Complaint No: D2007/120

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2012

Petition to the Visitors against a Disciplinary Finding

**Before**:

**MR JUSTICE BURNETT**

**MS BERYL HOBSON & MR JOHN ELLIOTT**

- - - - - - - - - - - - - - - - - - - -

**Between:**

| | |
|---|---|
| **DAVID LEATHLEY** | **Petitioner** |
| **- and -** | |
| **THE BAR STANDARDS BOARD** | **Respondent** |

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

**Marc Beaumont** (instructed under the **Bar Public Access Scheme**) for the **Appellant**
**Cairns Nelson QC** (instructed by the **Bar Standards Board**) for the **Respondent**

Hearing date: Monday 21 November 2011
Further written submissions 19 December 2011

- - - - - - - - - - - - - - - - - - - -

# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE BURNETT

## THE VISITORS:

Introduction

1. Mr Leathley, the petitioning barrister ["the Petitioner"], appeals against a finding made by a tribunal on 17 November 2008 that his conduct was discreditable to a barrister. The Tribunal had five members. The judicial member was His Honour Roger Connor DL, the two lay members were Sir David Madel and Miss Margaret Rothwell CMG and the two barrister members were Mr Richard Bendall and Miss Louise McCullough. The Tribunal found that on 29 June 2007 the Petitioner had made a telephone call to a member of staff in the Criminal Appeals Office at the Royal Courts of Justice and made an enquiry about an official who worked in that office. That official was a witness is earlier proceedings pending before a disciplinary tribunal. The Tribunal concluded that the Petitioner had intentionally claimed to be Mr Joel Bennathan QC who was, at the time, counsel acting for the Bar Standards Board ["BSB"] in those earlier proceedings. The Tribunal found that the Petitioner had attempted to deceive the recipient of the telephone call. The Tribunal imposed the sanction of £1,000 fine and ordered the Petitioner to pay £2,876 by way of costs.

2. The appeal to the Visitors was heard on Monday 21 November 2011. It was followed by a series of email communications and requests made on behalf of the Petitioner and finally by further submissions on 19 December.

3. The petition of appeal is dated 4 December 2008. In due course, the appeal was listed for a day in accordance with Rule 13(1) of the Hearings Before the Visitors Rules 2010 ["the 2010 Rules"]. The Petitioner long ago suggested that two days would be needed but a directions judge disagreed. In fact, the substance of the Petitioner's appeal took up very little time during the hearing. A very short argument was advanced on the merits of the appeal. The Petitioner's conduct was said to be an acceptable tactic to discover information in circumstances where he suspected a lack of frankness on the part of the witness, a 'ruse de guerre' as Mr Beaumont on his behalf put it, which should not have been considered discreditable. The majority of the hearing was devoted to issues raised very shortly before the hearing of the appeal. An argument alleging apparent bias based on the payment of fees and expenses to the lay members, who sat on the Tribunal in 2008, was raised in an amended petition dated 8 November 2011. It is argued that those fees and expenses come from the Bar Standards Board ["the BSB"], which is the prosecuting authority in bar disciplinary matters and that, in effect, the prosecution paid the 'judges'. Two days later Sir Anthony May gave permission pursuant to Rule 14(7) of the 2010 Rules for that argument to be advanced. Following the grant of that permission, Ms Sara Down, the Head of the Professional Conduct Department of the BSB made a statement dated 17 November responding to the amended petition. Her statement also picked up on matters raised in a skeleton argument filed on behalf of the petitioner which was sent to the Clerk to the Visitors and the BSB at 18.34 on 16 November as an attachment to an email, that is only two clear working days before the hearing of the appeal. Mr Beaumont, who acts for the Petitioner and sent the email, asked that the skeleton argument be treated as the Petitioner's application for Ms Hobson and Mr Elliott, the non-judicial visitors. to recuse themselves from the appeal. The Visitors comprise a judge, a lay member and a barrister member. Ms Hobson is the lay member and Mr Elliott the barrister member hearing this appeal. The basis upon which it was contended that the non-judicial visitors should recuse themselves was that they have

in the past been paid fees and expenses for sitting as visitors and tribunal members which come from the BSB. Any fees and expenses payable for sitting on this appeal are similarly tainted. Further, it was said that a guidance pack provided to them in April 2009 by the Council of the Inns of Court ["COIC"], in which the BSB collaborated, contained a number of 'subliminal messages'. Provision of the Guidance constituted 'secret advance representations' from the BSB, the prosecuting authority in bar disciplinary matters and the Respondent in appeals to the visitors. It is contended that both these factors give rise to apparent bias on the part of the non-judicial visitors.

4. Ms Down's witness statement also made reference to the Guidance, it having been raised in the Petitioner's skeleton argument. In an email message on Friday 18 November Mr Beaumont indicated his wish generally to cross-examine Ms Down. In a further email from Mr Beaumont over the weekend there seemed to be some complaint that the Petitioner had insufficient time to digest the content of Ms Down's statement. However, any difficulty in dealing with these issues was the result of the Petitioner raising them very late. We do not consider that he has a legitimate complaint about the process that then followed and note that no application for an adjournment was made. In answer to a request made on our behalf in response to his request for leave to cross-examine Ms Down, Mr Beaumont had helpfully set out in an email the topics he wished to cover. Ms Down was able to make herself available at very short notice. We agreed to allow cross examination of Ms Down, even without any evidence in response having been filed. We inquired of Mr Beaumont how long he thought he would need in cross examination. He wished to have a couple of hours, but we considered that extravagant particularly as there was no apparent direct challenge to Ms Down's evidence and also given that one day was set aside for the appeal. We asked Mr Beaumont to complete his cross examination in half an hour. In the event it took 40 minutes but he comfortably covered the topics he had identified in his email. The cross-examination was in essence one of exploration (or clarification as it was put in an email on 18 November) rather than challenge. Very little of substance emerged. A short additional statement was lodged from Ms Down in the course of the hearing dealing with one of the topics on which she had been asked questions, but of which she had no direct knowledge.

5. Ms Hobson had her letter of appointment by COIC with her at the hearing of the appeal. A copy was provided to the parties, in particular to assist Mr Beaumont to formulate his arguments on behalf of the Petitioner. Subsequent to the hearing, the Petitioner sought, and was given, copies of the attachments referred to in that letter. On behalf of the Petitioner Mr Beaumont sought yet further material. We provided some further information relating in particular to diversity training and invited the parties to make such additional submissions in writing as they saw fit. Training had been referred to in a Memorandum of Understanding attached to Ms Down's statement. Training was one of the topics about which Mr Beaumont asked questions.

6. Shortly before the hearing, Mr Beaumont raised two questions relating to the judicial visitor with a view to his possible recusal for apparent bias. He noted that a former head of the chambers of which Burnett J was a member, Hugh Carlisle QC, had chaired the Professional Conduct Committee of the General Council of the Bar ["the PCCC"] approaching 20 years ago. Mr Beaumont wished to know whether Burnett J had ever sat on that committee, any successor committee, or prosecuted a case of

professional misconduct for the Bar Council. The answer to each question was no, but it should not be thought that even if the answer had been yes, it would necessarily give rise to any question of apparent bias. Then Mr Beaumont noted that another member of Burnett J's former chambers, Sir Geoffrey Nice QC, is now the Vice Chairman of the BSB (an appointment he has taken up since Burnett J left the chambers). We do not consider that a past professional association of this sort gives rise to apparent bias in the light of the authorities to which, in due course, we shall turn.

7. Mr Beaumont developed his arguments on apparent bias in relation to both the non-judicial visitors and the lay panel members in a single submission. We agreed to hear all the argument, including that relating to the merits of the appeal leaving aside the various bias arguments, conscious that it would be necessary to consider the issues in the following order:

   i) Should Ms Hobson and Mr Elliott recuse themselves on grounds on apparent bias? If no

   ii) Was the Tribunal infected with apparent bias? If no

   iii) Should the appeal be allowed on the merits?

**The Law of Bias**

8. The principles which govern questions of bias are now well established. They derive, in particular, from *R v. Bow Street Metropolitan Stipendiary Magistrate and Others ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119; *Porter v. Magill* [2002] 2 A.C. 357; *Davidson v. Scottish Ministers* [2004] UKHL 34, [2004] HRLR 34 and *Meerabux v. Attorney General of Belize* [2005] 2 A.C. 513. These authorities (and others) were recently reviewed in the judgment of Rix L.J. in the Court of Appeal in *R (Kaur) v Institute of Legal Executives Appeal Tribunal* [2011] EWCA Civ 1168. The authorities deal with what is described as 'apparent bias' and also the principle that no one can be a judge in his own cause. *Pinochet* was an example of the latter. It was Lord Hoffman's association with Amnesty International that was in issue. *Porter* was concerned with the former. Rix LJ, citing both *Davidson* and *Meerabux*, suggests a synthesis of the two streams of authority. The arguments advanced by the Petitioner rely upon apparent bias. In *Porter* the House of Lords settled the correct approach to the law of apparent bias. It is to be found at paragraph [103] of the speech of Lord Hope of Craighead:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

9. The House of Lords adopted the approach of Lord Phillips of Worth Matravers MR in *In re Medicaments and Related Classes of Goods (2)* [2001] WLR 700. Further elucidation of the test has followed in both the House of Lords and the Court of Appeal. The fair-minded and informed observer is neither unduly sensitive nor suspicious yet he is not complacent. He is assumed to have taken the trouble to acquire knowledge of all relevant information before coming to a conclusion: see *Helow v. Secretary of State for the Home Department* [2008] 1 WLR 2416, per Lord

Hope of Craighead between paragraphs [1] and [3]. The fair-minded and informed observer is also expected to be aware of the law and the functions of those who play a part in its administration: see *Lawal v. Northern Spirit* [2003] UKHL 35 at paragraphs [21] and [22]. When applying the test, any Court will take account of an explanation given by the tribunal and assume that the hypothetical observer is also aware of that explanation: see *In re Medicaments* at [67]. In *AWG Group v. Morrison* [2006] EWCA (Civ) 6, [2006] 1 WLR 1163, the Court of Appeal summarised a number of the principles in play. In paragraph [8] of his judgment, Mummery LJ cited a passage from *Locabail (UK) Limited v. Bayfield Properties Limited* [2000] QB 451 at 480, in which it had been observed that in most cases the answer regarding apparent bias would be obvious.

10. In the course of his judgment in *Kaur* Rix LJ referred to a case concerning the General Dental Council which merits mention:

> "32. In *Sadighi v. The General Dental Council* [2009] EWHC 1278 (Admin) (unreported, 5 May 2009, Plender J) the dentist had been convicted by the Council's professional conduct committee of dishonesty in forging the records of treatment of his patient. The committee tribunal had been chaired by Dr Leitch, who ending five years previously had served for two years as an elected member of the Council. It was submitted that the doctrine of apparent bias applied, but the submission failed. I do not find that surprising, seeing the merely historic nature of Dr Leitch's involvement…"

11. The problem identified in *Kaur* was this. Ms Kaur faced disciplinary action for conduct unbefitting a member of the Institute of Legal Executives ["ILEX"] or likely to bring ILEX into disrepute. An investigating committee of ILEX decided on the 'charges'. A disciplinary tribunal found the case proved (in part) against Mrs Kaur. She appealed to the ILEX Appeal Tribunal. One member of the Appeal Tribunal was the vice-president of ILEX. Mrs Kaur unsuccessfully sought the recusal of that member. Having failed in her appeal Mrs Kaur sought judicial review of the decision of the Appeal Tribunal on grounds of apparent bias. It was by that route that the matter came before the Court of Appeal. One member of the original tribunal that heard her case was a council member and director of ILEX, a company limited by guarantee. Although no objection had been taken to his presence at the time, or on the appeal, his position was considered in the judicial review proceedings. The Court of Appeal's conclusion was that ILEX had an interest in the governance of and upholding of standards in that branch of the legal profession. Applying either of the doctrines leading to disqualification the vice-president could not sit on the Appeal tribunal because of her inevitable interest in ILEX's policy of disciplinary regulation. A fair-minded and informed observer would have concluded that there was a real possibility of bias 'or to put in it Lord Bingham's terms, he or she would be concerned that there was here the appearance and perception and indeed reality that through [the vice-president] the [Appeal Tribunal] was not free of an influence which could prevent the bringing of an objective judgment to bear.'

12. *In Re P (A Barrister)* [2005] 1 W.L.R. 3019 concerned an appeal to the Visitors heard at the end of 2004 from a decision of a disciplinary tribunal of COIC of earlier that year. At the hearing of the appeal an objection was taken to the presence of the lay

member on the basis that she was a member of the PCCC. As such, although she was not one of the committee members who decided to prefer disciplinary charges against P, the argument was that she was nonetheless technically a judge in her own cause. It was also contended that her membership of the committee gave rise to a real possibility of bias as described in *Porter v. Magill*. The judgment of the visitors in that case comprehensively reviewed the authorities. Their conclusion was that membership of the committee that decided whether to prosecute a barrister for professional misconduct, even when the lay member concerned had not attended the relevant meeting or taken any part in the decision making process, precluded such a person from sitting as a visitor on an appeal from a disciplinary tribunal of COIC. That conclusion was reached by applying both streams of authority to the facts (that is the *Pinochet* line as well as applying the test in *Porter*).

The Bar's Disciplinary Process

13. A full treatment of the structure in place in 2004, when *P* was decided, can be found between paragraphs 14 and 34 of the judgment of the Visitors. The Bar Council Code of Conduct provided that a complaint would first be considered by the Complaints Commissioner who would refer the matter to the PCCC if a *prima facie* case were disclosed. The PCCC had various options open to it, including directing that the complaint should go before a disciplinary tribunal. The composition of the PCCC included lay members, two of whom were required to attend any meeting of the committee. Decisions of those attending the meeting were taken by majority. In 2004 lay members of the PCCC were appointed by the Complaints Commissioner and training was provided to familiarise those lay members with the workings of the Bar. The lay members performed three functions. First, they sat from time to time on the PCCC, on average twice a year making decisions relating to whether and, if so, what action should be taken on a complaint; secondly, they sat on disciplinary tribunals and thirdly they sat as visitors. The relevant tribunal rules in place at the time provided that no lay member could sit on a disciplinary tribunal hearing a case referred by a PCCC committee of which he was a member. Although not explicit in the Visitors Rules, a self-denying ordinance to the same effect was observed when selecting lay members to sit as a visitor. The role of COIC was to select the lay and barrister visitors to hear an appeal (the judicial member having been identified on behalf of the Lord Chief Justice). As noted in paragraph 34 of the judgment in *In re P*,

> "The COIC is an unincorporated body separate and distinct from the Bar Council. It has its own constitution. Neither the Lords Chief Justice nor the Deputy Lord Chief Justice have an executive or *ex officio* position in the COIC."

14. It is unnecessary for the purposes of the matters which arise for consideration in this appeal to rehearse the ancient jurisdiction of the Visitors. A convenient summary is found in the judgment of Sir Donald Nicholls V-C in *R v Visitors to the Inns of Court ex parte Calder* [1993] 3 WLR 287 starting at page 292. It is sufficient to record that for centuries the Judges, acting as Visitors, exercised an appellate jurisdiction from disciplinary findings by the Inns of Court against barristers. As the disciplinary processes have evolved and changed the visitorial jurisdiction has been preserved and modified. Yet visitors did not, and do not, sit as a court of law even when the

visitorial jurisdiction was exercised exclusively by judges. The visitors sit in a domestic forum that forms part of the internal disciplinary process of the bar.

15. The Bar's disciplinary process has changed since 2004 when *In re P* was decided. In the first place, following *In re P,* lay members who sat on disciplinary tribunals and as visitors were no longer members of the PCCC. More fundamentally, statutory changes were made by the Legal Services Act 2007 ["the 2007"], which had been anticipated by the Bar Council the year before, when it established the BSB. The BSB was created in 1 January 2006 when the Bar Council separated its regulatory functions from its other functions and delegated the discharge of those regulatory functions to the BSB. Those functions included the investigation and prosecution of complaints. The separation of the regulatory and representational functions of the Bar Council was put on a statutory footing by the 2007 Act. That Act established the Legal Services Board ["the Board"] to oversee the various constituent parts of the legal profession. It was required to promote the regulatory objectives set out in section 1.

> "The regulatory objectives
> (1)In this Act a reference to "the regulatory objectives" is a reference to the objectives of—
>
> (a) protecting and promoting the public interest;
>
> (b) supporting the constitutional principle of the rule of law;
>
> (c) improving access to justice;
>
> (d) protecting and promoting the interests of consumers;
>
> (e) promoting competition in the provision of services within subsection (2);
>
> (f) encouraging an independent, strong, diverse and effective legal profession;
>
> (g) increasing public understanding of the citizen's legal rights and duties;
>
> (h) promoting and maintaining adherence to the professional principles.
>
> (2)The services within this subsection are services such as are provided by authorised persons (including services which do not involve the carrying on of activities which are reserved legal activities).
>
> (3)The "professional principles" are—
>
> (a) that authorised persons should act with independence and integrity,
>
> (b) that authorised persons should maintain proper standards of work,
>
> (c) that authorised persons should act in the best interests of their clients,
>
> (d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of

> being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and
>
> (e) that the affairs of clients should be kept confidential.
>
> (4) In this section "authorised persons" means authorised persons in relation to activities which are reserved legal activities."

It is apparent that the 2007 Act was concerned to ensure that professional standards were maintained - see section 1(1)(h) and (3).

16. The 2007 Act recognised a number of 'approved regulators', amongst which was the Bar Council, and by section 27 required them to separate their regulatory functions from their representative functions. 'Representative functions' were defined as those in connection with representation, or promotion, of the interests of the persons represented by the approved regulator. Colloquially, those are known as the 'trade union functions'.

17. The founding premise of the 2007 Act was that there should be self-regulation of the various branches of the legal profession. Yet one if its principal objectives was to ensure that the regulatory functions of a professional body were insulated from, and for practical purposes independent of, the representative functions. Section 30 of the 2007 Act empowered the Legal Services Board to make rules to achieve those ends:

> "(1) The Board may make rules ("internal guidance rules") setting out requirements to be met by approved regulators for the purposes of ensuring –
>
> > (a) that the exercise of the approved regulator's functions is not prejudiced by its representative functions, and
> >
> > (b) that decisions relating to the exercise of an approved regulator's regulatory functions are so far as reasonably practicable taken independently from decisions relating to the exercise of its representative functions.
>
> (2) The internal governance rules must require each approved regulator to have in place arrangements that ensure –
>
> > (a) that the persons involved in the exercise of the regulatory functions are, in that capacity, able to make representations to, be consulted by and enter into communications with the Board, the Consumer Panel, the OLC[1] and other approved regulators, and
> >
> > (b) that the exercise by those persons of those powers is not prejudiced by the approved regulator's representative functions and is, so far as is reasonably practicable, independent from the exercise of those functions.

[1] The Consumer Panel was established by section 8 of the 2007 Act. The OLC is the Office for Legal Complaints established by section 114(1).

> (3) The internal governance rules must also require each approved regulator –
>
> > (a) to take such steps as are reasonably practicable to ensure that it provides such resources as are reasonably required for or in connection with the exercise of its regulatory functions,
> >
> > (b) to make such provision as is necessary to enable persons involved in the exercise of its regulatory functions to be able to notify the Board where they consider that their independence or effectiveness is being prejudiced."

The primary legislation thus envisaged that the Bar Council would maintain separate regulatory and representative functions, take steps to ensure the independence of those carrying out the regulatory functions and make adequate funds available to enable the regulatory functions to be carried out effectively. Regulatory functions include disciplinary functions.

18. The Internal Governance Rules 2009 were made by the Board pursuant to section 30(1) of the 2007 Act. Detailed requirements are set out in the Schedule to the rules. Part 1, dealing with governance, recognises that the regulatory functions may be performed by a body which is not a separate legal entity from the professional body (the approved regulator). Practical, rather then hermetically sealed legal, independence is the requirement. Part 3 requires that proper resources are made available to the regulatory body, that it has autonomy with regard to using those resources and that if shared facilities or staff are used there must be fair and transparent dispute resolution mechanisms in place.

19. Section 51 of the 2007 Act provides that a practising fee required to be paid by a member of the profession may only go towards defraying the cost of what are recognised 'permitted purposes' by the Board, and further that the Board must approve the level of that fee. Permitted purposes include regulatory functions. The Bar Council receives its funds from practising certificate fees, voluntary subscriptions and also from subscriptions from the four Inns of Court. In turn, the Bar Council funds the BSB in accordance with its statutory obligations.

20. The BSB took over the functions of the PCCC. So now it is the BSB that decides what steps to take, if any, in response to a complaint against a barrister. If the conclusion is that there should be a case brought before a disciplinary tribunal the BSB will prefer a charge, prepare the necessary documents and act as prosecutor before a tribunal. It will be the respondent in any appeal to the Visitors.

21. COIC appoints the members of disciplinary tribunals and decides who shall sit as the lay and barrister members of the Visitors hearing an appeal. That was an arrangement made by the Bar Council, before the advent of the BSB, which has been continued. It is not a statutory requirement. The statutory position is simpler. The Bar Council is the approved regulator, enjoined to separate its regulatory functions from its representative functions. The regulatory functions include matters relating to discipline which in the statutory scheme are assigned to the BSB.

Payment of Fees and Expenses

22. The lay members of disciplinary tribunals and lay visitors are paid a daily fee for sitting. They are also entitled to claim expenses actually incurred in respect of travel, accommodation and subsistence. In common with all those who are paid expenses for travel they are encouraged to book ahead and shop online to minimise their actual expenditure. They are encouraged to use accommodation in the Inns of Court if possible, because it compares very favourably in cost with other options. There is a flat above the Bar Council offices which might be made available, but the evidence is that it has never been used by a tribunal member or visitor. It is customary for tribunal members to be provided with lunch in the hall of an Inn when a disciplinary tribunal is sitting, with the Inn picking up the cost. The barrister members give their time *pro bono* and receive no expenses.

23. The mechanism of payment of the lay members' fees and expenses has changed over the years. Prior to October 2010 the Bar Council paid the fees and expenses directly to the lay members. Since October 2010 the fees and expenses have been paid by the Inns of Court on behalf of COIC, but the ultimate source remains the Bar Council. That arises as a result of the mechanism by which COIC operates its disciplinary functions under the Memorandum of Understanding with the BSB and Bar Council. COIC itself has no bank account. The Inns of Court, on rotation, assume responsibility for defraying the disciplinary expenses of COIC. For example, the relevant Inn for the period between 31 March 2011 and 31 December 2013 is Gray's Inn. Thus the fees and expenses of lay members during this period will be paid by Gray's Inn. However, the relevant Inn's subvention to the Bar Council is reduced by the amount it pays out in this respect (and in respect of a number of other expenses).

24. It follows that the fees and expenses of the lay members who sat on the disciplinary tribunal in this case were paid by the Bar Council. The fees and expenses of the lay visitor will be paid by Gray's Inn but ultimately recouped from the Bar Council by way of a reduction in the Inn's subvention.

25. An order for costs made against a barrister found guilty of professional misconduct may include an amount to reflect the fees and expenses of the lay members of the disciplinary panel.

26. Ms Down's witness statement sets out the fruits of the inquiries made on her behalf about how other self-regulating professions remunerate the lay members of their various disciplinary tribunals. It is commonplace for professional regulatory bodies to pay all the costs associated with disciplinary panels, including the fees and expenses due to panel members. The General Medical Council confirmed that it meets the expenses of the lay and medical members from its own resources. The General Dental Council confirmed that it funded the fees and expenses paid to lay members from its own income, which principally comes from membership fees. The same is true for the Nursing and Midwifery Council. Ms Down explains that information relating to the Solicitors Regulation Authority is set out on its website. It records that income from the mandatory practising fees can be used only for approved purposes (in accordance with the 2007 Act) which included the full cost of the Solicitors Disciplinary Tribunal. The Solicitors Disciplinary Tribunal itself says that whilst it is independent of the Law Society, its running costs are funded by the Law Society. The Tribunal has an administration company which pays the tribunal members. The remuneration

policy of the General Osteopathic Council's fitness to practise panel indicates that the payment of members of the panel will be by the Council. The costs burden of paying panellists at the General Pharmaceutical Council's disciplinary hearings lies with the Council itself.

The Guidance

27. The Guidance, which it is argued infects the non-judicial visitors with apparent bias, was issued by COIC in the spring 2009. In a covering introduction Dame Janet Smith, than president of COIC, said this:

> "I am pleased to present this Information and Guidance Pack for the use of COIC's disciplinary panel members.
>
> It is intended as both a training and reference resource and I hope panel members will find it useful. …
>
> The pack has been developed in conjunction with the Bar Standards Board and a working group which included a Disciplinary Tribunal chair; a lay panel member and a barrister member. …"

In her witness statement, Ms Down described more of the genesis and development of the Guidance.

28. In 2006 the then Complaints Commissioner began a strategic review of the complaints and disciplinary processes. He reported in October 2007 and made a large number of recommendations for improvement. Amongst them were these:

> "Recommendation 45
>
> The Bar Standards Board should develop information and guidance packs for all decision-makers in the system which includes general information about the operation of the system as well as specific guidance and policies relevant to the performance of the individual roles.
>
> Recommendation 46
>
> The Bar Standards Board should explore what support can be given to the COIC for the induction and training and mentoring of Tribunal members.
>
> Recommendation 47(b)
>
> The Bar Standards Board should work with the COIC to develop specific written guidance for the Chairs of Disciplinary Tribunals which covers their role and responsibilities with particular emphasis on the need to encourage and respect lay members."

The BSB set up a Strategic Review Implementation Group chaired by Sue Carr QC to implement the recommendations generally but established a sub-group to implement these three recommendations. It was that group to which Dame Janet referred in her

introduction. It comprised a Circuit Judge, two barrister members and a lay member, together with COIC's Tribunal Administrator. In addition Ms Down and a 'project officer' were members of the group. The project officer was Ariel Ricci who at the time was responsible for policy matters at the Complaints and Hearings Department of the BSB. They met in April 2008 and decided that a single information and guidance pack should be produced for all those who sat on tribunals and as visitors (rather than having a second and separate document for chairmen). Outline contents were agreed. Ariel Ricci produced a draft of sections dealing with complaints and disciplinary processes, the section on fairness and justice was drafted by one of the barrister members, the judicial member drafted the section on good practice when chairing hearings and the lay member drafted the section setting out guidance on the role of panel members. Following exchanges of drafts and further meetings the composite document was approved by the group on 24 February 2009. It was then sent to Dame Janet Smith. After the Information and Guidance Pack was approved for distribution by Dame Janet, the BSB undertook the printing and distribution. Dame Janet's introduction is dated April 2009 but the Guidance was sent out on behalf of COIC under cover of a letter from Baroness Deech, Chair of the BSB, dated 27 March 2009. It was sent to the lay and barrister panel members. It was not sent to judicial panel members because they are appointed on an *ad hoc* basis (as are the judicial visitors). The timing of its distribution means that those who sat on the original disciplinary tribunal in this case had not by then received the Guidance, but both non-judicial visitors did receive it after 27 March 2009. Ms Down explained that COIC is in the process of updating the Information and Guidance Pack and intends to reissue it shortly.

29. Lady Deech's letter referred to the changes in the disciplinary process being implemented at the time (largely as a result of the strategic review) and summarised them.

Training and other factual matters relating to the Visitors

30. We have seen that the Guidance was designed, in part, to provide training. We will return to the discrete criticisms made by Mr Beaumont of the content of the Guidance, but at this stage identify some additional facts relating to the appointment and training of the non-judicial visitors which loomed large in the emails received after the hearing and in the Petitioner's supplementary submissions filed on Monday 19 December. Ms Hobson's letter of appointment is dated 11 November 2005. It came from the Rt Hon Lord Justice Waller who was then the President of COIC:

> "Thank you for attending the familiarisation session on 31 October….
>
> COIC is of the view that the session made the difference between the Bar Council's procedures and those of COIC sufficiently clear to "un-taint" those Lay Representatives who had observed a PCCC meeting as part of their previous 'training'. I am therefore pleased to formally appoint you as a member of the panel of COIC Lay Representatives.
>
> … The initial term of office should be for 3 years, renewable for another 3 years, by invitation of the President of COIC. However,

> should the circumstances arise whereby your suitability for membership of the panel is in question, the President has the right to withdraw you from the panel."

The letter enclosed the terms and conditions of appointment together with details of the fees payable and expenses claimable, copies of which Ms Hobson had retained and looked out.

31. In an email sent to Mr Beaumont by the Clerk to Visitors on 14 December responding to various questions raised on behalf of the Petitioner, further information was provided:

> " … In the Autumn of 2010 Ms Hobson was invited to attend an equality and diversity training course run by the BSB. She did not in fact attend. She has not attended any other training session. Mr Elliott attended the equality and diversity course. Otherwise, he recalls attending a hearing before he sat for the first time.
>
> Mrs Hobson was originally selected in October 2004 as a lay-member in pre-COIC days. Her appointment was confirmed by the Complaints Commissioner of the Bar Council. She attended a training session on 25 November 2004 and attended a meeting of the PCCC as an observer for training purposes in December 2004. She was not a lay member who sat on the PCCC. Ms Hobson attended the familiarisation session referred to in Waller LJ's letter of 11 November 2005 but cannot now locate any documents that might have been provided to her."

32. The reference to 'pre-COIC' days was no more than an indication that these events occurred before Ms Hobson's appointment by Lord Justice Waller. The appointments process before 2005 (that is before the decision in *In re P*) involved the Complaints Commissioner and the Chairman of the Bar Council. Ms Hobson did not sit as a member of the PCCC because the practise ceased following the decision in *In re P*.

33. Mr Beaumont had an email exchange with Fredelinda Telfer of the BSB following the hearing concerning the training of panel members. On 29 November she said:

> "Any training given to disciplinary tribunal panellists has been provided by COIC."

In a reply, Mr Beaumont referred to paragraph 20.5 of the Memorandum of Understanding which provides, *inter alia*, that the costs of providing training to panel members will be paid by the relevant Inn (that is the Inn responsible on rotation for defraying the costs of the COIC disciplinary process) but then be deducted from the annual subvention to the Bar Council. He asked for a breakdown of what training the BSB (meaning Bar Council) had paid for in respect of the members of the disciplinary tribunal and the visitors. The context of paragraph 20.5 was paragraph 6.1, which assigned responsibility for training to COIC. Paragraph 8.1 expanded upon this:

> "COIC will be responsible for the induction of new clerks and Panel Members. COIC will also be responsible for providing ongoing training where necessary, and updates for clerks and Panel Members. COIC will consult with the BSB as to the content of any such induction, training or updates. The BSB will offer whatever assistance possible including assisting in the development of new training courses, preparing training materials and conducting induction and training sessions. Notwithstanding the above, the content, timing and delivery of any training will remain the full responsibility of COIC."

Procedural History

34. We have referred to the fact that in the two working days before the hearing, and over the ensuing weekend, the Clerk to the Visitors received a number of emails requesting information on behalf of the Petitioner. The scope of the bias argument being advanced concerned payment of panel members and visitors together with complaints about the Guidance. In our view, neither issue required further disclosure beyond the information set out in Ms Down's statement. The arguments are ones of principle. The Petitioner indicates that he was unaware personally that panel members were paid by the Bar Council until he read a magazine article on 27 October 2011. Nonetheless, the fact that lay panel members are paid a fee has been apparent from advertisements seeking recruits under the old system and the new; and in a self-regulatory system the source of funds can, for practical purposes, only be the professional body itself. On behalf of the Petitioner Mr Beaumont said in an email dated 23 November that 'the issue of training was revealed only one clear day before the appeal hearing in the "MOU" exhibited to Ms Down's witness statement'. Prior to that date, Mr Beaumont had been aware of some of the contents of the Memorandum of Understanding because he referred to, and quoted passages from it, in the skeleton argument that was lodged on behalf of the Petitioner a day earlier. None of those passages dealt with training. Those extracts had come from a witness statement of Ms Down's in another case, in which she had no cause to refer to training. Mr Beaumont had not seen the Memorandum of Understanding itself until shortly before the hearing of this appeal.

35. In an email dated 22 November, Mr Beaumont suggested that Waller LJ should be asked to make a statement about the letter of appointment that had been produced at the hearing, in particular to explain the use of the word "taint". A complaint was made that there had been 'no proper disclosure' of 'what happened to give rise to Waller LJ's remarks'. On the same day, the BSB was asked to provide details of training provided to the lay members involved in this case at both levels, with another reference to a duty of disclosure. Ms Telfer's reply and Mr Beaumont's riposte have already been referred to. Mr Beaumont also sent the email on 23 November, earlier referred to, for the attention of the judicial visitor seeking information about the training received by the non-judicial visitors. The information requested on behalf of the Petitioner was volunteered in the response from the Clerk to the Visitors of 14 December set out above. On 24 November Mr Nelson QC, counsel for the BSB, suggested in an email that it was inappropriate to try to conduct further argument by electronic correspondence. Mr Beaumont responded by suggesting that there should be further directions requiring the BSB to file evidence about training and/or a further hearing (in addition to a disclosure by the visitors of the training they had received).

36. The message sent on behalf of the visitors on 14 December provided the information that had been sought. The Petitioner's submissions served by leave of the visitors on 19 December contain much pointed rhetorical questioning of why the information contained in that email was not provided earlier. Parties to litigation generally, and most especially to a process before a body comprising a number of individuals who are neither in close physical proximity nor free from other commitments, should not labour under the impression that its members wait ready to respond instantly to messages in the days leading up to a hearing or from a hearing. The Petitioner was informed by the Clerk to the Visitors on 29 November that the Visitors intended to discuss the various emails received from Mr Beaumont and that there would be a response 'in due course', which there was.

37. We have been content for the Petitioner to develop an argument relating to training. It was explored during the cross-examination of Ms Down and has been pursued since, even though no leave to amend the petition was sought. The nature and extent of the involvement of BSB in training lay members of disciplinary panels is clear from the Memorandum of Understanding, Ms Telfer's email and the experience of the non-judicial visitors in this case. Like the other arguments advanced on behalf of the Petitioner, it raises a point of principle that does not depend upon the fine detail.

The Payment of Fees and Expenses to the Lay-Visitor

38. It is submitted on behalf of the Petitioner that the payment of a fee to the lay-visitor, for which the Bar Council ultimately bears the burden by way of off-set against the Inn's annual subvention, together with the payment of any expenses in the same way, would lead the fair-minded and informed observer, who was neither unduly sensitive nor suspicious yet not complacent, having considered the facts, to conclude that there was a real possibility that she is biased. Mr Beaumont further submits that the payment of fees and expenses direct by the Bar Council prior to October 2010 was itself sufficient to disqualify Ms Hobson from adjudicating as a visitor on this appeal. The argument does not affect Mr Elliott's position because he receives neither fees nor expenses.

39. It forms no part of Mr Beaumont's submissions that lay visitors should not be paid a daily rate for sitting on appeals, although he did appear to suggest that paying first class travel (which is claimable for long journeys), with meals and accommodation on top was somehow significant. We are unable to see why the payment of expenses actually incurred, up to unexceptional limits, could itself be a relevant factor. Mr Beaumont accepts that in a self-regulated profession the costs incurred in paying lay members should come from the profession itself. He submits that there should be complete insulation between the money used to pay lay panel members, and the resources of the Bar Council (which also funds the BSB). He mooted the possibility that the Bar Council should maintain a separate fund into which barristers would be obliged to pay an annual fee from which it would then defray such expenses, alternatively that a mechanism should be devised by which barristers were obliged to make an annual payment to COIC.

40. Mr Beaumont submits that lay visitors are paid by the prosecution. That, to our mind, is a mischaracterisation. It is more accurate to say that the regulatory body (the BSB) is funded by the Bar Council and so, ultimately now and directly before, are the fees and expenses paid to the lay visitors. The subscriptions paid by barristers and

subventions from the Inns of Court are used by the Bar Council to fund both. Both fall within the costs of regulatory activity for the purposes of the 2007 Act.

41. The hypothetical observer would be fully aware of the self-regulatory structure imposed by the 2007 Act. He would be aware that Parliament had contemplated that the Bar Council should charge a practising fee approved by the Board from which the costs of, *inter alia,* the disciplinary process would come. He would be aware that the only practicable source of funds to discharge the fees and expenses of lay visitors would be the funds of the Bar Council. He would know that the BSB has functional independence and that in particular the Bar Council may not interfere in its workings. He would know that the panel members are independent. He would know that one of the BSB's functions is to prosecute disciplinary transgressions. He would appreciate that the payment of the fee to a lay visitor, and any properly recoverable expenses associated with sitting as visitor, would follow irrespective of the outcome of the appeal to the Visitors. He would understand that broadly similar arrangements are made across the spectrum of self-regulating professions, many of which operate in similar ways.

42. In all these circumstances we are unable to accept the submission that any fair-minded and informed observer would conclude that there was a real possibility that a lay visitor sitting on an appeal from a disciplinary panel would be biased in favour of the BSB on account of the way in which that visitor is paid, either now or before the change in the practical arrangements in 2010. Our conclusion is consistent with the very recent decision of the Court of Appeal in *R (Sandhar) v. Office of the Independent Adjudicator for Higher Education* [2011] EWCA Civ 1614, in which an argument that the Adjudicator and his staff were biased because they were funded by the higher education institutions who were parties to the matters upon which they adjudicated, was rejected.

The Guidance

43. Mr Beaumont characterised the Information and Guidance pack as a secret submission by a party to the disciplinary process and that 'there is a real possibility of a subconscious lack of impartiality by reason of exposure to influence as to the BSB prosecuting policies set out or alluded to in the Guidance Pack, as well as exposure to a number of other matters' (skeleton paragraph 42). He submits that influence is achieved through 10 subliminal messages. Those subliminal messages are said to be as follows:

(i) *That the BSB has a number of important functions which its equates with the public interest thus leading the panel member to support the BSB, perhaps subconsciously.* In particular, objection is taken to Lady Deech's covering letter which states that the BSB 'is committed to ensuring that standards at the Bar are maintained in order to ensure that people receive a high level of service from barristers.' Because the pack was sent out on behalf of COIC by the BSB under cover of Lady Deech's letter it is submitted that the lay member must wonder whom they represent. Complaint is made that in paragraph 2.6 of the Guidance, COIC states that 'given COIC's responsibilities for disciplinary matters, it has a real interest and input into the [BSB's] policy and procedures in relation to complaints and disciplinary processes'. The next sentence says that COIC is one of the bodies required to approve changes to the Disciplinary Tribunal Rules. Section 3 of the Guidance document

provides information about how the BSB operates and includes a copy of its strategic plan. The strategic plan is a document addressed to the world and in particular to identified 'stakeholders'. It is not addressed to COIC or its panellists. Particular passages are said to convey this subliminal message, particularly those which refer to the public interest and the interests of consumers, even though the context of these references is a statement that 'we will adopt processes and procedures that are fair, objective and transparent'. It is submitted that

> 'COIC has allied itself with the broader policy aims of the BSB, such as to win the confidence of the Legal Services Board and consumers. The fair minded observer might well take the view that the decision of a lay panellist to acquit a particular barrister … could be tempered by the thought that this might displease the Legal Services Board or consumer groups.'

The Petitioner relies upon a passage in the Sentencing Guidance produced by COIC in April 2009 as exemplifying that. It is said in paragraph 2.5 that 'COIC fully supports the BSB's aims and objectives and urges disciplinary panel members to adopt them when dealing with disciplinary cases.' Mr Beaumont submits that this statement is 'extraordinary' but to judge whether that is so it is necessary to identify the aims and objectives which COIC supports. They are set out in the preceding two paragraphs of the same section.

> "2.3 The BSB's strategic objectives applicable to the complaints and disciplinary system are:
>
> - To establish systems to identify areas of risk to consumers; to take action to remedy poor performance by barristers; and where things go wrong, to provide an efficient and fair complains and disciplinary system.
>
> - To be recognised as a respected, independent regulator according to best regulatory principles with the confidence of the Legal Services Board, consumers, the Bar and other stakeholders.
>
> 2.4 In taking these higher level strategic objectives forward, the BSB is committed to ensuring that the Bar's complaints and disciplinary system operates according to the following aims:
>
> - To act in the public interest;
>
> - To protect the public and consumers of legal services;
>
> - To promote access to, and the proper administration of, justice;
>
> - To maintain high standards of behaviour and performance for the Bar;

- To provide appropriate and fair systems of redress for those who receive poor service from a barrister;

- To provide appropriate and fair systems for the barrister who is subject to regulatory action;

- To ensure complaints are dealt with fairly, expeditiously and consistently; and

- To promote public and professional confidence in the complaints and disciplinary process."

It is, to our mind, difficult to see what objection there could be to COIC suggesting to panel members that they should have in mind these factors when exercising their functions. To be fair to the Petitioner, we do not understand him to suggest otherwise. Instead Mr Beaumont submits that because the BSB prosecutes disciplinary matters and as prosecutor seeks a conviction the fair minded observer would fear that a lay panel member would understand paragraph 2.5 as indicating that COIC itself is telling them to convict. That is not what it says. We do not accept that a fair reading of the Guidance carries any of the adverse inferences contended for by the Petitioner on this aspect of his argument or that it could lead a fair minded observer to conclude that a lay member might be biased in favour of the BSB

(ii) *That the case will have merit because the BSB was satisfied that there was enough evidence to prosecute the case.* This subliminal message is said to arise from the information provided about the complaints procedure (and the unsurprising statement that proceedings are taken only if a judgment is made that there is sufficient evidence), that the filtering process is done on the papers and furthermore (in the section dealing with disciplinary tribunals) that there is a strike out procedure determined by a directions judge alone. To our mind, none of these matters give rise to any question of bias. Here the process can be compared with criminal proceedings. Any magistrate will know that a judgment has been made by the CPS that the test for prosecution has been passed upon consideration of the paper evidence available. The availability of a striking out procedure, determined by the judge alone, which if unsuccessful leads to a full hearing on the merits, adds nothing to the argument.

(iii) *That barristers may behave errantly, but the BSB can expedite and simplify matters (and the panel members should assist them to do so).* This message is said to be conveyed by the section in the Guidance on disciplinary tribunals which notes that 'the directions compliance phase may last for several months or more if there are problems with obtaining evidence or the barrister fails to comply'. It notes that bundles of documents are sent out at least 14 days before the hearing, but that barristers often send papers in late, in which case they are sent out as soon as possible. It states that most applications to adjourn hearings are made by barristers but sometimes by the BSB and must be thought through carefully, especially if there has been earlier delay. It suggests that the prosecutor will open a case unless the panel suggests it is familiar with the facts, particularly where an opening note has been produced. The strict rules of evidence do not apply but if a barrister wishes to give evidence, he should do so on oath and be subject to cross-examination rather than making assertions of fact in submission. So, it is submitted, the proceedings are said to be informal unless such informality might work to the advantage of the barrister. We do not consider that these references

carry any of the sinister connotations contended for by the Petitioner. The reference to the time that the directions phase may take is no more than a statement of fact. So too is the reference to the late provision of documents which, in context, is there to explain how panel members will receive their papers. There can be no objection to a panel deciding that it does not need a case opened, but would prefer to go straight to the evidence. The reference to a barrister giving evidence on oath has been taken out of context. It follows a passage indicating that the BSB may call witnesses and also that the barrister may call witnesses. The directions for a disciplinary hearing will cover which witnesses are to give oral evidence – see the Disciplinary Tribunal Regulations 2009 ["the 2009 Regulations"]. There is no suggestion that such witnesses will not have given evidence on oath, and indeed elsewhere in the information pack there is a document dealing expressly with the form of an oath or affirmation. What the passage is designed to ensure is that a barrister should give evidence properly and not under the guise of argument.

(iv) *That the BSB may prove its case without calling witnesses.* Paragraph 7.11 of the section dealing with Disciplinary Tribunals includes these sentences:

> "Once the Directions have been agreed or ordered by a Judge, a period of compliance with the Directions follows. This will normally involve the barrister providing a list of witnesses required to be called to give evidence, submission of statements and/or a defence bundle."

Paragraph 7.18 says that witnesses are not always required to give evidence, because most cases are considered on the papers. Nonetheless, the barrister may wish to give evidence on oath. From this it is said that a sinister subliminal message arises. In our judgment, there is nothing sinister about this. The question of which witnesses should give oral evidence is a matter upon which directions will be given, covered expressly by the 2009 Regulations. Those directions, as the extract makes plain, may be the subject of agreement failing which the Judge will determine them. The reality of many disciplinary matters is that the facts upon which the charge or charges are brought are not the subject of dispute. It is the conclusion which follows that is contentious.

(v) *That the burden of proof is for practical purposes reversed.* It is said that nowhere in the guidance is the burden of proof set out. Further, that in paragraph 9.9 this is said:

> "If the case is very complicated it may be helpful to make a list of all the allegations against the defendant and match these against the defence statement to establish if any gaps exist."

Regulation 11 of the 2009 Regulations provides that the criminal standard of proof shall be applied when adjudicating on charges of professional misconduct and the civil standard when adjudicating upon charges of inadequate professional services. Whilst it might be thought that the Regulations should expressly have stated that the burden of proof rests upon the prosecution, that it is so is axiomatic to the whole process. No complaint is made that the disciplinary tribunal in this case reversed the burden of proof and we find it difficult to conceive that any tribunal would misapprehend where the burden of proof lay. The whole concept of 'no case to answer' presupposes that

the burden of proof rests upon the body bringing the case. That is referred to in the Guidance both at the directions stage and at the full hearing. Paragraph 9.9 is no more than an invocation to the panel members to identify the issues and prepare properly for a contested hearing. We do not consider that the fair-minded and informed observer, having considered the facts, would adopt the conclusion advocated by the Petitioner.

(vi) *Try to ensure that there is no prospect of an appeal.* Mr Beaumont reminds us that the BSB has no general right of appeal from a disciplinary tribunal, by contrast with the barrister.[2] He complains that the section dealing with adjournments carries the implication set out above. We do not agree. In paragraph 9.41 of the Guidance, written we remind ourselves by the lay member who sat on the sub-group considering the Information and Guidance Pack, this is said of the written reasons for the findings:

> "Once the panel has agreed upon a finding the Chair will draft the written findings and reasons with the assistance of the panel members. It is of the utmost importance that this document is well reasoned and carefully written. Giving inadequate reasons for a finding may be a valid ground of appeal."

It is said that this passage 'reveals a partisan and self-centred concern about the need to secure a conviction'. In our judgment that is an extreme suggestion which would not occur to the reasonable observer. The need to give adequate reasons for a decision, determined in every case by the context, is an almost universal requirement of the exercise of a judicial or quasi-judicial function. There can be no sensible objection to panel members having this requirement drawn to their attention.

(vii) Section 11 of the Guidance pack contains two examples of reasons given in disciplinary cases, anonymised and thus subject to some redaction, one concerning misconduct and the other for providing inadequate professional services. Both concern adverse findings against barristers. It is submitted that *the fair minded and informed observer would consider that there was a real possibility of bias in the mind of the lay panellist presented with examples of reasoned convictions, but not reasoned acquittals.* We regard this suggestion as fanciful. In both examples, the evidence (including disputed evidence) is set out in the decision and the conclusions, including resolving to the extent necessary any conflicts of evidence, rehearsed. These previous decisions do no more than suggest a structure to the reasons document and cannot, in our view, be thought to suggest, subliminally or otherwise, that panel members should 'convict' rather than 'acquit'.

(viii) *That even if you think that the complainant is a liar and/or has concocted his/her case maliciously, do not say so.* The submission is founded upon paragraph 9.42 of the Guidance which says:

> "The findings should be written in plain English without legal terms. The complainant may be present and want to hear something they

[2] The limited circumstances in which the BSB can appeal to the Visitors are set out in Regulation 25 of the 2009 Regulations.

> can understand. This is particularly important if the panel finds that the charge(s) are not proved. Where appropriate, the reasons should make clear that the credibility of the complainant is not being impugned."

Mr Beaumont submits that this is a strong steer to take every possible step to avoid offending a dishonest or malicious complainant. The sensibilities of the *ex hypothesi* dishonest consumer are regarded as more important than public vindication of the *ex hypothesi* honest barrister. He submits that this is a manifestation of an ideological (or political) bias against barristers. We are at a loss to understand how that submission arises on the language of the paragraph quoted. It is commonplace in judicial and quasi-judicial decision making that the outcome desired by someone concerned in the proceedings in not secured but their evidence is accepted. In those circumstances, it may be important to say so. We would add, although not expressly contemplated in this section of the guidance, that there is a world of difference when rejecting the evidence of a witness between doing so on the grounds that the person concerned has an honest but mistaken belief in the facts, on the one hand, and that he is lying, on the other. It is good practice to make the distinction clear.

(ix) *That even if the barrister is an eminent man or woman and a senior practitioner, ignore the barrister's achievements over many years of service to his or her profession and to the public.* The Petitioner's complaint is that at the sentencing stage the Sentencing Guidance diminishes the weight to be given to character evidence. In our judgment, the paragraphs accurately reflect the proper legal approach to character evidence when considering sanction following a finding of professional misconduct. The proper approach is discussed in authorities such as *Bolton v. the Law Society* [1995] 1 WLR 512 and those which follow it.

(x) *That the BSB should not be made subject to a costs order. If it loses, this can never be because of bad decisions to prosecute, but because it has some special responsibility that is of great public importance.* The Guidance correctly points out that costs can be awarded against the BSB following a successful strike-out application at the directions stage, and for or against the BSB at the disciplinary hearing or on appeal. It goes on accurately to say that the BSB resists all applications for costs, and founds its submission on *Baxendale-Walker v. Law Society* [2007] 3 All ER 330, a decision of the Court of Appeal of 15 March 2007. In that case the Court of Appeal concluded that ordinarily a costs order should not be made against the Law Society in disciplinary proceedings on the simple basis that costs follow the event. Mr Beaumont submits that apparent bias arises because of a failure in the Guidance to refer to a decision in 2005 (*Bar Council v. Shrimpton* [2005] EWHC 2472) where Lindsay J, giving the judgment of the Visitors, appears to have taken a different view. In our judgment there can be no bias argument raised on the back of the fact that the Guidance annexes a copy of the leading decision of the Court of Appeal on the approach to costs applications in a disciplinary context which can have no principled difference from that applicable to the Bar. Whether the earlier case to which Mr Beaumont has drawn our attention remains authority for any different approach must await a full argument before an appropriate body when a costs application is made against the BSB.

44. None of the arguments advanced upon the content of the Guidance succeeds. We are inclined to think that Mr Nelson was right in his submissions to suggest that these

arguments are apt not for the fair-minded and informed observer, having considered the facts, but for someone approaching the documents with a rather jaundiced view of the world.

Training

45. The Petitioner's submission is a simple one. The 'prosecution' have no business having any involvement in training people who will sit in a disciplinary capacity. Any involvement taints those who have been trained such that the fair minded and informed observer would conclude that there was a real possibility of bias. The factual position relating to training is summarised in paragraphs [30] – [33] above. The lay visitor has received no training in which the BSB has been involved, and no training before then after the COIC familiarisation session referred to in her letter of appointment. The barrister visitor attended a diversity and equality course in 2010 organised by the BSB on behalf of COIC. There is no reason to suppose that the training was not conducted in accordance with the Memorandum of Understanding, the material parts of which we have set out. The Petitioner's argument proceeded at all times by drawing a direct analogy between the CPS and BSB, on the one hand, and disciplinary panels and the Crown Court on the other. The submission is that it would be wrong for the CPS to organise a training course for the judiciary and is wrong for the BSB to have any involvement in training lay members of disciplinary and visitorial panels. In our judgment, the analogy is not apt. A self regulating profession, governed by statute in the way we have described applies to the Bar, will necessarily establish a disciplinary structure which involves the selection and appointment of panels or tribunals. These are the domestic tribunals referred to by Sir Donald Nicholls in *ex parte Calder*. Training, perhaps in recent times especially diversity and equality training, is a natural part of the diet of those serving on domestic tribunals. We do not consider that the fair minded and informed observer would scent bias from the fact that the BSB has input into the training of panel members, particularly in the light of the self-regulatory nature of the disciplinary processes and the arrangements reflected in the Memorandum of Understanding. That Memorandum of Understanding imposes clear responsibility for training on COIC, removing it to an extent not achieved in other environments. For example, Schools Admissions Appeals, which are made against decisions of admissions authorities, are heard under the statutory scheme by panels paid by and trained under arrangements made by and funded by the admissions authorities: see the Schools Admission Appeals Code presented to Parliament on 1 December 2011 pursuant to section 85(3) of the School Standards and Framework Act 1998.

46. The Petitioner's post hearing submissions suggest that unless he knows the precise content of the training received by the barrister visitor, together with details of the refreshments offered (he speculates that it might have been champagne and canapés), together with a list of those who attended, to determine whether members of the BSB were in some way undermining the independence of the attendees, he cannot be sure there was no bias. He worries that the diversity training might have led the attendees to act with bias against men, for example. There is, to our minds, nothing in the training arrangements in place between the BSB and CIOC which support a bias argument. They make clear the responsibility of COIC for all training. We do not consider that input into training by the statutory regulatory body could give rise to an

apparent bias argument. Furthermore, as a matter of fact neither non-judicial visitor has attended any training session that could give rise to any concern.

47. These are not the concerns of the objective bystander but the unduly suspicious and concerned individual mentioned by Lord Phillips in *In re Medicaments.*

Further Discrete Arguments Supporting the Recusal of the Non-Judicial Visitors

48. Mr Beaumont submits that Ms Hobson's letter of appointment raises a subliminal message that were she to acquit barristers she might be removed. That is said to arise from the reference in the letter that 'should circumstances arise whereby your suitability for membership of the panel is in question, the President has the right to withdraw you from the panel.' We are simply unable to see how the words used by Waller LJ could sensibly give rise to such an application. Mr Beaumont buttresses the argument by suggesting that it 'appears to be the case [that] the president of COIC could terminate tenure on the back of a private report that a dissenting or defence-minded panellist is "unsuitable".' So he submits that to avoid becoming unpopular with the President of COIC panel members might be prosecution-minded. Such an argument, we regret to say, is absurd.

49. Mr Beaumont advanced an argument on the strength of descriptions by the non-judicial visitors of their own roles in the bar disciplinary structure. The lay visitor's Linkedin site entry refers to her being a 'Lay Member on the barristers Disciplinary and Fitness to Practise panels at the Bar Standards Board/Council of the Inns of Court'. The barrister visitor's details filed with the General Dental Council (on whose disciplinary tribunal he sits), refers to his being a 'Member of the Bar Standards Board Disciplinary Tribunal'. It is submitted that the hypothetical informed observer would be concerned about the reference in each entry to the BSB. We do not accept that submission.

50. The arrangements between the Bar Council, the BSB and COIC are set out in a series of documents which include the Memorandum of Understanding, the Constitutions of the various bodies, Standing Orders and the Code of Conduct. They are relatively complex and involve the distribution of many functions, not readily understood by those outside the profession or possibly many of those within it. The visitors' reference to the BSB is no more than an indication that they sit in Bar disciplinary matters, in particular because COIC is relatively unknown.

51. We have set out the detail of Ms Hobson's letter of appointment. It was described as 'extraordinary' in written submissions made on behalf of the Petitioner and much was made of the use by Waller LJ of the word 'un-taint', which he placed in inverted commas. The context of its use is obvious. It spoke of lay members who had observed a PCCC meeting under the previous disciplinary procedures. Whilst the vice identified in *In re P* was a lay panel member being a member of, and attending meetings of, the PCCC and thus having collective responsibility for prosecution decisions, the lay visitor did not reach that stage. COIC would have been concerned to ensure that the problem identified in *In re P* did not arise in connection with those it was appointing for the future to sit as lay members of panels, even if the identified facts were not the same. Be that as it may, Waller LJ's letter of appointment is dated just over six years ago and the lay visitor's earlier appointment is more than seven years ago. Given the historic nature of the pre-COIC appointment the hypothetical

observer would not be concerned about events of that antiquity, just as Plender J held in *Sadighi* and was endorsed by Rix LJ in *Kaur* (see paragraph 10 above).

52. The Memorandum of Understanding between the BSB and COIC makes COIC responsible for the recruitment of panel members. The detail is found in paragraph 7.5:

> "Recruitment to the pool of clerks and Panel members will be conducted by COIC through an open recruitment process and in accordance with the Nolan Principles. COIC will consult the BSB to draft the job descriptions and person specifications for the clerks, lay members and barrister members. In all other respects, the recruitment of clerks and Panel Members is a matter for COIC and is not covered by the MoU."

Mr Beaumont submits that this limited involvement is improper and gives rise to apparent bias of those who have been appointed following such involvement, but we are unable to see why.

The Position of the Tribunal Members

53. The lay members of the original tribunal were paid their fees and expenses by the Bar Council. Such an arrangement, for reasons already given when dealing with the argument relating to the visitors, does not give rise to apparent bias. Assuming, for the sake of argument in favour of the Petitioner, that they received training in which the BSB played a part, that too does not give rise to apparent bias for the reasons which we have already given.

54. A discrete argument was raised in connection with the way in which costs orders are made in disciplinary tribunals. In the event that the BSB succeeds in the prosecution for a disciplinary offence and seeks its costs, the costs claimed generally include the fees and expenses payable to the lay members. Such costs are frequently ordered. This is said to give rise to a distinct concern of bias on the basis that the lay members will be more likely to find against a barrister because by doing so they can then ensure that the costs of their own engagement will be recovered on behalf of their 'employer'. The difficulty with that submission, which we do not accept, is that the fees and expenses payable to the lay members are paid ultimately by the Bar Council whatever the outcome of the proceedings. We do not accept that the hypothetical observer would, for a moment, believe that this aspect of the scheme compromised the independence of those members.

Ruse de Guerre

55. We identified the argument advanced in support of the appeal on its merits at the outset of this judgment. For the purposes of this appeal the Petitioner has been constrained to accept the factual conclusion reached by the Tribunal, namely that he had claimed to be Joel Bennathan QC in a telephone call to the Criminal Appeal Office, intending to deceive the person to whom he was speaking. Before the Tribunal he had denied pretending to be Mr Bennathan, but recognises that there is no basis upon which the factual conclusion can be upset on this appeal. The *ruse de*

*guerre* argument was advanced before the Tribunal in the alternative. The Tribunal's conclusion was:

> "We considered that for a barrister to pretend to be the barrister prosecuting him before a disciplinary tribunal involved moral turpitude, could not be justified as a *ruse de guerre* and was conduct discreditable to a barrister."

56. In summary, the Petitioner was due to be tried on 5 July 2007 an earlier case brought by the BSB. The complainant was an official who worked in the Criminal Appeal Office. The allegation against the Petitioner was one essentially of rudeness. In late June the Petitioner was informed by the BSB that the person in question was unable to give oral evidence at the hearing for medical reasons. The Petitioner suspected that this was untrue and that the witness was perpetrating a deceit upon BSB and the Tribunal. As he put it in his evidence before the Tribunal, 'criminal lawyers develop a nose' for these things but, as he later added, his suspicion was informed by the fact that the witness had blown the underlying incident out of proportion. He also suspected that the BSB would then suggest that the evidence should be read, which if the Tribunal agreed, would deprive him of an opportunity to cross-examine the witness. So the Petitioner set about discovering the true position and perpetrated the deceit with a view to determining whether the witness was at work. He says that she was and from that says that what he considers to be no more than a white lie revealed a greater deceit. He telephoned the Criminal Appeal Office. He spoke to one official but asked whether he could speak to the witness who he had heard was unwell. When he was told the witness would be asked to phone him back, he gave his name as Joel Bennathan, but it would appear left his own telephone number.

57. Mr Beaumont submits that the Petitioner was not acting as a barrister at all when he telephoned the Criminal Appeal Office but as 'a private citizen defending himself against … allegations made against him by a public body.' He submits that, in any event, 'deceit' and 'discredit' are different animals. Whether what the Petitioner did was discreditable involves a finely balanced moral judgment. Mr Beaumont submits that the Tribunal failed to give sufficient weight to the context of the deception (that is suspicion that the witness was dissembling), or the outcome which he submits was to establish that point. Mr Beaumont also points to an intervention by the judicial member of the Tribunal, where he suggested that the *ruse de guerre* argument was unattractive, and suggests that it was not given the serious attention it deserved. In our judgment that observation was unobjectionable.

58. We should observe that we have not been shown any conclusion of a disciplinary tribunal that the witness was dissembling in the way suggested and are not aware of any finding to that effect. It is not established. In any event, it does not follow that because a witness is capable of being at work (if that was the case), that he is necessarily fit and able to give evidence. It depends upon the condition in issue, about which we know little, save for a reference at page seven of the evidence of the Petitioner himself before the Tribunal. We do not consider it appropriate to name the official who was the object of the Petitioner's submissions, still less to descend into detail about the medical condition or conditions in question. It is sufficient to observe that they are, in our experience, precisely of the sort which might enable a person to undertake some tasks but not others. But there is a difficulty with the submission that the conduct of the Petitioner should be judged by the outcome,

namely whether his suspicion about the witness was correct. If the conduct was justified at all, it was the suspicion that justified it, not whether the suspicion turned out to be well-founded.

59. We do not accept the submission that the conduct found proved by the Tribunal was not conduct for which the Petitioner should be responsible *qua* barrister. It arose from his practice as a barrister and a disciplinary process resulting from alleged misconduct. Furthermore, we do not believe that the question whether the conduct was discreditable involves a fine moral judgment. We conclude that 'discreditable' is an apt word to describe what the Petitioner did and agree with the conclusion of the Tribunal to that effect.

Conclusion

60. In the result this appeal is dismissed. The circumstances are such that there is no basis on which the non-judicial visitors should recuse ourselves. The argument that the Tribunal was infected with bias is rejected. There is no merit in the appeal itself. This is the judgment of us all.