BEFORE THE VISITORS TO LINCOLN'S INN
ON APPEAL FROM THE DISCIPLINARY TRIBUNAL
OF THE COUNCIL ON THE INNS OF COURT

Ref No: D2006/098&099

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/10/2008

Before:

THE HONORABLE MR JUSTICE KING

MISS MARION SMITH

MR DAVID HALL

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Between:

Robert Gordon Lennox O'Reilly Apsion

- and -

The Bar Standards Board

- -

Hearing dates: 23rd & 24th June 2008

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APPROVED JUDGMENT

The Appellant appeared as a litigant in person
MR ADAM SPEKER appeared on behalf of the **BAR STANDARDS BOARD**

Part 1: Introduction

1 This is the unanimous view of the Visitors.

2 Mr Apsion was called to the Bar by Lincoln's Inn on 28 July 1977. On 14 June 2007 he was found guilty of 3 charges of professional misconduct and 4 charges of inadequate professional service by a disciplinary tribunal of the Council of the Inns of Court ("the Tribunal"). The charges on which Mr Apsion was found guilty related to 2 complaints. Mr Dilnot, his former client, made one complaint. He had instructed Mr Apsion under the Public Access Scheme to advise and defend him in a defamation action bought against him by the second complainant, Mr Davey. The charges and particulars can be summarised as follows: -

Charge 1: professional misconduct contrary to paragraphs 603 and 901.7 of the Code of Conduct of the Bar of England and Wales (8th Edition) ("the Code of Conduct").
Mr Apsion, on or about 29 March 2005 accepted instructions to act for Mr Dilnot in circumstances that caused him to be professionally embarrassed as he lacked sufficient expertise or competence to handle the defence to a claim in defamation.

Charge 2: professional misconduct contrary to paragraphs 701 and 901.7 of the Code of Conduct.
Mr Apsion, between about 29 March and 27 April 2005 undertook the tasks of advising and defending Mr Dilnot in the action, which tasks he knew or ought to have known he was not competent to handle.

Charge 4: professional misconduct contrary to paragraphs 301 and 901.7 of the Code of Conduct.
Mr Apsion on or about 4 April 2005 drafted a defence in the action brought by Mr Davey in terms and language that were discreditable to a barrister, were wholly improper and prejudicial to the administration of justice, or were likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.

Charge 5: inadequate professional service contrary to paragraphs 903 and 904 of the Code of Conduct.
Mr Apsion, on or about 29 March 2005, accepted instructions to act for Mr Dilnot in his defence to the action in circumstances where he lacked sufficient experience or competence to handle or advise upon the defence to a claim in defamation.

Charge 6: inadequate professional service contrary to paragraphs 903 and 904 of the Code of Conduct.
Mr Apsion provided Mr Dilnot with advice in the form of an undated written opinion that was inadequate and contained statements or propositions of law that were legally incorrect or unsustainable.

Charge 7: inadequate professional service contrary to paragraphs 903 and 904 of the Code of Conduct.
Mr Apsion, on or about 4 April 2005 drafted a defence in the action in terms and language that were offensive, unprofessional or inappropriate to appear in a statement of case to be served and filed in the course of legal proceedings, that were legally incorrect and failed to disclose a proper defence and that were contrary to the instructions or interests of his lay client.

Charge 8: inadequate professional service contrary to paragraphs 903 and 904 of the Code of Conduct.

Mr Apsion between about 29 March and 27 April 2005 charged and received from Mr Dilnot fees that were excessive for the amount or nature or quality of the work he carried out on his behalf.

3 The Tribunal dismissed charge 3 that alleged professional misconduct in drafting a statement of case containing an allegation of fraud against Mr Davey in circumstances where he did not have clear instructions to make such allegation and did not have before him reasonably credible material which as it stood established a prima facie case of fraud.

4 On charges 1, 2 and 4 Mr Apsion was:

(i) suspended from practice as a barrister and from enjoyment of all rights and privileges as a member of Lincoln's Inn and prohibited from holding himself out as a barrister without disclosing his suspension for 18 months on each charge concurrently;

(ii) prohibited from accepting or carrying out any public access instructions indefinitely; and

(iii) ordered to repay all fees paid and forego all outstanding fees arising out of the material instructions.

5 No separate penalty was imposed in relation to charges 5 – 8 inclusive. Mr Apsion was also ordered to pay the BSB's costs. The Tribunal rejected Mr Apsion's application to suspend the orders suspending his practising certificate and prohibiting him from accepting any public access instructions.

6 Mr Apsion now appeals to the Visitors against both the Tribunal's findings and sentence. He alleges that the Tribunal's decision was wrong and that he did not have a fair trial relying on Article 6 of the European Convention on Human Rights.

Part 2: The background facts

7 In 2002 Mr Dilnot, through his company, carried out building work at a house belonging to Mr Davey and his wife. A dispute arose, which lead to litigation, ultimately compromised through mediation in September 2004.

8 Mr Davey commenced defamation proceedings in the High Court in early 2005 ("the defamation proceedings"). His Particulars of Claim complained of 4 publications:

(i) a letter dated 17 September 2004 sent by Mr Dilnot to a Mr Hinton, a surveyor previously retained by Mr Davey;

(ii) an email dated 29 September 2004 allegedly sent by Mr Dilnot to a "Daniel Silk";

(iii) a fax allegedly sent by Mr Dilnot to Mr Hinton on 29 September 2004 consisting of copies of 2 emails purporting to pass between Mr Dilnot and "Daniel Silk"; and

(iv) a letter allegedly sent by Mr Dilnot on 12 October 2004 to Mr Underwood, a builder previously retained by Mr Davey. A copy of an email dated 4 October 2004 from "Daniel Silk" to Mr Dilnot was sent with this letter.

The central sting of the alleged libels was serious. Although it was put differently the thrust was that Mr Davey, a barrister, had acted dishonestly and reprehensibly and had attempted to pervert the course of justice.

9 Mr Dilnot, having seen an advert in the local newspaper placed by Mr Apsion, instructed him to act on his behalf in the defamation proceedings. During the course of his short retainer Mr Apsion advised Mr Dilnot in conference and produced 2 documents, one titled "Opinion" and the other "Draft Defence". Mr Apsion's Draft Defence was typed up by Coodes. It was correctly entitled Defence and Counterclaim and Mr Dilnot signed the Statement of Truth. It was lodged with the Court early in May 2006 either shortly before or shortly after the extended deadline on 3 May 2006 which Coodes, Mr Dilnot's then solicitors, had obtained. For his work Mr Apsion received £5,875 from Mr Dilnot and considered that £1,768.39 remained due.[1]

10 In the course of the next few months:

(i) Mr Dilnot sought advice from Hugh James, solicitors. They expressed considerable concern as to "*Mr Apsion's Opinion and the Defence Document*";

(ii) Mr Davey's solicitors applied to strike out the Defence and Counterclaim as served. This application was ultimately settled on terms that allowed Mr Dilnot to serve a substitute Amended Defence settled by his new counsel, Rupert Butler, but Mr Dilnot had to pay Mr Davey's costs of his strike out application;

(iii) Mr Dilnot filed a complaint with the BSB. He complained about Mr Apsion's work in the defamation proceedings;

(iv) Mr Dilnot through his solicitors Hugh James notified a claim in negligence to Mr Apsion which Mr Apsion passed to his insurers, the BMIF; and

(v) Mr Davey complained about Mr Apsion to the BSB. His complaint was based on the Defence as served, which is the document drafted by Mr Apsion.

11 The defamation proceedings were not settled. At trial in June 2006 Mr Davey was held to have been libelled by Mr Dilnot and awarded £5,000 damages. Mr Dilnot was also ordered to pay indemnity costs and penal interest.

Part 3: The main events leading up to the Tribunal hearing and the hearing itself

12 Mr Butler provided a statement to Hugh James in July 2006 in which he commented on "*the effects caused by [Mr Apsion's] drafted Defence and Counterclaim*" in the defamation proceedings. Hugh James sent a copy of this statement to the BMIF. Mr Dilnot, who was facing bankruptcy proceedings instigated by Mr Davey, sent a copy of it to Mr Davey. Mr Apsion sent a copy of Mr Butler's statement to the BSB on 4 October 2006.

13 Mr Davey (wrongly) understood that Mr Butler's statement had been submitted in support of Mr Dilnot's complaint to the BSB. He wrote to the BSB on 26 August 2006 saying that there were a number of incorrect statements in Mr Butler's statement but would only provide a detailed response if asked. He did not wish to assist Mr Apsion and stood by his own complaint. He was writing as "*Mr Butler is deposing as to the effect caused by the Defence settled by Mr Apsion … I am better able to say what the effect was.*" Mr Davey explained that he had made a Part 36 offer on standard libel terms shortly after service of the Defence and Counterclaim. That offer had been repeated before trial. Neither offer had been referred to in Mr Butler's statement. Mr Davey made it clear that in his opinion the reason for the proceedings getting to trial, with the consequent orders against Mr Dilnot, "*was not Mr Apsion's*

[1] Transcript Day 3 p. 22 lines 8 – 10

Defence at all as Mr Butler tries to assert but Mr Dilnot's own conduct". He concluded the letter by stating that he would "*give any further assistance as may be required*". The BSB did not ask Mr Davey for any further assistance.

14 Mr Apsion was supplied with a copy of the BSB's Bundle in January 2007. Mr Apsion subsequently agreed, as recorded in the Agreed Directions of 31 January 2007, that: -

"*the BSB's Bundle of Documents with the exception of the charge sheet would be submitted into evidence without any further proof*;"

15 The same directions also record that Mr Apsion wished for Mr Dilnot, Mr Davey and Mr Butler to be called at the Tribunal Hearing and he was ordered to provide copies of statements of any witnesses who he wished to call at the Tribunal within 28 days.

16 Mr Apsion subsequently confirmed, both before and during the Tribunal hearing, that he did not require Mr Dilnot, Mr Davey or Mr Butler to attend for cross-examination before the Tribunal.[2] He also chose not to give evidence himself or call any witness other than his assistant Mrs O'Brien. He was given permission by the Tribunal to serve her statement on the first day of the hearing.[3] The consequences of these decisions, which are of course well known to any practising barrister, were pointed out to him both in the BSB's written and oral submissions and by the Tribunal.[4] Mr Apsion accepted that in so far as any of his written submissions consisted of assertion without evidence to support it, it fell to the ground. [5]

17 At the express request of the Tribunal, the BSB's Counsel prepared and submitted a Scott Schedule during the Hearing to provide a useful summary on how the matters relate to the particular charges made against Mr Apsion.[6] We have been provided with a copy.

18 We will return to the events during the Tribunal proceedings in Part 6 where we address Mr Apsion's submissions as to procedural unfairness.

Part 4: The appeal procedure

19 Mr Apsion represented himself before us with the help of his assistant Mrs O'Brien. (She had assisted him in the same way before the Tribunal). [7] Counsel appeared for the BSB. Both parties made oral and written submissions. We have also been supplied with a substantial amount of documentation including the Tribunal Chairman's report of the proceedings before him and a transcript of the Tribunal proceedings on 14 and 15 May and 14 June 2007. We have read and fully taken all this material into account in reaching our decision.

20 Procedural directions for the appeal were made on a number of occasions. Mr Apsion at one stage said he intended to seek permission to call Mr Davey before us. Rix LJ directed on 7 May 2008 that if Mr Apsion did intend to ask us to hear Mr Davey he should serve a witness statement from him of the evidence that he wished to call by 21 May 2008. No statement was served and Mr Apsion told us during the appeal hearing that he did not seek permission to call Mr Davey.

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2 Transcript Day 1 pp. 17 – 18, 36, 39, 45 Transcript Day 2 pp. 27, 39 - 44

3 Transcript Day 1 pp. 35, 36 and 45 (the application was at page 34) Transcript Day 2 pp. 7 – 9, 16-17, 40-44

4 Transcript Day 1 pp. 17 - 18

5 Transcript Day 2 p. 8 line 18

6 Transcript Day 1 p 99

7 Transcript Day 1 p. 46. The application was at page 7

21 We had to remind Mr Apsion on a number of occasions that he could not give evidence to us by way of submission. We warned him that in making our decision we would distinguish between his statements of submission and of evidence and ignore the latter.

22 On the first day of the hearing before us Mr Apsion requested permission to put in evidence material that had come into existence since the Tribunal hearing: items 4 – 20 in the Bundle entitled Appellants Bundle. Some of this material would not require permission such as Rix LJ's directions. We gave permission for him to put this material before us conditionally, and told him that he must explain the relevance of any document relied on.

23 Since the conclusion of the hearing before ourselves, Mr Aspion without any permission from the Visitors has sought to make further submissions by letters dated 2 July, 18 July, 29 August and 16 September 2008. In so far as these further submissions sought to expand upon submissions already made before ourselves we have considered it proper to have regard to them, notwithstanding the absence of any permission. Copies of the submissions have been sent we understand to the BSB who have not indicated a wish to respond. In so far as the submissions have sought to raise new grounds of appeal not canvassed before ourselves in the course of the hearing we consider that it cannot be appropriate for such to be within the scope of this judgment. There has to be finality in any appeal process. We refer in this regard to the submission of 16 September 2008 concerning the validity of the order of the Tribunal pursuant to regulation 28 of the Disciplinary Tribunal Regulations that the practising certificate of Mr Aspion be suspended immediately. This hitherto has not been the subject of any submissions on this appeal. We also note that an application to Rix LJ as the Directions Judge to suspend sentence was refused.

Part 5: Jurisdiction

24 Counsel for the BSB reminded us of the scope of our jurisdiction. He referred us to R v. Visitors to the Inns of Court ex part Calder [1994] QB 1. Sir Donald Nicholls V-C said this at page 42D-F:

"*… I can see no reason to doubt that an appeal to the judges as visitors is precisely that: an appeal. It is so described in the authorities. In Lincoln v. Daniels [1962] 1 Q.B. 237, 256, Devlin L.J. referred to it as "a rehearing on appeal." Thus the visitors will look afresh at the matters in dispute and form their own views. The procedure followed in the conduct of such an appeal is a matter for the visitors. The current visitors' rules provide that fresh evidence will be admissible only in exceptional circumstances. In the absence of fresh evidence the appeal will be comparable to an appeal in the Civil Division of the Court of Appeal. Regarding sentence, it will be for the visitors to exercise their own discretion and judgment.*"

Stuart-Smith LJ said this at page 59 C-D: -

"*For reasons to which I shall later refer, in my opinion an appeal to the visitors is or should be a full rehearing on the merits and as such it should cure any procedural defect or breach of natural justice on the part of the tribunal, unless it can be said that the evidence was for that reason not fully before them, in which case, under the Hearings before the Visitors Rules 1991 they have power to "order a rehearing on such terms as they may deem appropriate:" rule 11(3).*

His reasons are set out at page 61H - 62D where he says this:

"*I come then to the final ground of appeal, namely, that the visitors misdirected themselves as to the nature of their jurisdiction in that they treated the matter as one of review rather than appeal by way of rehearing on the merits. It was not contested*

before us that the proper approach was that of an appellate court rehearing the case on its merits, such as is the position of the Court of Appeal on appeal in a civil case from the decision of a judge alone. Although the point has never fallen to be decided, I agree that this is the correct approach. All the cases dealing with the judges' jurisdiction as visitors refer to it as an appeal to the visitors. There is no warrant for thinking that they limited themselves to the circumstances in which the prerogative writs of prohibition, mandamus or certiorari would lie, that being the foundation of the judicial review jurisdiction. The language of the Hearings before the Visitors Rules 1991 is appropriate for an appeal and not a review only. Thus the appellant is referred to as such and not an applicant: rule 2(2). The grounds of appeal are against the finding and the petition should refer to the evidence relied upon: rules 5 and 7(2) (e). The visitors may either allow the appeal or order a rehearing: rule 11(3). They are not limited to quashing the order. Like any other appellate court, the visitors do not as a rule hear evidence from witnesses unless they give leave under rule 10(6) and (7). Accordingly they should adopt the same approach to findings of fact made by the tribunal as the Court of Appeal do to findings of the trial judge: see Yuill v. Yuill [1945] P. 15; Watt or Thomas v. Thomas [1947] A.C. 484 and Powell v. Streatham Manor Nursing Home [1935] A.C. 243."

Staughton LJ said this at page 68 D – G

"The second point concerns the effect of a breach of the rules of natural justice by the disciplinary tribunal, and whether that was cured by the appeal to the visitors, which was (or rather should have been) a rehearing on the record. In Lloyd v. McMahon [1987] A.C. 625 it was said that a full appeal by way of rehearing on the merits will normally cure procedural error in the tribunal appealed from. I have some hesitation in accepting that the error was cured in the present case. An appellate tribunal which does not rehear the evidence will inevitably attach some weight to the conclusions of the tribunal appealed from. If that tribunal was affected by bias - whether actual, apparent or imputed - the defect is only cured if there is a full, careful and independent review of the evidence by an appellate tribunal, followed by its own findings of fact. If that does not happen, it seems to me arguable that the breach of the rules of natural justice remains effective; and is a ground for judicial review. But then there is the question whether it is within the more limited grounds of judicial review in the case of visitors under Ex parte Page [1993] A.C. 682. There has been no suggestion of any breach of the rules of natural justice by the visitors in this case. Was their decision infected by the breach before the disciplinary tribunal? And if so, is that a ground of judicial review within Ex parte Page*?*

I need not express a concluded view on those questions, as I agree with Sir Donald Nicholls V.-C. and Stuart-Smith L.J. that the decision of the visitors must in any event be quashed on the ground that they misunderstood the scope of their task."

Although the rules which govern this hearing are now the Hearings Before The Visitors Rules 2005, the key provisions identified by the Court of Appeal in Calder remain the same. We have approached this hearing on the basis outlined in Calder.

25 At the beginning of the hearing before us Mr Apsion was referred to rule 10 (6) of the Hearings before the Visitors Rules 2005, and informed that one of the Visitors (King J) is a bencher of Lincoln's Inn. Mr Apsion stated that he had no objection to him continuing to hear the appeal.

Part 6: Mr Apsion's submissions of procedural unfairness

26 Mr Apsion submitted that he had been denied a fair trial as a result of the BSB's failure to obtain further evidence from Mr Davey following on from his offer at the

conclusion of his 26 August 2006 letter of "*any further assistance as may be require*". Mr Apsion did not suggest that Mr Davey would have given any particular evidence if he had been asked but relied on the fact that nobody knew what Mr Davey would have said if his offer had been taken up. Mr Apsion further submitted that the BSB's subsequent failure to supply a copy of their letter of 8 September 2006 to him until July 2008 amounted to a "*deliberate suppression of evidence*".

27 It is common ground that the BSB, having received Mr Davey's 26 August 2006 letter, did not ask him for further assistance although by their 8 September 2006 letter they did acknowledge receipt of this letter. We accept that we do not know what Mr Davey would have said if he had been asked. However the main issue on all the charges is whether the work Mr Apsion did for Mr Dilnot was sub-standard. That is to be decided by looking at what Mr Apsion did, in the context of his instructions and the relevant law, practice and procedure. Substandard work generally has the potential to damage the client's interests. When considering liability in disciplinary proceedings, unlike professional negligence claims, it is at most that potential that matters, not whether the damage actually occurred. Comments such as those made in Mr Butler's and Mr Davey's evidence about the actual effect of the draft Defence on the possibility of settlement and the outcome of the defamation proceedings are irrelevant to these disciplinary proceedings. Accordingly there was no obligation on the BSB to seek further assistance from Mr Davey. We further find there is no substance in the allegation of suppression by the BSB of any evidence material to this appeal.

28 We were left in some doubt as to whether Mr Apsion was also submitting that Mr Davey's 26 August 2006 letter had been suppressed. We therefore record that a copy was in the BSB's bundle provided to Mr Apsion in January 2007 and put before the Tribunal in May 2007. BSB's counsel drew the attention of the Tribunal to the letter in both his written and oral submissions.[8] In our judgment the BSB fully complied with their obligations in relation to this letter. Mr Apsion was free to request that Mr Butler or Mr Davey gave live evidence at the Tribunal hearing. He chose not to do so. We refer to paragraph 21 of this judgment.

29 Mr Apsion submitted before us that the Tribunal had unfairly refused to allow him to address them on the third day of the hearing about Mr Davey's complaint against him[9] and in particular had unfairly refused to allow him to address them about the material in the BSB's Bundle at pages 241 to 331. We invited him to identify the material in those pages that he relied on. Apart from Mr Davey's 26 August 2006 letter that we have dealt with above, he identified no specific document. He was content to let us read the material and come to our own conclusion. He submitted that an unfair approach had come about as a result of the Tribunal wrongly characterising the charges based on Mr Davey's complaint (charges 3 and 4) as being subsumed in the charges based on Mr Dilnot's complaint.

30 Counsel for the BSB submitted that it was clear from the outset that the 2 complaints overlapped entirely. It was therefore appropriate to subsume Mr Davey's complaint (on which charges 3 and 4 were based) into the case brought in relation to the complaint of Mr Dilnot. There was no legal, practical or other disadvantage suffered by Mr Apsion as a result. Counsel also submitted that as a general point it should be noted that the Tribunal afforded Mr Apsion more than ample opportunity to present his case in a fair and just manner. Mr Apsion was given at least double the time that the Prosecutor was given for the presentation of the BSB's case. Counsel for the BSB in his written skeleton stated that (i) Mr Apsion first criticised the subsuming of the 2 complaints after judgment was delivered, which was a month after the hearing

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8 Transcript Day 1 p. 67

9 Transcript Day 3 pp. 9 - 11

started,[10] (ii) Mr Apsion was forced to admit that he had not complained before, and, (iii) it was dealt with by the Tribunal.

31 Mr Apsion in response referred us to 2 letters dated 29 May and 7 June 2007 (with attachment). In these documents Mr Apsion complained that the Tribunal Chairman had prevented him from replying to Mr Davey's complaint and asked for his letters to be circulated to each member of the Tribunal. His point was that he had complained before the third day of the hearing.

32 In our judgment:

(i) the Tribunal were correct in their assessment that Mr Davey's position was subsumed in Mr Dilnot's complaint. Both complained about the same aspects of Mr Apsion's work and his competence albeit Mr Dilnot's complaint was more extensive;

(ii) there was no legal, practical or other disadvantage suffered by Mr Apsion as a result of this assessment. The Tribunal took a pragmatic approach to the presentation of Mr Apsion's case. Mr Apsion addressed the Tribunal at length over the first 2 days of the proceedings in support of his preliminary applications including an application of no case to answer and in his submissions on the charges. We draw attention in particular to this exchange that occurred towards the end of the second day, between Mr Apsion and the Tribunal Chairman: [11]

*"**[Mr Apsion]**: We have not dealt with Mr Davey yet.*
***The Judge**: His position is subsumed. I think Mr Davey is concerned in charges 3 and 4. the fact that he is concerned does not add anything to the points you feel you need to make, does it? You have been over 3 and 4, have you not?*
*[**Mr Apsion**] I bow to your Honour.*
***The Judge**: If there is anything you wish to say, if there is any discrete point you say applies to Mr Davey, and only arises out the fact that he is concerned.*
*[**Mr Apsion**]: the only other thing, if you are going to retire to consider your decision, and I have to go through this with you, is the complaint."*

It is clear from this exchange that Mr Apsion was not prevented from dealing with Mr Davey's complaint and was expressly invited to deal with any further points in relation to Mr Davey he felt he needed to make. He did not feel he had to. After this exchange Mr Apsion then went through the Scott Schedule. It included the points arising out of Mr Davey and Mr Dilnot's complaints. The Tribunal sat late until Mr Apsion agreed that he had concluded his submissions.[12] The Tribunal reserved judgment and adjourned the matter for a third day that was listed for 14 June 2007;

(iii) Mr Davey's 26 August 2006 letter was irrelevant and had been drawn to the Tribunal's attention. Similarly the other documents in the pages identified by Mr Apsion did nothing to assist his case; and

(iv) whilst we accept that Mr Apsion raised this complaint with the BSB during this adjournment, and at the outset of the third day, it remains the case that his complaints were late. They were raised after he had concluded his submission.

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10 Transcript Day 3 pp. 12-13.
11 Transcript Day 2 p. 85
12 Transcript Day 2 p. 102

33 In our judgment we do not think that in the light of the material before them the Tribunal can be criticised for reaching the decision they did. We have carefully considered the further submissions and information available to us and in our view it does not change the matter. In our view the Tribunal gave Mr Apsion every opportunity to present his case in a fair and just manner.

34 We turn now to consider the substantive grounds of his appeal and the alleged errors made by the Tribunal.

Part 7: The specific charges

35 We deal with Mr Apsion's submissions as follows:

(a) The scope of Mr Apsion's instructions
(b) The documents relied on were drafts
(c) The Draft Defence: inadequate particularisation
(d) The counterclaim for malicious prosecution
(e) The Draft Defence: the burden of proof in defamation proceedings
(f) The Draft Defence: the derogatory allegations against Mr Davey
(g) The Opinion
(h) Ratification
(i) Someone else was to blame for Mr Dilnot's misfortune
(j) The attacks on Mr Dilnot
(k) Mr Apsion's competence

(a) The scope of Mr Apsion's instructions

36 Mr Apsion submitted that the BSB's case, and the Tribunal's decision were based on the misapprehension that Mr Dilnot had admitted his libel to him in May 2005. Mr Apsion repeatedly asserted during his oral and written submissions that Mr Dilnot had denied publication. We allowed Mr Apsion to put an annotated copy of the Particulars of Claim in the defamation proceedings in front of us. They had not been shown to the Tribunal. Mr Apsion said that these were Mr Dilnot's annotations and showed his initial instructions from Mr Dilnot.

37 The scope of Mr Apsion's instructions relates to 2 matters. Firstly it relates to Mr Apsion's assertions before the Tribunal that so far as he was concerned the case was not about defamation. There was no law of defamation to apply save for the question of publication and therefore no need to waste his client's money on legal research or reading Gatley, the well-known practitioner's textbook on defamation.[13] Secondly it also went to Mr Apsion's alleged failure to consider or advise upon the provisions of the Defamation Act 1996 and the offer of amends procedure in particular and thus to his competence.

38 Counsel for the BSB pointed out that it was clear from what Mr Apsion had done that he had not treated this case as being only about publication. He himself had referred to taking novel points on privilege and pleaded other defences. He further submitted that the Tribunal did not rely on Mr Apsion's failure to consider or advise upon the provisions of the Defamation Act or the offer of amends procedure in reaching their conclusions. They made this explicitly clear to him in their debate following judgment. In any event his complaint was ill-founded as: -

(i) he himself suggested that the client make an apology and offer a payment;

[13] Transcript Day 2 pp. 26 line 17, 31, 45 lines 20 – 21, 47, 57, 62 and 67.

(ii) his assertion that Mr Dilnot's instructions were that he denied publishing the libels were contradicted or inconsistent with the Draft Defence he prepared in which publication was admitted; and

(iii) at different times Mr Apsion showed no awareness of the provisions but then stated that he had rejected them as inapplicable.

39 If we assume that Mr Apsion is correct, and he was instructed on the basis that publication was denied, he did not treat the case as being one in which the only issue was publication. His Draft Defence put many other issues in question and raised a number of defences such as justification, fair comment and qualified privilege and sought to advance a counterclaim for libel and malicious prosecution. These required knowledge to be used, and if necessary acquired, about the applicable principles of law.

40 We also agree that no complaint can be made about the Tribunal's decision as they did not rely on his failure to consider or advise upon the provisions of the Defamation Act.[14] For completeness we record our view that Mr Apsion's assertion about the scope of his instructions is supported by Mr Dilnot in his complaint to the BSB where he says that he had made it clear that he did not admit that he published the emails. It is however at odds with the Draft Defence in which publication on all 4 occasions is admitted. Given that Mr Apsion actually referred in his Opinion and Draft Defence to an apology and offering payment, we would have expected to see advice or an appreciation of the appropriate ways to do this. We however will take the same approach as the Tribunal and place no weight on this matter.

(b) The documents relied on were drafts

41 Mr Apsion submitted that he was convicted on the basis of draft documents that were works in progress, unfinished and by definition imperfect and that the Tribunal took no account of this. Mr Apsion also submitted that Mr Dilnot had obtained the Opinion by underhand means or that he had never provided his unfinished written Opinion to Mr Dilnot.

42 The BSB submitted that this ground of complaint is misconceived as: -

(i) the Tribunal made it clear in its judgment and in the debate with Mr Apsion which followed the delivery of their judgment that they fully understood the distinction drawn and the significance attached to it by Mr Apsion;[15]

(ii) the charges which Mr Apsion was found guilty of, other than charge 4, were couched in terms that were wider than simply the production of a finalised pleading, they related to "*advising*", "*defending*" or "*handling or advising upon the defence*" of the claim against his client;[16]

(iii) as the Tribunal noted in their Judgment[17] in his written submissions before the Tribunal Mr Apsion admitted in relation to his Draft Defence that "*had I known that time was of the essence I could have advised Dilnot to file it and subsequently amend it."*[18] He also admitted that he had signed the document as well; [19]

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14 Transcript Day 3 pp. 26 – 27.
15 Transcript Day 3 pp. 17 lines 13 – 16, 18 and 28
16 Transcript Day 1 pp. 16-17 and 38 – 39.
17 Transcript Day 3 p. 17
18 Transcript Day 3 p. 17 lines 18 – 19.
19 Transcript Day 2 p. 81

(iv) whether the document provided was in draft or final form it contained fundamental errors of law or procedure and other inappropriate statements which should not have appeared; and

(v) as the Tribunal noted Mr Apsion charged or sought to charge Mr Dilnot for the draft Defence (and Opinion) and his general advice fees which reflected 35 hours of work.

43 We accept the BSB's submission that the Tribunal did not ignore the distinction drawn and the significance attached to it by Mr Apsion. They expressly referred to it in their judgment. We also agree that the distinction that Mr Apsion seeks to draw gets him nowhere. He accepted that the Draft Defence was a document that could be filed at court. He did not deny that he worked through the Opinion with Mr Dilnot in early April 2006. Mr Apsion himself states in his written submissions filed before the Tribunal that "*My Opinion was never completed because it was overtaken by events, namely my drafting of Dilnot's Defence and Counterclaim, from which my Opinion was obvious*." He says in the same document that the draft Opinion "*is evidence of matters we discussed and the advice I gave him"*. Before us he submitted that he had given Mr Dilnot oral advice on all of the matters contained in the Opinion. He also charged the client for their preparation. The contents of the Opinion and the Draft Defence represent Mr Apsion's advice to Mr Dilnot, and clearly show the way in which Mr Apsion handled Mr Dilnot's defence to the defamation proceedings in March/April 2005. We note further than Mr Apsion, in his response to Mr Dilnot's letter of 20 May 2005, expressly claimed that he had "*earned his fees fairly and gave you sound advice, as well as drafted the pleadings"*. In those circumstances precisely when and how Mr Dilnot was provided with the Opinion in late April/early May seems to us to be irrelevant. We agree with the Tribunal's view that as Mr Apsion did not give evidence his allegations of misappropriation or deceit against Mr Dilnot remain unsustained. We also draw attention to his own response to Mr Dilnot's complaint in which he said, "*I did not let Dilnot have my Draft Opinion until after I returned from Peru*." We deal with the submission that no work in progress, and no advice to the client should have contained the basic errors these documents evidence below.

(c) The Draft Defence: inadequate particularisation

44 The Scott Schedule identified over 25 complaints relating to the Draft Defence. Mr Apsion in submission sensibly concentrated on a number of aspects rather than covering the full range of the points.

45 Any pleading in civil cases must set out a coherent concise statement of the material facts. It must disclose a legally recognisable claim or defence. Mr Apsion's response to Mr Dilnot's complaint in these disciplinary proceedings shows that he is well aware of the importance of particularisation. Defamation claims are no different although they are specifically dealt with in CPR 53 and the related Practice Direction. These provisions leave no room for doubt. CPR 53PD 2.1 states that Statements of Case should be confined to the information necessary to inform the other party of the nature of the case he has to meet. CPR 53PD 2.3 states that in a claim for libel the publication the subject of the claim and the alleged defamatory meaning must be identified. CPR 53 PD 2.5 states that where a defendant alleges that the words complained of are true he must specify the defamatory meanings he seeks to justify and give details of the matters on which he relies in support of that allegation. CPR 53 PD 2.6 states that where a defendant alleges that the words complained of are fair comment on a matter of public interest he must specify the defamatory meaning he seeks to defend as fair comment on a matter of public interest and give details of the matters on which he relies in support of that allegation.

46 Paragraphs 4 and 9 of the Draft Defence stated that Mr Dilnot claimed "*truth, justification fair comment*" and may have referred to a defence of qualified privilege. None of the required particulars were provided. Mr Apsion submitted that such defects could be rectified at a later stage. We do not agree. Compliance with the Practice Direction was an important requisite to any competent pleading as Mr Apsion ought to have known.

47 The full extent of the Counterclaim was as follows:

"*The counterclaimant claims damages for libel and malicious prosecution.*"

48 Absolutely no particulars were provided. The pleading did not comply with the CPR. Mr Apsion asserted in his written Skeleton that he could not include the particulars as Mr Dilnot had not provided them. In the circumstances the only proper approach was not to include such claims. Mr Apsion submitted that it was his intention to include and expand on the claim for malicious prosecution in Mr Dilnot's witness statement in the libel proceedings and by implication that such an approach was unimpeachable. As we have already said, we do not agree.

(d) The counterclaim for malicious prosecution

49 We turn now to consider whether in fact Mr Dilnot had a claim in malicious prosecution as a matter of law

50 Mr Apsion was very vague as to the basis on which he intended to put the claim in malicious prosecution. He referred to a complaint to the Master Builders Federation, a complaint made to the Police and something to do with the Environmental Health Authority ("EHA") but he accepted that so far as he was aware none of these had resulted in a criminal prosecution. However Mr Apsion asserts that civil cases could result in a claim for malicious prosecution.[20]

51 Mr Apsion is wrong. The elements required to establish a cause of action in malicious prosecution were defined in Gregory v. Portsmouth CC [2000] 1 AC 419 by Lord Steyn, with whom the rest of the House agreed at p. 426 as follows:

"*To ground a claim for malicious prosecution a plaintiff must prove (1) that the law was set in motion against him on a criminal charge; (2) that the prosecution was determined in his favour; (3) that it was without reasonable and proper cause, and (4) that it was malicious:…. Damage is a necessary ingredient of the tort*."

Lord Steyn recognised that there were certain special instances of abuse of civil legal process which had also been sufficient but these were limited. He said this at pages 427 to 428:

"*In English law the tort of malicious prosecution is not at present generally available in respect of civil proceedings. It has only been admitted in a civil context in a few special cases of abuse of legal process. Sometimes these cases are described as constituting a separate tort of abuse, but in my view … they "resemble the parent action too much to warrant separate treatment." The most important is malicious presentation of a winding up order or petition in bankruptcy: … It has long been recognised to be an actionable wrong to procure the issue of a search warrant without reasonable cause and with malice: … . An action in tort will also be available for setting in train execution against property without reasonable cause and maliciously: …. These instances may at first glance appear disparate but in a broad sense there is a common feature, namely the initial ex parte abuse of legal process with arguably immediate and perhaps*

[20] Transcript Day 2 p. 91

irreversible damage to the reputation of the victim. There is another instance of a recognised head of actionable abuse of process, namely the malicious arrest of a ship:…. Such claims are a rarity. The traditional explanation for not extending the tort to civil proceedings generally is that in a civil case there is no damage: the fair name of the defendant is protected by the trial and judgment of the court. The theory that even a wholly unwarranted allegation of fraud in a civil case can be remedied entirely at trial may have had some validity in Victorian times when there was little publicity before the trial: …. However realistic this view may have been in its own time, it is no longer plausible. In modern times wide dissemination in the media of allegations in litigation deprive this particular reason for restricting the tort to a closed category of special cases of the support of logic or good sense. It is, however, a matter for consideration whether the restriction upon the availability of the tort in respect of civil proceedings may be justified for other reasons. In English law the tort of malicious prosecution has never been held to be available beyond the limits of criminal proceedings and special instances of abuse of civil legal process. Specifically, it has never been extended to disciplinary proceedings of any kind."

52 Their Lordships in Gregory refused to extend the tort to disciplinary proceedings. In the light of the above Mr Apsion produced a hopeless basis for a plea of malicious prosecution. The advice he gave to his client was as follows: "*Such payment into Court would not prevent Mr Dilnot from suing Mr Davey for malicious prosecution that is a separate matter. I would ask the Court to hear that matter before the libel case. It is possible that if Mr Davey lost on the malicious prosecution point he might abandon the libel action.*" That advice was completely misconceived. Mr Aspion has sought in his written submissions to expand on his oral submissions by asserting that for the purposes of the tort Mr Davey did not have to be a prosecutor in any technical sense so long as he was the instigator of the prosecution and that the EHA had the power to bring a criminal prosecution.This submission continues to ignore one of the basic requirements of the tort absent as far as Mr Aspion was aware, namely a completed prosecution determined in the claimant's favour.

53 It is convenient to deal here with Mr Apsion's submission before us that the counterclaim bore fruit in that less than 2 months after the Defence had been served Mr Davey offered to settle the case. There is no evidence to support this assertion and no such inference can be drawn from the material we have seen. The appropriate response to this one line counterclaim was the one made, to apply to strike it out. In any case, as set out above, the main issue on all the charges is whether the work of Mr Apsion was sub-standard.

(e) The Draft Defence: the burden of proof in defamation proceedings

54 One of the issues that was extensively aired before the Tribunal was where the burden of proof fell in defamation proceedings. The issue arose by virtue of paragraph 5 of the Particulars of Claim in the defamation proceedings which alleged that:

"*In their natural and ordinary meaning, alternatively in their innuendo meaning, the words complained of meant and were understood to mean that the Claimant had ……."*

55 Paragraph 5 of Mr Apsion's Draft Defence said this

"*Having said what he said in his paragraph 4 it is for the claimant to address the matters which he has set out in his paragraph 5* ***and to prove that the "words complained of" were untrue****. The Defendant relies on what he has said in his paragraph 4 above.*" (emphasis added)

56 Before the Tribunal Mr Apsion appears to have disputed the incidence of the burden of proof. We agree with the BSB that in defamation proceedings once the claimant has proved publication, that the publication was of and concerning the claimant and the meaning the words are alleged to bear, the law presumes that defamatory words are false, and it is for the defendant to satisfy the court that the statement which he seeks to justify is true in substance and in fact.

57 At first, Mr Apsion submitted before us that paragraph 5 as drafted by him meant that it was for the claimant to prove only publication of the defamatory statement and the alleged meaning of the words complained of. That in our view is untenable. Indeed as his submissions developed he accepted that if one read paragraph 5 of his Draft Defence one way it was bound to follow he had got the law wrong. However for the first time in these disciplinary proceedings he went onto submit that paragraph 5 contained a typographical mistake. He said that the first sentence should read that it was for the claimant to prove that the "*words complained of*" were 'true' rather than 'untrue' and that he had simply missed the typing error. We reject this late explanation that has been repeated in the letter of 2 July 2008 written after the appeal hearing. The sentence as so amended makes no sense at all. Mr Apsion's suggestion of the altered meaning is based on the premise that the phrase "*the words complained of*" is a reference to the claimant's words in his pleaded particulars of claim and is synonomous with "the claimant's averments". The phrase "*the words complained of*", which is a term of art in defamation proceedings, is self-evidently a reference to the defendant's words complained of (in the material paragraphs of the Particulars of Claim) by the claimant as being both published by the defendant and as bearing a defamatory meaning. This paragraph can only be read as meaning that the claimant had the burden of proving that the words published were untrue. We further note that in his 18 July 2008 letter Mr Aspion has now withdrawn his claim to a typographical error and moved to a submission that in this paragraph he "*said that it was for Mr Davey to address those matters (the meanings he attributed to the words) and put him to proof that the words which [Mr] Dilnot uttered were "untrue" (in other words that they had meaning other than their true/natural meaning thus shifting the burden of proof in connection with his paragraph 5.*" We regard this latest submission as equally untenable.

(f) The Draft Defence: the derogatory allegations about Mr Davey

58 The Draft Defence at paragraphs 9, 14, 15 and 16 contained a number of derogatory comments about Mr Davey. Paragraph 9 stated "*only the most foolhardy of persons … would seek to make a mountain out of the molehill of a conversation between 2 colleagues working in the same line of business*". Paragraph 14 (4) described Mr Davey as one who: "*floats on a wave of his own self esteem*". Paragraph 15 asserted that Mr Davey " *far from suffering from anxiety and distress caused by the Claimant the Claimant has enjoyed and continues to enjoy pilloring both the Defendant and the Defendant's wife in the first instance and continues now to enjoy persecuting the Defendant over matters which not even most juveniles would occupy their time*".

59 Mr Apsion submitted before us that these were his instructions and therefore by implication appropriately included in the pleading. In this context Mr Apsion referred us to a number of authorities dealing with Article 10 of the European Convention on Human Rights. He submitted that they demonstrated that he was entitled to considerable latitude when it came to defending Mr Dilnot.

60 Article 10 in material part says this:

"1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to ... impart information and ideas without interference by public authority...*

2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*."

61 Mr Apsion referred us to the following extract from the "Short Guide to the European Convention on Human Rights" by Donna Gomien, Council of Europe Publishing 3rd edition, May 2005 at page 109:

"*With respect to criticism of public prosecutors and other governmental agents involved in judicial proceedings, the Court found a violation of Article 10 where a defence lawyer was convicted of defamation for issuing a public statement in which she used strong language in accusing the prosecutor in a case in which they represented opposite sides of improper conduct. The Court found a violation of Article 10 on the grounds that a prosecutor is entitled to less protection than a judge, noting also that the criticism at issue had been directed at the prosecution's strategy and performance in the case, and had not amounted to a personal insult. The Court further found that the threat of ex post facto review of counsel's criticisms of another party was difficult to reconcile with a defence counsel's duty to defend his or her client's interests (Nikula v. Finland (2002)). It came to the same conclusion where disciplinary action had been taken against a lawyer on account of statements made in his professional capacity during court proceedings (Steur v. The Netherlands (2003))."*

62 We were supplied with copies of the decision in Nikula v. Finland Application No 31611/96 and Steur v. The Netherlands (Application No 39657/08).

63 Counsel for the BSB submitted that Article 10 did not create an unqualified right to freedom of expression and that an individual could waive or qualify the right. Practising barristers agreed to such a limitation by accepting the Code of Conduct. Under the Code of Conduct Mr Apsion was legitimately debarred from making the sort of outrageous allegations about his client's opponent he has made in this case. He referred us to Rommelfanger v. Federal Republic of Germany Application N0 122442/86.

64 We repeat that Mr Apsion did not cross-examine Mr Dilnot or give evidence himself. The evidence before the Tribunal shows that Mr Dilnot was unhappy with the personal attack on Mr Davey and in particular was not happy with the use of the word juvenile in the Draft Defence. Moreover Mr Dilnot was entitled to expect that Mr Apsion would prepare a Draft Defence that complied with the CPR and was not an abuse of the process.

65 In our view Nikula and Steur do not help Mr Apsion. In Nikula The European Court of Human Rights said this about the applicable general principles: -

"44. *In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including in this case the content of the remarks held against the applicant and the context in which she made them. In particular, it must determine whether the interference in question was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles*

embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

45. The Court reiterates that the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar. Moreover, the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence. Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein…".

46. The Court also reiterates that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. While lawyers too are certainly entitled to comment in public on the administration of justice, their criticism must not overstep certain bounds. In that connection, account must be taken of the need to strike the right balance between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession. The national authorities have a certain margin of appreciation in assessing the necessity of an interference, but this margin is subject to European supervision as regards both the relevant rules and the decisions applying them …. However, in the field under consideration in the present case there are no particular circumstances – such as a clear lack of common ground among member States regarding the principles at issue or a need to make allowance for the diversity of moral conceptions – which would justify granting the national authorities a wide margin of appreciation …."

66 These principles were referred to in Steur. The European Court of Human Rights also said this about the approach of the Court:-

"38. The Court has also previously pointed out that the special nature of the profession practised by members of the Bar must be considered. In their capacity as officers of the court, they are subject to restrictions on their conduct, which must be discreet, honest and dignified, but they also benefit from exclusive rights and privileges that may vary from jurisdiction to jurisdiction –, among them, usually, a certain latitude regarding arguments used in court (see Nikula … and Casado Coca v. Spain, judgment of 24 February 1994, Series A no. 285-A, p. 19, § 46)."

67 Reflecting their approach the European Court in both Nikula and Steur considered the facts as a whole. These facts of both these cases including the content and the context of the statements were very different from Mr Apsion's situation.

68 In Nikula the applicant was convicted of public defamation in criminal proceedings. She was not a member of the Bar and therefore was not subject to its disciplinary proceedings. The conviction was based on criticisms she had made in the courtroom about the performance of the prosecutor in his capacity as a party to criminal proceedings in which she was defending one of the accused. Her comments did not amount to personal insult.

69 In Steur the applicant was a practising lawyer and was the subject of a successful complaint to his professional disciplinary tribunal. The complaint was based on criticism that the application had made in the courtroom and in pleading notes during civil proceedings that his client (who he was also representing in related criminal proceedings) had been pressured by a police officer during the criminal investigation into signing a confession of wrongdoing. The criticism was strictly limited to the

police officer's actions as an investigating officer as distinct from criticism focusing on his general professional or other qualities. It did not amount to a personal insult.

70 The facts of this case are very different. These proceedings are not civil or criminal proceedings for defamation but disciplinary proceedings. Mr Apsion's comments were about his client's opponent and not about a public prosecutor or civil servant. Mr Apsion's comments were no more than personal insults. They did not constitute a defence to the claim being made. Mr Apsion said that the assertion that Mr Davey had pilloried Mr Dilnot would be relevant to the claim in malicious prosecution but as we have already found that plea was not properly made.[21] These assertions in the Draft Defence were unnecessary and unwarranted. We agree with the Tribunal they were wholly improper, prejudicial to the administration of justice and likely to bring the profession into disrepute.

(g) The Opinion

71 Mr Apsion submitted that

(i) it has never been specified how the Opinion was inadequate;

(ii) neither Counsel for the BSB or the Tribunal stated which propositions of law were legally incorrect or unsustainable save for the proposition relating to "golf course conversations". Mr Apsion alleged that he maintained and still did that whilst he had made a novel proposition it was not necessarily legally incorrect or unsustainable. Without such points being taken there would be no breakthrough in the law. He suggested he might have been subject to criticism if he had not advanced it; and

(iii) to the extent that it was suggested that he should have given a rendering of the basic elements of the law of libel this was patently unnecessary, as Mr Dilnot had emphasised to him that he had not published any libel.

72 We reject these submissions. The defects in the Opinion and Mr Apsion's advice had been specified. The Scott Schedule listed over 10 particular defects. These include a number of allegations of propositions of law that were legally incorrect or unsustainable other than the "*golf course conversations*". We refer to points 12, 15, and 19. These issues were developed in submission to the Tribunal by Counsel for the BSB and responded to by Mr Apsion.[22] As to the golf course conversations in his Opinion Mr Apsion said:

"*However the only recipients of Mr Dilnot's publications were Mr Hinton he had worked with and the builder, Mr Underwood. An average member of the public would recognise that "golf course conversations", views exchanged in a pub and matters discussed at a professional or trading association were understandable. The sort of matters raised by Mr Dilnot were no more insidious than matters discussed between barristers at lunches in their Inns about solicitors, lay clients and so on. Indeed, barristers are often trenchant about judges. If all of these matters were wrapped up in libel actions, the Royal Courts of Justice would have no capacity to deal with any other aspect of justice."*

73 Mr Apsion supplied little detail either before us or before the Tribunal as to how he proposed to argue his novel point of law. Indeed his approach before the Tribunal had been to simply say, "*You do enjoy privilege when the 2 of you are working in a company. In other words*: *'This client is untrustworthy. Get his money up front' or 'do not take him because he is unreliable' That is covered by privilege."* When asked

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21 Transcript Day 2 p. 67

22 Transcript Day 2 pp. 88 - 92

for the grounds for that assertion he said "*It just is. Case law says so. I was merely extrapolating or, as one judge said to me once:'Everybody knows that'. … Even though they are not within the corporate structure they are employed by the same man on the same building job.*"[23] We accept BSB's submission that this did not amount to a defence. The allegations pleaded in the Particulars of Claim were serious defamatory allegations against a professional man, namely dishonestly fabricating a claim. Whilst it is correct that the publications were extremely limited, and arguably, to people who would or might not believe them to be true these points went to damage not liability.

74 We have already given our reasons for rejecting the submission that Mr Dilnot's case was all about publication.

(h) Ratification

75 Mr Apsion submitted that he was in someway absolved as Mr Dilnot and Coodes had ratified the Draft Defence: the former by signing the Statement of Truth and the latter by filing the document. We do not understand how this affords Mr Apsion with a defence to disciplinary charges of lack of competence and the provision of sub-standard service. Mr Dilnot as the lay client was in no position to evaluate the legal and procedural aspects of the Draft Defence or the advice he was given. He was entitled to rely on Mr Apsion. The most that could be said in relation to Coode's conduct was that it was some evidence that the pleading was not sub-standard. However in our view the mistakes in the Draft Defence were so basic that we would place no weight on any such evidence.

(i) Someone else was to blame for Mr Dilnot's misfortune

76 Mr Apsion made frequent reference to Mr Dilnot being the author of his own misfortune or to Mr Butler as having been the cause of his difficulties. He referred to Mr Dilnot's failure to accept his advice to settle, and to Mr Dilnot's rejection of the offers made by Mr Davey. He also submitted that Mr Butler had been criticised by the trial judge at the defamation proceedings. He accused Mr Dilnot of perjury in the defamation proceedings given his action ultimately failed. We find in these submissions no materiality to the validity of the disciplinary charges which Mr Apsion faced. These charges go only to the propriety and competence of Mr Apsion's professional conduct on behalf of his then client during the limited period when he was under instructions from such client.

77 Mr Apsion submitted that there was no suggestion that his Defence would have been struck out. He said that was mere speculation. He referred us to Prest v. Secretary of State for Wales [1984] FTF 28 February (CA) and Antoniades v. Villiers [1990] 1 AC 417. He submitted that these showed that subsequent evidence was a guide to what went before. It was not conclusive but the court could look at it. With the consent of the BSB's counsel he took us not to a copy of the report of this case but to a summary he wrote about Prest in "Agricultural Land Valuation in Tax Cases" published by RGA Publications of Bude. Mr Apsion wrote this:

"[Prest] provides authority for the fact that a Court, and by necessary implication a valuer, can, in ascertaining facts on a particular date (say 31 March 1982) take into account subsequent events (such as, for example, 1995 prices.) Such subsequent events are not necessarily conclusive and need not even be accorded weight; but they can be considered: …."

He did not identify any particular passages in Antoniades but we note that Lord Oliver at page 469 said this:

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[23] Transcript Day 2 pp. 68 - 69

"*But though subsequent conduct is irrelevant as an aid to construction it is certainly admissible as evidence on the question of whether the documents were or were not genuine documents giving effect to the parties' true intentions*"

Lord Jauncy made a statement to similar effect at page 475.

78 Mr Apsion drew our attention to the Tribunal's reference, when dealing with Charge 8 (excessive fees) to the "*unchallenged evidence of the replacement barrister, Mr Rupert Butler*".[24] However this reference has to be read in the context of the Tribunal's clear, and in our view correct, approach that it made no findings as to what the effect of the work had actually been, as opposed to its potential.[25]

79 In our judgment the work carried out by Mr Apsion was sub-standard and its potential for harm was obvious. A defective pleading can be the subject of pre-trial attack or can lead to the client reaching trial without the parameters of the case being identified at all or correctly. All of this can cost the client in the sense that he may have to pay more in legal fees, costs, interest and damages. Moreover any pleading raising an unparticularised defence of justification in defamation proceedings where damages are at large and assessed as at judgment is potentially admissible in aggravation of damages.

80 For completeness, in case we are wrong about the relevance to this appeal of the actual effect of Mr Apsion's work, we find that its potential to harm the client did occur to a material extent. In this context we have considered Mr Butler's statement in the light of Mr Davey's 26 August 2006 letter. We accept that Mr Butler and Mr Davey have different views about the effect of Mr Apsion's Defence on the prospects of settlement of the defamation proceedings. However harm occurred in a different way. In our view it is inconceivable that the application to strike out would have failed. The only way to avoid the order being made was taken: Mr Apsion's Defence was withdrawn and replaced at the client's costs.

(j) The attacks on Mr Dilnot

81 Mr Apsion made a number of submissions to the effect that Mr Dilnot lied in his dealings with him and questioning his motives for complaining to the BSB. We allowed Mr Apsion to show us a photocopy from his passport. He said that the date stamp "Lima 5 May 2005" coupled with the fact that he was on a 24 hour journey and his mobile phone was limited meant that the telephone conversation on 4 May 2005 that Mr Dilnot referred to in his complaint to the Tribunal cannot have taken place. Mr Apsion also made frequent reference to a letter written by Hugh James to the BMIF dated 27 March 2006. This letter rejected the BMIF's proposals but put forward terms on which the negligence action could be settled. These terms required Mr Apsion to refund the fees Mr Dilnot had paid, pay general compensation of £1,500 and take account of any possible adverse costs' awards in the defamation proceedings. If these terms were met Mr Dilnot would formally withdraw his complaint against Mr Apsion.

82 These submissions are irrelevant in the circumstances of this case. We repeat that the key issue on all the charges is whether the work Mr Apsion did for Mr Dilnot was sub-standard and these matters do not assist in addressing that question. In relation to the specific attacks referred to above: -

(i) these allegations can only be made on a proper evidential basis. That would have involved the cross-examination of Mr Dilnot and Mr Apsion giving

[24] Transcript Day 3 pp. 21 - 22.
[25] Transcript Day 3 pp. 21 - 22

evidence to the Tribunal. Mr Apsion chose that neither step be taken. These allegations are therefore unsustained; and

(ii) in any event the telephone conversation is of no significance as it occurred outside the relevant period identified in the charges. In any event Mr Dilnot's desire to resolve his disputes with Mr Apsion is quite understandable. The BSB and the Complaints Commissioner determine what the public interest needs and requires.

83 We find it regrettable that Mr Apsion chose to make these serious allegations against Mr Dilnot solely by way of submission.

(k) Mr Apsion's competence

84 As to his competence Mr Apsion's submissions as presented before us were that: -

(i) the Tribunal failed to take account of the unchallenged facts that:

(a) he had lectured on the law of defamation;

(b) he had advised about 600 Lloyds names in or about 1993-1994 many of whom were making or wished to make potentially defamatory remarks about Lloyds and many of its officials and/or members; and

(c) as an author and publisher he had to be constantly aware of developments in the realm of libel.

(ii) the BSB had alleged that he failed to attend recent CPD courses in the law of libel. As an established practitioner he was not required to attend any CPD courses until 2005 and Mr Dilnot came to see him in March 2005;

(iii) the charges should have referred to the case in question rather than any libel case. There were some libel cases he would undertake on his own and others in connection with which he would advise the engagement of a specialist practitioner;

(iv) the Tribunal had failed to take account of how well he had acquitted himself in connection with Mr Dilnot's case. He had advised settlement and his counterclaim had provoked a Part 36 offer;

(v) the Tribunal had wrongly rejected Mr Apsion's submission that the only issue in the defamation proceedings were publication;

(vi) the BSB was unable to grasp the law of malicious prosecution and to interpret the import of Gregory.

(vii) Mr Dilnot had been adamant that he had not published any defamation and the Act did not apply nor the option of an offer of amends; and

(viii) measuring success by the number of reported cases in which a barrister appears does not provide an objective assessment of the quality of his or her work. Mr Apsion submitted that a barrister should aim to minimise damage to a client and not waste court time. He referred to Lord Woolf's Access to Justice Report.

85 Mr Apsion submitted that he had seen Mr Dilnot at unsocial hours, short notice and at one stage had incurred a £500 surcharge on an aeroplane ticket. Mr Apsion did not give evidence to the effect that these circumstances had affected his experience or

competence to accept the instructions, or the standard of the work he had produced although in submission before the Tribunal he suggested that he had had insufficient time to carry out the necessary research.[26] We put no weight on such a suggestion. It has not been properly established. It is at odds with his oft stated assertion that he did not research as the case had nothing to do with defamation. We doubt that much time at all is needed to carry out the basic research needed to avoid the simple mistakes made by Mr Apsion. Moreover the point does not take Mr Apsion very far. He should, if concerned about this, have declined the instructions and at the very least warned Mr Dilnot about it. There was no evidence in the material we had seen that Mr Dilnot was so warned.

86 We have already dismissed the submissions made in (iv) – (vii). In our view the key point, and identified as such by the Tribunal, was whether or not Mr Apsion's advice and work contained basic errors of defamation law. We agree with the Tribunal that it did. The Tribunal also took account of the fact that Mr Apsion had admitted that he had dealt rarely with defamation cases and had not carried out any research to ascertain the applicable law. Nothing Mr Apsion has said before us demonstrates that the Tribunal's findings as to his competence are wrong. We agree with them.

Part 8: Conclusion on the appeal against the Tribunal's findings

87 The criminal standard of proof must be applied when adjudicating upon charges of professional misconduct. The civil standard of proof applies to charges of inadequate professional service. Having read the Tribunal's carefully reasoned judgment and considered fully the material before them and us, in our judgment the Tribunal were entitled to conclude that Mr Apsion was guilty of charges 1, 2, 4, 5, 6, 7 and 8. Having considered the material before us, we agree with their decision.

Part 9: The appeal against sentence

88 Before the Tribunal Mr Apsion was given time to consider his submissions in mitigation.[27] The Tribunal repeatedly invited him to consider being represented and advised him to take time and care in the submissions he made about mitigation. Mr Apsion was adamant that he did not wish to be represented on mitigation. He made no submissions apart from indicating his view that the appropriate sentence would be a reprimand. Mr Apsion was plainly concerned that he would be incriminating himself if he were to make mitigation submissions.

89 Mr Apsion has one previous disciplinary finding against him. In June 2003 Mr Apsion, then represented by Leading Counsel had admitted one charge of professional misconduct. The particulars of the offence were that in 2002 Mr Apsion in representing a client before the Crown Court, engaged in conduct that was discreditable to a barrister in that he demonstrated that he was unaware of the law in respect of the procedure to be followed in an appeal against conviction from a Magistrates Court to a Crown Court. For this Mr Apsion was fined £1,000 and reprimanded by the Tribunal. Mr Apsion did not appeal this sentence. The record identified 11 reasons for imposing that sentence. In summary they showed that Mr Apsion, through Leading Counsel, had accepted that he had made basic mistakes on points of law that would not have been made by someone practising criminal law regularly and that his behaviour had reached the threshold of discreditable conduct. However Mr Apsion had made his lay and professional solicitor aware of his lack of experience, had pleaded guilty and had stated his intention to refrain from accepting instructions to appear in criminal cases in the future.

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[26] Transcript Day 2 p. 62

[27] Chairman's Report of Proceedings of the Tribunal paragraph 16, Transcript Day 3 p. 24.

90 We have read the reasons given by the Tribunal for its sentence. They were these:

(i) on any view this was a serious case given the lack of competence found;

(ii) Mr Apsion's own conduct on his own behalf of this whole matter had to be disregarded. It could neither enhance or mitigate any sentence;

(iii) Mr Apsion's approach to his instructions was so unprofessional that he was not competent to practice in the field of defamation at all;

(iv) it was impossible to gauge accurately what the impact of Mr Apsion's participation in Mr Dilnot's case had been;

(v) Mr Apsion had shown no remorse indeed had sought to pass the blame on to his former client for his own failings;

(vi) Mr Apsion had not made any corresponding concession in relation to defamation cases as he had made in the previous complaint against him;

(vii) the findings in the present case in important ways resembled the findings of the earlier Tribunal; and

(viii) of particular concern was that as a public access barrister the filter of another professional between client and Barrister was unavailable. The lay client was thus especially vulnerable to any shortcomings either in service or for that matter, levels of charging fees for work done.

91 Mr Apsion addressed us at length on sentence, having made it clear that he did not accept that he was guilty of any of the present charges. He submitted that the Tribunal's sentence had been unfair and disproportionate for a number of reasons.

92 He compared the Tribunal's decision in the present case with the decision in the previous complaint where he had not been suspended from practice at all. He took issue with a number of the reasons given by the previous Tribunal for imposing the sentence. He said that he had not accepted that the points of law put forward were misconceived and wrong in law or that someone practising criminal law regularly would not have made such errors. He accepted that Leading Counsel on his behalf had conceded that his behaviour reached the threshold of discreditable conduct, but said that he was not happy that such concession had been made.

93 Mr Apsion also said that he had been through the Bar Council's Sentencing Log and on to the Bar Council's web site. No one had been dealt with as harshly as he had.

94 He further submitted that the effect of the order was to disbar him. He practised on his own. All his work since 2004, when he had qualified as a direct access lawyer, had come through direct access. He had lost £200,000 as a result of his immediate suspension.

95 He also told us that he had reviewed his procedures so that a client could not come to his office at all times, call him at all times or ring and speak to his secretary when he knew he was abroad. Mrs O'Brien, who also addressed us, told us she had instigated changes to Mr Apsion's documentation procedures. She had told Mr Apsion his files needed to be better organised, and that he needed to treat each of his documents as if it were a £50 note. She had considered watermarking and other security steps. She expanded on these measures in her submissions of 16 September 2008.

96 Mr Apsion also said that he did not intend to do another libel or libel related matter again. Whilst he might have been able to help in minor matters he was quite happy to

deny the general public his services on libel. However he regarded tax cases quite differently.

97 Specifically as to the order to repay his fees he repeated his submission that Mr Dilnot was motivated by a desire to extract money from the BMIF.

98 Finally he submitted that he should not have to pay the BSB's costs given their failure to take up the offer by Mr Davey of further assistance. Although he initially indicated that he thought time served was an appropriate sentence, his final position was that he should be reprimanded in relation to the typographical error in the draft Defence.

99 In our judgment we do not think that in the light of the material before them the Tribunal can be criticised for reaching the decisions they did. We have considered the further submissions and information available to us and in our view they do not change the matter. We adopt their reasons save for (vi) and would add this:

(i) there were important differences between the previous matter and this one. The previous complaint did not arise out of public access work. At that stage Mr Apsion was not able to take such work. In the previous complaint Mr Apsion had realised that he lacked relevant experience and had made both the lay client and his instructing solicitors aware of this. In the present complaint Mr Apsion had shown no such self-awareness. He never informed Mr Dilnot of any limitations to his ability to deal adequately with his instructions. We can place no weight on the complaints Mr Apsion now makes about the reasoning of the previous Tribunal or the conduct of his Leading Counsel in the previous matter. The appropriate way to raise such complaints was to appeal the sentence. No such appeal was made;

(ii) we have considered the Bar Council's Sentencing Log, and the Bar Standard Board's Sentencing Log on the web site. The information available about any particular sentence is limited. These sources show that serious charges receive more severe sentences such as suspension. Mr Apsion was convicted of serious charges. It is not disproportionate to pass the sentence imposed in this case in the context of a professional convicted of 3 findings of professional misconduct based on his incompetence.

(iii) Mr Apsion has not been disbarred. When his suspension ends he may continue to practice as a barrister other than by direct access. In any event we have to balance his interests with the public interest in protecting clients who use the direct access scheme;

(iv) we note the steps taken to improve his administrative procedures. However these do not address the key complaint made against Mr Apsion: his competence in advising clients;

(v) we also note Mr Apsion's intention not to accept instructions in libel and libel related matters. However this concession, at this late stage, does not have the same significance this time. It is not linked as it was in the previous matter with an awareness and acceptance of the mistakes committed. Moreover in the space of 3 years Mr Apsion has provided substandard professional services to 2 clients, conduct that was discreditable to a barrister;

(vi) Mr Dilnot's alleged motive is irrelevant. The work that was done was seriously sub-standard; and

(vii) for the reasons we have already given the BSB had no obligation to seek further assistance from Mr Davey.

Part 10: Conclusion

100 Charges 1, 2, 4, 5, 6, 7, and 8 have been made out to the requisite standard of proof to our satisfaction. We dismiss Mr Apsion's appeal against the Tribunal's findings and sentence. As indicated at the close of the hearings we will, on the handing down of this judgment, invite further submissions on costs before making any costs order.