was no longer the Respondent's

client after 19th July 2019. The Appellant asserted that KW was a client of Wayne Lewis Ltd who were going to deal with the conveyancing of her future house. The Respondent accepted that he had taken "measures" to safeguard KW's money by "accepting it" into his own bank account because Wayne Lewis Ltd was struck off the register of companies on the 20th of October 2019 and if he hadn't transferred KW's money into his own bank account it might have been "lost", therefore he asserted that it was an "emergency situation" in which he was protecting KWs money.

25. **Ground four.** Under this ground the Appellant pointed out that there was no pleaded duty to safeguard KW's money in any of the charges and the Appellant again asserted that he was a separate legal entity from Wayne Lewis Ltd and the Tribunal was wrong in law to impose a duty on him when KW was the client of the company not of him.

26. **Appeal against sanction.** There were 8 original grounds of appeal against sanction. The first was the the Respondent's age, he will be nearly 72 when the suspension ends. The second was that the Tribunal did not discuss suspension before passing that as a sentence. The third, was that the Tribunal failed to weigh his 40 years of good professional practise, his clean record and his remorse. The fourth was that his offending fell into the moderate culpability bracket of class D because there was limited harm and there was no medical evidence of stress or mental suffering by kW. The fifth ground was his acceptance that he breached the trust of KW. He accepted that she trusted him with the sale proceeds and he was reckless as to his method of protecting her money. He relied on recklessness rather than intention as a mitigating factor. The sixth ground was that he should have been given credit for repaying the debt in full and for paying compensation as required by the Legal Ombudsman. He asserted there was no risk of repetition. The seventh ground was that he would not be doing conveyancing again. The eighth ground was that the costs were excessive and that they were increased due to technical video difficulties with the connection made for the BSB's witness at the hearing which were not his fault.

27. The Appellants verbal submissions were clearly and helpfully crafted by his counsel. He relied on the rule of common law fairness summarised by Stanley Burnton J in *R (Wheeler) v Metropolitan Police* [2008] EWHC 439, in which, at paragraphs 1.6 and 1.7, vagueness in charges which leads to potential unfairness at disciplinary hearings was ruled to be a reason for judicial review of the result. The appellant also relied on *Albert v Belgium* [1983] 5 E.H.R.R 533, in which Article 6 of the ECHR and in particular Article 6(3)(c) setting out the duty to inform the accused of the nature and the detail of the cause was confirmed and it was submitted that Art 6 was applicable in cases such as this. In relation to charge 1 the Appellant submitted that it was not clear from the Tribunal's judgment what the Appellant had been convicted of. Wholly properly the Appellant's counsel brought to the Court's attention the decision in *Richards v Law Society* [2009] EWHC 2087, in which May LJ and Saunders J ruled that clarification of the charges could be drawn from the prosecutor's opening statement (see paras. 30 and 33). The Appellant submitted that the ruling in *Wheeler* should be

preferred to the ruling in *Richards* because professionals should be given the benefit of the doubt on the natural justice point that clarifying a charge as late as the opening at a hearing does not give sufficient time for the accused to gather together his defence or to defend himself properly. The Appellant then showed how the the vague initial wording of charge 1 became focussed on the client care letter not covering conveyancing or the receipt of money from KW in July 2019. The Appellant submitted that charge 2 did not set out any dates so was unfair. The Appellant submitted that the money was paid into a company account which was owned by a separate legal entity and that KW was not "his" client when the sums went into the BCA. In relation to charge 3, the Appellant denied that the money paid in was client money because KW was a "former client". In relation to charge 4 it was submitted that the charge was misconceived because it asserted that the Respondent failed to repay the money, it did not assert that he delayed repayment of the money. If it had asserted delayed repayment he would have pleaded guilty, but as it asserted failing to repay it was factually incorrect and no conviction could have arisen from it. The Appellant relied on the transcript in which his counsel began to raise what appeared to be a preliminary issue about the separate legal entities point in examination in chief of the Appellant. However, this never turned into a submission at half time and was in the end a submission made at the end of the hearing. I was taken to parts of the transcript which showed that the Appellant accepted in cross examination that he pitched to be the conveyancer for the sale of the matrimonial home but that KW's ex-husband refused to instruct him and so he was not appointed to sell to the house. This was a bizarre piece of evidence in view of the fact that the Respondent accepted throughout that he was not qualified to act as a conveyancer and so should never have been doing that. The Appellant complained that foreseeability of harm was not part of any of the drafted charges. The verbal submissions in relation to sanction ran along the lines set out in the skeleton argument.

28. It can be seen from this summary that the drafting of the charges was central to the appeal against conviction. The assertion that the charges were unfair because they were so vague runs throughout the appeal and the assertion that the company: Wayne Lewis Ltd, was responsible for receiving and dealing with the money, not the Appellant, is a main theme in multiple grounds. The Grounds do not make plain that any particular factual finding is being attacked nor was the finding of misconduct on charge 5 attacked.

The Law

29. Under S.24 of the *Crime and Courts Act 2013:*

> "24 Appeals relating to regulation of the Bar:
> (1) …
> (2) The General Council of the Bar, … may confer a right of appeal to the High Court in respect of a matter relating to—
> (a) regulation of barristers,"

30. The right to appeal the decision of a Bar Tribunal and Adjudication Service (BTAS) tribunal is set out in the *BSB Handbook* at rE236 which states:

> "In cases where one or more charges of *professional misconduct* have been proved, and/or a *disqualification order* has been made, an appeal may be lodged with the High Court in accordance with the Civil Procedure Rules:
> .1 by the *Respondent* against finding and/or sanction;
> .2 with the consent of the *Commissioner*, by the *Bar Standards Board* against sanction."

31. The procedure on appeal is set out in the *Civil Procedure Rules*. Part 52 governs appeals. In relation to whether the appeal is a review or a rehearing and the appellate Court's powers, CPR r.52.21 says this:

> "**Hearing of appeals**
> 52.21 (1) Every appeal will be **limited to a review** of the decision of the lower court unless—
> (a) a practice direction makes different provision for a particular category of appeal; or
> (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
> (2) Unless it orders otherwise, the appeal court will not receive—
> (a) oral evidence; or
> (b) evidence which was not before the lower court.
> (3) The appeal court will allow an appeal where the decision of the lower court was—
> (**a**) **wrong; or**
> **(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.**
> (4) The appeal court may draw any inference of fact which it considers justified on the evidence.
> (5) At the hearing of the appeal, a party may not rely on a matter not contained in that party's appeal notice unless the court gives permission." (My emboldening).

Review not rehearing

32. There is a Practice Direction governing statutory appeals (PD52D). It does not require, in PD 27.1A or elsewhere, that such appeals are by way of rehearing. The Respondent submitted that this appeal should be run under the normal rule that it is a review not a rehearing. The Appellant did not demur. I have not been provided with circumstances which would justify displacing the normal rule and so approach this appeal as a review. In any event it is clear that the Court's powers under CPR Part 52 to overturn a tribunal's decision are the same whether the procedure is a rehearing or a review. Both

are tied to the grounds of appeal. In reviews, the evidence is limited to that relevant to the grounds of appeal and the parties are discouraged from putting before the appellate Court all of the evidence before the Court below. So PD52B at para 6.4 expressly requires the appeal bundle in a review only to contain witness statements and documents relevant to the appeal. A full transcript of the evidence is not required.

Case law on findings of fact appeals

33. Where the appeal is against the findings of fact of the tribunal, what are the tests, or gateways which the High Court is to apply to determine whether the tribunal's decision was "wrong"? There are 3 standard gateways to determining whether a decision is wrong which are separate from the gateway for serious procedural or other irregularity. These are: (1) a failure to give sufficient reasons; (2) making findings which are irrational or which no reasonable tribunal could make or which fail to take into account relevant matters or take into account irrelevant matters; (3) making findings of fact which are not supported by the evidence.

The overall approach to statutory appeals

34. The correct approach to the test in relation to appeals against findings of fact run by way of rehearing was considered by Sharp LJ and Dingemans J in the Divisional Court in *General Medical Council v. Jagjivan* [2017] 1 WLR 4438. The following principles were expounded (at paras. 39-40):

> *"The correct approach to appeals under section 40A*
> 39. As a preliminary matter, the GMC invites us to adopt the approach adopted to appeals under section 40 of the 1983 Act, to appeals under section 40A of the 1983 Act, and we consider it is right to do so. It follows that the well-settled principles developed in relation to section 40 appeals (in cases including: *Meadow v General Medical Council* [2006] EWCA Civ. 1390; [2007] QB 462; *Fatnani and Raschid v General Medical Council* [2007] EWCA Civ. 46; [2007] 1 WLR 1460; and *Southall v General Medical Council* [2010] EWCA Civ. 407; [2010] 2 FLR 1550) as appropriately modified, can be applied to section 40A appeals.
> 40. In summary:
> i) Proceedings under section 40A of the 1983 Act are appeals and are governed by CPR Part 52. A court will allow an appeal under CPR Part 52.21(3) if it is 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings in the lower court'.
> ii) It is not appropriate to add any qualification to the test in CPR Part 52 that decisions are 'clearly wrong': see *Fatnani* at paragraph 21 and *Meadow* at paragraphs 125 to 128.
> iii) The court will correct material errors of fact and of law: see *Fatnani* at paragraph 20. Any appeal court must however be

extremely cautious about upsetting a conclusion of primary fact, particularly where the findings depend upon the assessment of the credibility of the witnesses, who the Tribunal, unlike the appellate court, has had the advantage of seeing and hearing (see *Assicurazioni Generali SpA v Arab Insurance Group* (Practice Note) [2002] EWCA Civ 1642; [2003] 1 WLR 577, at paragraphs 15 to 17, cited with approval in *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325 at paragraph 46, and *Southall* at paragraph 47).

iv) When the question is what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence: see CPR Part 52.11(4).

v) In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact. As a consequence, the appellate court will approach Tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence: see *Fatnani* at paragraph 16; and *Khan v General Pharmaceutical Council* [2016] UKSC 64; [2017] 1 WLR 169, at paragraph 36.

vi) However there may be matters, such as dishonesty or sexual misconduct, where the court "is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal …": see *Council for the Regulation of Healthcare Professionals v GMC and Southall*[2005] EWHC 579 (Admin); [2005] Lloyd's Rep. Med 365 at paragraph 11, and *Khan* at paragraph 36(c). As Lord Millett observed in *Ghosh v GMC* [2001] UKPC 29; [2001] 1 WLR 1915 and 1923G, the appellate court "will afford an appropriate measure of respect of the judgment in the committee … but the [appellate court] will not defer to the committee's judgment more than is warranted by the circumstances".

vii) Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing retributive justice, because the overarching concern of the professional regulator is the protection of the public.

viii) A failure to provide adequate reasons may constitute a serious procedural irregularity which renders the Tribunal's decision unjust (see *Southall* at paragraphs 55 to 56)."

35. In *Volpi v Volpi* [2022] EWCA Civ. 464, Lord Justice Lewison gave guidance thus:

"**Appeals on fact**

2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.

3. …

4. …

5. Tribunals are free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense. Whether any positive significance should be attached to the fact that a person has not given evidence, or to the lack of contemporaneous documentation, depends entirely on the context and particular circumstances: *Royal Mail Group Ltd v Efobi* [2021] UKSC 33, [2021] 1 WLR 3863."

Gateway 1: failure to give sufficient reasons.

36. Failure to give adequate reasons is a longstanding gateway for allowing an appeal. This was recently neatly summarised by Morris J in *Byrne v GMC* [2021] EWHC 2237 thus:

> "**(5) The extent of the duty to give reasons**
>
> 23. In relation to the duty to give reasons, I have been referred to a number of authorities, including in particular *Selvanathan v GMC* [2000] 10 WLUK 307; *English v Emery Reimbold & Strick* [2002] 1 WLR 2409; *Gupta*, supra, at §14; *Phipps v GMC* [2006] EWCA Civ. 397 at §106; *Muscat*, supra at §108; *Mubarak*, supra, at §§9-12, 35-36; *Southall*, supra, at §§50-55, 56 and 59 and *O v Secretary of State for Education*, supra, at §§59 -63.
>
> 24. In the present case Rule 17(2)(j) of the Rules requires the Tribunal to give reasons for its findings of fact. In considering the extent and content of the duty to give reasons, the current leading authority is *Southall*, citing in detail the earlier cases of *Selvanathan*, *Gupta*, *Phipps* (in turn referring to *English v Emery Reimbold & Strick*). At §54, Leveson LJ (citing *Phipps*) confirmed that the purpose of such a duty to give reasons is to enable the losing party to know why he has lost and to allow him to consider whether to appeal. It will be satisfied if, having regard to the issues and the nature and content of the evidence, the reasons for the decision are plain, either because they are set out in terms or because they can be readily inferred from the overall form and content of the decision. It is not necessary for them to be expressly stated, when they are otherwise plain or obvious. Leveson LJ then continued as follows:
>
> > "55. For my part, I have no difficulty in concluding that, in straightforward cases, setting out the facts to be proved (as is the present practice of the GMC) and finding them proved or not proved will generally be sufficient both to demonstrate to the parties why they won or lost and to explain to any appellate Tribunal the facts found. In most cases, particularly those concerned with comparatively simple conflicts of factual evidence, it will be obvious whose evidence has been rejected and why. In that regard, I echo and respectfully endorse the observations of Sir Mark Potter [in *Phipps*].
> >
> > 56. When, however, the case is not straightforward and can properly be described as exceptional, the position is and will be different. Thus, although it is said that this case is no more than a simple issue of fact (namely, did Dr Southall use the words set out in the charge?), the true picture is far more complex. … I am not suggesting that a lengthy judgment was required but, in the circumstances of this case, a few sentences dealing with the salient issues was essential: this was an exceptional case and, I

> have no doubt, perceived to be so by the GMC, Dr Southall and the panel.
>
> …
>
> 59. Further, once providing some reasons, in my judgment, the panel did have to say something about Dr Southall who gave evidence on this topic for some days. If (as must have been the case) they disbelieved him, in the context of this case and his defence, he was entitled to know why even if only by reference to his demeanour, his attitude or his approach to specific questions. In relation to Ms Salem, the position was worse: to say that the panel "did not find her evidence to be wholly convincing" is not good enough. … That is nothing to do with not being wholly convincing: it is about honesty and integrity and if the panel were impugning her in these regards, it should have said so."

25. As made clear at §56, the factual issue in *Southall* was not "a simple issue of fact" of whether the doctor did or did not use particular words; rather it was particularly complex. §56 of *Southall* is not authority for the proposition that specific reasons for disbelieving a practitioner are required in every case where his defence is rejected. The references to "the circumstances of this case" and "in the context of this case and his defence" in §§56 and 59 imply that there will be cases where such reasons will not be required.

Reasons and credibility

26. As regards reasons concerning the credibility of witnesses

(1) Where there is a dispute of fact involving a choice as to the credibility of competing accounts of two witnesses, the adequacy of reasons given will vary. In *English v Emery*, Lord Phillips stated that "it may be enough to say that one witness was preferred to another, because the one manifestly had a clearer recollection of the material facts or the other give answers which demonstrated that his recollection could not be relied upon ". On the other hand, *Southall* at §55, and *Gupta* at §13 and 14 suggest that even such limited reasons are not necessarily required in every case.

(2) Secondly, whilst Mr Mant accepted that it is a common practice in Tribunal decisions on fact, there is no requirement for the disciplinary body to make, at the outset of its determination, a general comparative assessment of the credibility of the principal witnesses. Indeed such a practice, undertaken without reference to the specific allegations, has been the subject of recent criticism in *Dutta* at §42 and *Khan* at §§106 and 107. In my judgment, consideration of credibility by reference to the specific allegations made is an approach which is, at least, equally appropriate.

> 27. Finally, an appeal court will not allow an appeal on grounds of inadequacy of reasons, unless, even with the benefit of knowledge of the evidence and submissions made below, it is not possible for the appeal court to understand why the judge below had reached the decision it did reach. It is appropriate for the appeal court to look at the underlying material before the judge to seek to understand the judge's reasoning and to "identify reasons for the judge's conclusions which cogently justify" the judge's decision, even if the judge did not himself clearly identify all those reasons: see *English v Emery Reimbold* §§89 and 118."

37. Thus, it is apparent that the scope of the duty to give reasons is a flexible one dependent on the complexity of the facts of the case and the need for fairness in explaining to the losing party the decisions of fact and the decisions on the credibility of the witnesses, so that the losing party on any point can understand why the decisions were reached and consider whether to appeal.

Wrong and deference to the expertise of the Tribunal

38. Laws LJ in *Raschid v GMC* [2007] EWCA Civ. 46; 1 WLR 1460, (an appeal against sanction case) ruled that:

> "17. The first of these strands may be gleaned from the Privy Council decision in *Gupta v General Medical Council* [2002] 1 WLR 1691, para 21, in the judgment of their Lordships delivered by Lord Rodger of Earlsferry:
>
> > "It has frequently been observed that, where professional discipline is at stake, the relevant committee is not concerned exclusively, or even primarily, with the punishment of the practitioner concerned. Their Lordships refer, for instance, to the judgment of Sir Thomas Bingham MR in *Bolton v Law Society* [1994] 1 WLR 512, 517—519 where his Lordship set out the general approach that has to be adapted. In particular he pointed out that, since the professional body is not primarily concerned with matters of punishment, considerations which would normally weigh in mitigation of punishment have less effect on the exercise of this kind of jurisdiction. And he observed that it can never be an objection to an order for suspension that the practitioner may be unable to re-establish his practice when the period has passed. That consequence may be deeply unfortunate for the individual concerned but it does not make the order for suspension wrong if it is otherwise right. Sir Thomas Bingham MR concluded, at p 519: "The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a

> part of the price." Mutatis mutandis the same approach falls to be applied in considering the sanction of erasure imposed by the committee in this case."

18 The panel then is centrally concerned with the reputation or standing of the profession rather than the punishment of the doctor. This, as it seems to me, engages the second strand to which I have referred. In *Marinovich v General Medical Council* [2002] UKPC 36 Lord Hope of Craighead, giving the judgment of the Board, said:

> "28. . . . In the Appellant's case the effect of the committee's order is that his erasure is for life. But it has been said many times that the Professional Conduct Committee is the body which is best equipped to determine questions as to the sanction that should be imposed in the public interest for serious professional misconduct. This is because the assessment of the seriousness of the misconduct is essentially a matter for the committee in the light of its experience. It is the body which is best qualified to judge what measures are required to maintain the standards and reputation of the profession.
>
> "29. That is not to say that their Lordships may not intervene if there are good grounds for doing so. But in this case their lordships are satisfied that there are no such grounds. This was a case of such a grave nature that a finding that the Appellant was unfit to practise was inevitable. The committee was entitled to give greater weight to the public interest and to the need to maintain public confidence in the profession than to the consequences to the Appellant of the imposition of the penalty. Their Lordships are quite unable to say that the sanction of erasure which the committee decided to impose in this case, while undoubtedly severe, was wrong or unjustified."

19. There is, I should note, no tension between this approach and the human rights jurisprudence. That is because of what was said by Lord Hoffmann giving the judgment of the Board in *Bijl v General Medical Council* [2002] Lloyd's Rep Med 60, paras 2 and 3, which with great respect I need not set out. As it seems to me the fact that a principal purpose of the panel's jurisdiction in relation to sanctions is the preservation and maintenance of public confidence in the profession rather than the administration of retributive justice, particular force is given to the need to accord special respect to the judgment of the professional decision-making body in the shape of the panel. That I think is reflected in the last citation I need give. It consists in Lord Millett's observations in *Ghosh v General Medical Council* [2001] 1 WLR 1915, 1923, para 34:

> "the Board will afford an appropriate measure of respect to the judgment of the committee whether the practitioner's failings

> amount to serious professional misconduct and on the measures necessary to maintain professional standards and provide adequate protection to the public. But the Board will not defer to the committee's judgment more than is warranted by the circumstances."
>
> 20. These strands in the learning then, as it seems to me, constitute the essential approach to be applied by the High Court on a section 40 appeal. The approach they commend does not emasculate the High Court's role in section 40 appeals: the High Court will correct material errors of fact and of course of law and it will exercise a judgment, though distinctly and firmly a secondary judgment, as to the application of the principles to the facts of the case."

39. The Tribunal's expertise and role is taken into account by the High Court in an appeal and deference and respect is given to that role and to the three purposes behind the role which the Tribunal is serving, namely: protection of the public, protection of the reputation of the profession (not punishment) and maintenance of high standards. Whereas the respect may be profound, the deference is not total. It is measured by reference to the test to be applied to determine whether the Tribunal's decisions were wrong as to fact (or law).

Wrong and the "live evidence" principle

40. In *Grizzly Business v Stena Drilling* [2017] EWCA Civ. 94, the advantage which the Tribunal has over the appellate Court was summarised by Longmore, Lloyd Jones and Treacy LJJ, thus:

> "39. The parties were broadly agreed upon the relevant law in the light of the recent Supreme Court decisions of *Henderson v Foxworth* Investments Ltd [2014] UKSC 41; [2014] 1 WLR 2600 and *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 the latter of which cited with approval *Hamilton v Allied Domecq Plc* [2006] SC 221, para 85. In the latter case it was said:-
>
> > "If findings of fact are unsupported by the evidence and are critical to the decision of the case, it may be incumbent on the appellate court to reverse the decision made at first instance."
>
> In *Henderson* the Supreme Court (para 62) also said:-
>
> > "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."
>
> We have also had regard to the last three reasons why appellate courts are warned not to interfere with findings of fact unless compelled to do so as enumerated by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ. 5:-

> "iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
> v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
> vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

41. I take into account that I am at a disadvantage when assessing the credibility of the witnesses who gave evidence in person at the Tribunal hearing. The members heard and saw them give evidence, I did not. All this Court can analyse is the transcript and the witness statements against the documentation. This is an obvious disadvantage when assessing honesty and credibility.

Wrong and the generous ambit principle – on findings of fact

42. The correct approach to appeals against findings of fact was reconsidered in *R (Dutta) v GMC* [2020] EWHC 1974 (Admin), a statutory appeal in which *Jagjivan* was not cited. Warby J ruled as follows (I have not repeated the long list of citations):

> "20. … This is a challenge to the Tribunal's fact-finding processes at Stage 1. A specialist Tribunal may of course have specialist expertise that is relevant at that stage, but this is not such a case. If the Court finds that the Tribunal went wrong at the first stage, it should quash the conclusions at all three Stages, unless persuaded that the error would have made no difference to the outcome. That, as Ms Hearnden rightly accepts, is a high threshold, which is not readily satisfied: *R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] 1 WLR 3315, 3321.
> 21. Bearing that in mind, the points of most importance for the purpose of this case can be summarised as follows:
> (1) The appeal is not a re-hearing in the sense that the appeal court starts afresh, without regard to what has gone before, or (save in exceptional circumstances) that it re-hears the evidence that was before the Tribunal. "Re-hearing" is an elastic notion, but generally indicates a more intensive process than a review: *E I Dupont de Nemours & Co v S T Dupont (Note)* [2006] 1 WLR 2793 [92-98]. The test is not the "*Wednesbury"* test.
> (2) That said, the Appellant has the burden of showing that the Tribunal's decision is wrong or unjust: *Yassin* [32(i)]. The Court will have regard to the decision of the lower court and give it "the weight that it deserves": *Meadow* [128] (Auld LJ, citing *Dupont* [96] (May LJ)).

> (3) A court asked to interfere with findings of fact made by a lower court or Tribunal may only do so in limited circumstances. Although this Court has the same documents as the Tribunal, the oral evidence is before this Court in the form of transcripts, rather than live evidence. The appeal Court must bear in mind the advantages which the Tribunal has of hearing and seeing the witnesses, and should be slow to interfere. See *Gupta* [10], *Casey* [6(a)], *Yassin* [32(iii)].
> (4) Where there is no question of a misdirection, an appellate court should not come to a different conclusion from the Tribunal of fact unless it is satisfied that any advantage enjoyed by the lower court or Tribunal by reason of seeing and hearing the witnesses could not be sufficient to explain or justify its conclusions: *Casey* [6(a)].
> (5) In this context, **the test for deciding whether a finding of fact is against the evidence is whether that finding exceeds the generous ambit within which reasonable disagreement about the conclusions to be drawn from the evidence is possible:** *Yassin* [32(v)].
> (6) The appeal Court should only draw an inference which differs from that of the Tribunal, or interfere with a finding of secondary fact, if there are objective grounds to justify this: *Yassin* [32(vii)].
> (7) But the appeal Court will not defer to the judgment of the Tribunal of fact more than is warranted by the circumstances; it may be satisfied that the Tribunal has not taken proper advantage of the benefits it has, either because reasons given are not satisfactory, or because it unmistakably so appears from the evidence: *Casey* [6(a)] and cases there cited, which include *Raschid and Gupta* (above) and *Meadow* [125-126], [197] (Auld LJ). Another way of putting the matter is that the appeal Court may interfere if the finding of fact is "so out of tune with the evidence properly read as to be unreasonable": *Casey* [6(c)], citing *Southall* [47] (Leveson LJ)." (My emboldening)

Gateway 2: wrong due to Wednesbury unreasonableness

43. If the Appellant proves that the Tribunal's decision is *Wednesbury unreasonable* then the appeal will be granted. I say this despite what Warby J ruled in *Dutta* because I consider that when he said it is not the *Wednesbury* test, he was ruling that the test of "wrong" encompasses *Wednesbury* but goes beyond it. The *Wednesbury* test is used for judicial review and involves consideration of 3 classic gateways. Firstly, whether the Tribunal has made an irrational decision, in the sense that no reasonable Tribunal could have come to that decision on the evidence. Secondly, whether the Tribunal has taken into account matters which are irrelevant when reaching a material finding of fact (for instance skin colour, gender, religious beliefs, political allegiance). Thirdly,

whether the Tribunal has failed to take into account a relevant matter when making a material finding of fact (for instance objectively independent documentary evidence stating the opposite). This is settled law in judicial review. If the Tribunal's decision is one no reasonable Tribunal could make then it will be held to have been wrong.

Is there a Gateway 3: wrong but not *Wednesbury unreasonable?*

44. This Court is not permitted to allow the appeal just because this Court disagrees with the Tribunal's findings on one or more facts. Lawyers may honestly disagree over almost everything, but that is not a ground for allowing an appeal. For this gateway, which may exist at an evidential level below the level at which the evidence on appeal reaches *Wednesbury unreasonable,* there are three threshold principles set out in the case law which make the gateway difficult to open:
(1) the "deference and respect" and the "professional experience in the field" principle;
(2) the "Tribunal heard and saw the live evidence" principle;
(3) the "generous ambit of disagreement" principle.

45. I considered this issue in *Roach v GMC* [2024] EWHC 1114 (Admin). At para. 34 in *Roach* I came to the following conclusion:

> " … Where the appeal is against a finding of fact, and it is not made on the grounds of lack of reasoning in the judgment (gateway 1), or procedural unfairness (a different gateway), the test for the appellate Court to apply is to determine whether no reasonable judge would have made the finding of fact or whether there was no evidence to support the finding of fact. In my judgment this amounts to the same thing, because no reasonable judge could make a finding of fact on no evidence. This formulation clearly encompasses gateway 2: *Wednesbury unreasonableness,* but does it go further? Two oft used phrases in grounds of appeal, which were used by the Appellant in the appeal before me, are that the Tribunal "misread" the evidence and/or that the finding was "against the weight" of the evidence. Lord Briggs included examples of where the tribunal "misunderstood" material evidence or overlooked it. It seems to me that the question whether such a ground comes within gateway 3 depends on the circumstances and whether the misreading of or the weight of the contra-finding evidence is sufficient to satisfy the three threshold principles and lead to the appellate Court concluding that the finding was wrong. So, for instance, misreading a witness statement as asserting a traffic light was "red" when in fact what was written was that it was "green", would amount to a finding which no reasonable Tribunal could make. But that is within gateway 2. However, preferring the evidence of one eye-witness over another, may fall foul of the three threshold principles and be insufficient to make a finding that the Tribunal was wrong. If a Tribunal makes

> the challenged finding of fact on the live or written evidence of a witness, that is some evidence, it is not "no evidence", so powerful reasons are going to be needed for the appellate Court to find that "no reasonable" Tribunal could have reached that finding. …."

Applying the law to the facts

46. **Ground 1.** It is a requirement of the common law, natural justice and of Art. 6 of the ECHR, that in regulatory matters such as this the accused is entitled to know the charge laid against him and the detail of the charge sufficiently well to be able properly to defend himself against the charge. The ground of appeal in this case is that charge 1 was too vague and hence was unfair to the Appellant. It is true that the charge does not set out the particulars of the Respondent's actions which were criticised as misconduct. However, the complaint was about the Appellant receiving over £300,000 from KW when she was his client, when he had not yet been paid, when he wanted to recover his fees and when he invited her to instruct the solicitors who handled the conveyancing of the sale of the matrimonial home, to pay the money into the BCA set up and run by *Wayne Lewis Ltd*. He was well aware that charge 1 related to his failure to supply KW with a CCL for this activity because he was served with the charges in February 2023 and drafted a witness statement dated 31.8.2023 answering them. In that witness statement he set out that, despite knowing that he was not qualified to do conveyancing work and that he was not allowed to hold client money, he was worried that he would not get paid for the work he had done for KW in the ancillary relief proceedings. So, he decided that he would not be protected: *"unless I could direct how the proceeds of sale, when paid over, were disbursed. Without the availability of BarCo, I only ever intended to hold enough by way of proceeds of sale to satisfy Ms Willis' indebtedness to me as to fees, and the ensure that the rest was promptly paid over to her. Ms Willis agreed this approach.*" Over £300,000 was paid into the Barclays bank BCA held by *Wayne Lewis Ltd* as his direction, but he wholly failed at that time to issue the client (KW) with a client care letter. His earlier CCL stated expressly that he could not handle client money and the DBA he signed with her (which was not produced in evidence) could not have said anything different, because he was not allowed to accept or hold client money as a barrister. He stated in the witness statement that he left his "assistant" Ms Raana, to deal with movement of the funds. He dealt specifically with charge 1 at paras. 22 and 23 of his statement. He asserted that the CCL from December 2017 covered the professional work he did and then asserted that the payment of his fees for that work was mere "administrative work", not professional work and that retaining the money as a personal favour to KW was not professional work, so no CCL was needed. He therefore denied charge 1.

47. I do not find in the Appellant's witness statement any misunderstanding of the detail of charge 1. He set out his defence to the charge on point. Nor, at the hearing did his barrister make and application to adjourn for more time to construct his defence to charge 1 at any time based on vague pleading or drafting. If the Appellant had been disadvantaged by a surprise relating to the detail of charge 1 he could have expressly

asserted that in his evidence or through his barrister. He did not. When the Appellant drafted his notice of appal he did not assert he had been misled or disadvantaged by the drafting of charge 1. In all of the circumstances I do not find that the Appellant has been at all disadvantaged by the drafting of charge 1 and hence this part of ground 1 is dismissed.

48. The second part of ground 1 related to dates. The same legal submission is made: namely that the lack of dates in the charges (pleural) disadvantaged the Appellant in his defence such that the proceedings were unfair to him. This ground cannot bite on charge 3 because that sets out a specific date. It does not bite on charge 4 because the failure to repay the moneys between the date of the demand in October 2019 and the final payment in August 2023, was never in dispute. Nor does it bite on charge 5 because specific dates are set out in that charge. So, in logic it can only bite on charge 2. A simple reading of charge 2 discloses that it related specifically to receiving the sum of £322,989.81, then holding and dealing with that after receipt. In my judgment, the facts of the date when that sum was received and handled were wholly within the Appellant's knowledge and control and were obvious to him. The suggestion that he was in some way misled by the absence of a stated date is unsupported by any evidence and is not what his barrister told the Tribunal nor what he said in his evidence. Reading his witness statement and his verbal evidence it is clear he knew very well what the date of transfer was made into his accounts. In my judgment this part of this ground of appeal is not made out.

49. **Ground 2.** ***Wayne Lewis Ltd.*** Under this ground the Appellant seeks to overturn unspecified findings of the Tribunal on the basis that the Tribunal attributed the acts of a company to the Appellant when they were separate legal entities. This initially attractive submission falls apart under logical analysis. Firstly, on the Appellant's own evidence, the company bearing his full name, using his trading name and the name of his chambers, was struck off on 20.10.2019, so there was no separate legal entity after that date. Secondly, there was a gap between the signing of the CCL in December 2017 (and the undisclosed DBA in December 2017) and the signing of the conveyancing retainer between KW and Mrs Raana in 2019. The Tribunal found that a conveyancing retainer was signed after the transfer of the large sum to the Appellant. KW wrote in her witness statement (paras. 6-7) that she transferred the sum to the Respondent, then looked for a house to buy, found one, then made an offer, then the Appellant arranged for her to meet Mrs Raana at his Tottenham office. So, there was a gap. In the gap the Appellant was found to have instructed KW to pay the sum to him by paying it into the company's BCA account. That instruction was wholly his responsibility and his action. Only he knew that: (1) he was not allowed to do what he instructed his client to do; (2) the BCA was in the name of his company which had already received at least one notice about being struck off; (3) the BCA was not a client account at all, the money in that account was the company's money and was not held on trust for clients; (4) the company was not a registered legal entitled regulated by the Law Society or a registered or licenced conveyancer; (5) the money in the BCA was at risk of being lost to creditors

of the company. Thirdly, as the Tribunal found and the Appellant accepted in his witness statement and in evidence, he controlled the BCA. In his witness statement he wrote that: he intended to hold the sums to satisfy the fees; he was asked by KW to hold on to the sums for longer; his assistant Mrs Raana would deal with the movements (obviously on his instructions); he was still directing the process himself (para. 20) and he was "controlling the funds". Indeed, on the evidence and the findings of the Tribunal, the Appellant moved the funds from the BCA into his personal account just before the company was struck off to "protect KW". Fourthly, the Appellant never explained who were the signatories of the BCA for the purpose of moving funds. He may only have been company secretary but, if he was a signatory, he had the power to move the funds. There is no suggestion that his ex-wife or Mrs Raana moved the funds for their own independent reasons. Fifthly, the Appellant personally paid KW over the long period between October 2019 and August 2023. He did not assert that his defunct company was the debtor. Thus, there was ample evidence to justify the Tribunal's decisions and findings that the Appellant handled and controlled KW's money, not Wayne Lewis Ltd. For all of those reasons I dismiss appeal ground 2.

50. **Ground 3. £250,000 into the Appellant's personal account.** The first part of this ground (paras. 18 and 20) contain a repeat of the corporate entity defence raised in ground 2. I have dealt with that in part above. The second paragraph of this ground is a repeat of ground 1, I have dealt with that above too. The third part, in paras. 21 and 22, raises the corporate entity point by reference to the conveyancing agreement signed by KW with the company, *Wayne Lewis Ltd*. The Appellant asserts that the conveyancing agreement covered the receipt of the payment of £322,989.18 and so the company was paid that sum and as a result it had nothing to do with the Appellant. That submission ignores the chronology. The Tribunal found that the instruction from the Appellant to KW to pay the proceeds of the sale of the matrimonial home to the Appellant came in the gap, not after KW signed the conveyancing retainer so this ground fails on the chronology of the factual findings.

51. The next part of this ground rests on the drafting of the charges numbered 1, 2, 3 and 4. All refer to "the client" not "former client". The Appellant asserts that by the time of the conduct in these charges KW was a former client so the charges cannot be upheld. This ground ignores the Tribunal's finding that the words "the client" covers not only current clients but also former clients where the context so permits: see paras. 69 (v) and (vi) and see the BSB Handbook at the definitions section. The Tribunal found that the context did so permit and that finding is not challenged. Even if it was impliedly challenged, I do not consider that the decision was wrong. Therefore, in my judgment, this ground fails.

52. The final paragraph of this ground (para. 24) contains an insightful admission that the Respondent accepted money into his personal account when his company was struck off but provided no explanation as to why he let the company get into the position where it came to be struck off. He described this as an emergency, but gave no evidence on

how he let the emergency arise and why he chose to put KW's money into the BCA which was a "non-client" account of an unregulated company which was on the verge of being struck off. This paragraph really discloses that the Respondent was "protecting" KW's money from his own company's financial collapse. None of this assists the appeal against the findings of misconduct.

53. **Ground 4.** The first 3 paragraphs of this ground relate once again to the corporate entity defence with some added hyperbole. For the reasons set out above in relation to the Tribunal's findings on the chronology and on the Appellant's actions in asking KW to pay the sum to him and into the BCA in the gap, I do not discern any merit in this ground.

54. The next sub ground relied upon by the Appellant (but not actually set out in paras. 26-28 of the Amended grounds), was based on the wording of charge 4 which was that the Respondent "failed to repay" the sums. This, it was argued, was clearly wrong because he had repaid the sums in full, hence the charge must fail. It was submitted that had the charge been redrawn to allege delayed repayment it would have been admitted. The context of this charge was that it was drafted and served on the Respondent in February 2023 before he had repaid all of the money to KW. The last part payment was made in August 2023. Instead of redrawing the charges, they were left as they had originally been drafted. The first matter to note is that the Respondent admitted that he failed to repay KW when she asked him to do so in October 2019 and many times after that. Those were breaches of his professional obligations to account to her for her own money. The Tribunal found that he repeatedly failed to repay, despite offering to do so. In my judgment the words "failed to repay" do not need the importation of the words "in full" to complete the charge. The charge is complete as drafted. Not only did the Appellant fail to repay on demand, he failed to repay all or parts of the residual £17,000 for more than 3 years. I consider that the Appellant's submission is straining the meaning of the words in a way in which they do not need to be strained. A normal and ordinary interpretation of the words suffices and was taken by the Tribunal. I do not consider that this sub-ground has any merit.

55. There was no appeal against charge 5, so that charge stands in any event.

Appeal against Sanction

56. It is clear from the reasoning given by the Tribunal that they regarded the Appellant's misconduct as serious. So do I. The main ground of appeal is that the conduct should have been categorised as in the middle range.

57. I have in mind the case law on deference to the Tribunal on findings of fact and on sanction, in particular where the reputation of the profession is concerned. The Appellant's misconduct was in relation to a huge sum of money, owned by a vulnerable individual, at a delicate time in her life. This misconduct was added to by the Appellant accepting money when he knew he was not allowed to by the BSB Handbook. It was

aggravated by the Appellant mixing the money with his failing company's money and then taking £38,000 for his own purposes on 3.10.2019 and never explaining to the Tribunal, KW or the Court what he did with that. In my judgment the Tribunal was entitled to infer he used it himself based on his own evidence in some communications in which he said he mis-spent it. The undisclosed use to which the Appellant put the retained sums is a further matter of seriousness. I do not consider that the middle range was the correct category for this misconduct nor do I consider that the Tribunal were wrong to place the misconduct into the serious category.

58. As to the aggravating and mitigating factors, the reasoning sets them out with clarity. It is not correct to assert that the Tribunal overlooked the Appellant's age, experience or good record. On the risk of recurrence, the Tribunal rightly noted that most of the Appellant's work was funded on DPA so no solicitors stood between him and his clients and hence no protection was afforded by other trained and regulated lawyers. This the Tribunal rightly regarded as a risk. Overall I do not consider that the sanction of 18 months suspension was wrong or reached in a procedurally incorrect manner.

Reasoning

59. Lest it be thought that I have overlooked the implication in the grounds of appeal that the Tribunal's judgment lacked sufficient reasoning, I shall deal with that shortly here. In the circumstances of the misconduct alleged, which was simple and limited in scope, I do not consider that the reasoning provided was insufficient. Not every fact or argument needs to be covered in a set of reasons. The charges were addressed one by one, the factual findings made were clear, the Appellant's defences were considered and addressed and the witnesses were analysed and their credibility assessed and reasons were given for the conclusions reached.

Conclusions

60. For the reasons set out above I dismiss all of the grounds of appeal against the findings of misconduct and against the sanctions determined by the Tribunal.

END