



Neutral Citation Number: [2023] EWHC 1198 (Admin)

Case No: CO/2314/2022

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**DIVISIONAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 24 May 2023

**Before :**

**LADY JUSTICE NICOLA DAVIES**  
**MRS JUSTICE FARBEY**

-----  
**Between :**

**TIMOTHY RAGGATT**  
**- and -**  
**BAR STANDARDS BOARD**

**Appellant**

**Respondent**

-----  
**Graeme McPherson KC** (instructed by **Clyde & Co**) for the **Appellant**  
**Oliver Campbell KC** (instructed by the **Bar Standards Board**) for the **Respondent**

Hearing dates: 1 and 2 March 2023  
-----

**Approved Judgment**

This judgment was handed down remotely at 10.00am on 24 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

**Lady Justice Nicola Davies and Mrs Justice Farbey:**

1. This is the judgment of the court. It is an appeal from decisions of the Bar Tribunal and Adjudication Service Disciplinary Tribunal (“the Tribunal”) following the Bar Standards Board (“the BSB”) prosecution of the appellant on five charges alleging professional misconduct during the criminal prosecution of Conrad Jones in 2006 and 2007 (“the Jones proceedings”). The appellant was instructed by the Crown Prosecution Service (“CPS”) as leading counsel in connection with the Jones proceedings. The focus of the BSB’s prosecution was upon two matters namely:
  - (a) The role which the appellant had played in late 2006/2007 in the non-disclosure by the CPS to the defence of certain material (referred to during the disciplinary proceedings as “the surveillance material”) during the course of the Jones proceedings. This was the alleged conduct which provided the basis for charges 1, 2 and 3.
  - (b) An observation made by the appellant during the third trial of Conrad Jones to the trial judge in the absence of the jury on 31 July 2007, this provided the basis for charges 4 and 5.
2. The burden was upon the BSB to prove the charges to the criminal standard. The Tribunal found charges 2 and 5 proven and imposed suspensions upon the appellant’s ability to practise of 12 months and 3 months respectively to run concurrently.
3. The appellant appeals the findings that he breached para 301(a)(ii) of the Code of Conduct of the Bar of England and Wales in the respects alleged in charge 2 and charge 5 and appeals the sanctions imposed by the Tribunal. The court was provided with substantial bundles of evidence which included sensitive and confidential material which we, like the Tribunal, considered in camera.

**The factual background**

*The murder prosecution*

4. On 4 April 2005 Clinton Bailey was shot outside the Three Horseshoes public house in Coventry. He later died of his wounds. Mr Bailey’s murder was investigated by the West Midlands police (“WMP”). Five men, Liam Dooley, Craig Dooley, Luke Turner, James Dunn and Gary Higgins were charged with Mr Bailey’s murder. The trial of the five men took place before Underhill J (as he then was) in June and July 2006. The appellant was instructed by the CPS as leading counsel for that trial, no criticisms are made of his conduct in connection with that prosecution.
5. At the murder trial, Maria Vervoort (“MV”) was an important witness. As at the time of the murder she was the partner of Gary Higgins and had been in the public house at the time of the murder.
6. All five defendants were convicted. The convictions of Higgins and Dunn were subsequently quashed by the Court of Appeal in 2016 ([2016] EWCA Crim 1392).

*“The Jones proceedings”*

7. Each of the five defendants charged with Clinton Bailey's murder was an associate of Conrad Jones. On 12 June 2006 MV complained to the police that multiple attempts had been made, by means of threat and bribes, to dissuade her from giving evidence at the murder trial. MV alleged that Conrad Jones was responsible for all such attempts.
8. A specific allegation made by MV was that Conrad Jones had met with her at Nottingham railway station on 1 or 2 June 2006 and threatened and bribed her not to give evidence in the murder trial. MV alleged that Conrad Jones had offered her £15,000 not to give evidence and threatened to harm her family and herself if any of the five men were convicted.
9. MV was interviewed by WMP on 12 June, 25 July and 10 August 2006. In summary she recalled that: (a) she had travelled to the Nottingham station meeting by train from Burton-on-Trent; (b) the meeting had taken place during the afternoon of Thursday 1 or Friday 2 June 2006; (c) the meeting had lasted about 10 minutes, she had been in Nottingham for 1-1½ hours; (d) MV returned to Burton-on-Trent by train at about 3 or 4pm.
10. MV signed witness statements on 12 June and 10 August 2006.
11. Conrad Jones was subsequently charged with "doing an Act or Acts Tending and Intended to Pervert the Course of Public Justice". The period covered in the indictment was between 4 April 2005 and 16 June 2006. The alleged conduct of Conrad Jones at the Nottingham station meeting was one of the acts relied upon by the Crown.
12. In a defence case statement served in advance of his trial, Conrad Jones denied making direct or indirect approaches to MV, denied telephone contact with her and expressly denied meeting with MV on 1 or 2 June 2006 at or near Nottingham railway station. In his first defence statement he indicated an intention to put forward and call witnesses to support his alibi. Conrad Jones asserted that on 1 June 2006 he remained in Coventry all day. He also provided a detailed account of his movements and associations in the Coventry area on 2 June 2006. On 21 November 2006 Conrad Jones served a supplemental defence statement which provided details of his alibi witnesses and alleged movements on 1 June 2006.
13. From the service of the defence case statement, it was clear that the defence case was there was no meeting between MV and Conrad Jones on 1 or 2 June. Further, disclosure of MV's telephone records/cell site material was to provide an evidential basis for cross examination of MV by defence counsel, exploring the inconsistencies of her phone's movements with her evidence that she had been in Nottingham on 1 or 2 June.
14. In the opening note for the trial drafted by the appellant it was stated that:

“ .... there came a time – precise date and time which may well not matter – when CJ met MV personally at Nottingham railway station. RN [MV's sister] had set the meeting up on his behalf but what matters is that it took place and what was said between them not exactly when which of course MV did not note or keep records about .... When they met CJ told MV that he would pay her £15K not to go to court and to disappear....”

*The surveillance material*

15. In 2006 Conrad Jones was the subject of police surveillance which included 1 and 2 June 2006. The effect of the surveillance material on 1 June 2006 precluded the presence of Conrad Jones in Nottingham on that day.
16. On 2 June 2006 the surveillance material records that at 14:23 a BMW driven by Conrad Jones pulls up outside his house. He walks into the house for one minute and then drives away in the BMW. The next entry is at 18:01. Conrad Jones arrives driving the BMW, he goes into the house for two minutes before driving away in the BMW.

*Pre-trial preparation*

17. The autumn of 2006 represented the final period of preparation for the trial which appears to have been due to commence in early December 2006. On 21 September 2006 DS Neil Ashton sent an email to Angela Trotter in the CPS identifying his concerns as to the meeting alleged by MV to have taken place at Nottingham railway station. The email records that MV alleged that the meeting took place on either 1 or 2 June 2006. DS Ashton stated that this is “problematic” for reasons which he identified as follows:

“...In interview, Rachel Nally [MV’s sister] states she travelled back from Skegness on Thursday 1<sup>st</sup> June and can remember meeting people in a Coventry club that night. Her cell site has yet to be received so her movements cannot be corroborated at this time other than by John POWER.

However the movements of JONES on the two days in question are known and he could not have met with Maria on Thurs 1<sup>st</sup> June. There is a window on Friday 2<sup>nd</sup> between 1424hrs and 1801hrs when he could have travelled to Nottingham, but he could not have left Coventry until 1424hrs and Maria says the meeting had taken place and she had travelled back to Burton by 3-4pm, having been in Nottingham for an hour to an hour and a half.

Most crucially, at no time during those two days does Maria Vervoort’s phone cell-site in Nottingham, During the available window on the Friday she continues to cell-site in Derby/Burton area.

During the build up to the first meeting 29/05.06, there is phone traffic between Rachel and Vervoort and similar traffic before the two meet on Sat 3<sup>rd</sup> June. There is no contact at all for Friday 2<sup>nd</sup> June, unusual if they were meeting.

Conrad Jones has vehemently maintained he has not been to Nottingham and has demanded CCTV be scrutinised to verify his claim. Unfortunately due to Vervoort’s initial confusion over dates the CCTV for the wrong dates was seized.

There are some other factors of her evidence about the second meeting which I will not bother with here but which would be of interest if picked up by the defence.

In conclusion, there is nothing to corroborate the second meeting and plenty to cast doubt on it. Vervoort could be mistaken about the date and/or place, but despite having been asked about it again she maintains the allegation. She may have met Conrad during the first meeting but if that is so why doesn't she say that? It is difficult to question her about it again without appearing to be disbelieving of her.

I would like my concerns to be passed to Counsel so that they are fully aware of the strength or otherwise of the case."

18. On 17 October 2006 the CPS prepared instructions to the appellant for a conference which was held on 30 October 2006. The instructions refer the appellant to the "bundles of sensitive unused material enclosed above and is requested to consider the content of the E-Mail from DS Neil Ashton dated 21<sup>st</sup> September 2006 and to provide those instructing with a written advice setting out how Counsel wishes to disclose to the defence the substance of the E-Mail and the supporting material listed as Items 2, 3 & 4 on the retained bundle of unused material. Could Counsel please provide written advice by 30<sup>th</sup> October 2006."
19. A note of the 30 October conference was made, its authorship, as with notes of all the relevant conferences, is unknown. The appellant attended the conference. All relevant conference notes, parts of which are redacted, are included in the confidential schedule annexed to this judgment which is available only to the parties and their representatives in these proceedings.
20. It is clear from the 30 October 2006 conference note that there was discussion of the surveillance material in respect of 1 and 2 June 2006. The appellant is recorded as requesting provision of the material for 1 and 2 June, a PII application is contemplated. The issue of MV's evidence for those days is discussed as is the phone cell siting evidence placing MV in Burton on 1 and 2 June. A decision was made to disclose MV's phone records for 29 May, 1 and 2 June 2006 together with cell site evidence.
21. On 30 November 2006 a conference took place which lasted two and a half hours. The appellant is listed as being present as are DS Ashton and others. The surveillance material for 1 and 2 June is discussed, questions are raised as to the accuracy of the video record, the issue of the disclosability of the material is raised.
22. On 11 December 2006 a third conference took place, present at which were the appellant, DCI Atherley, DS Ashton and others. The appellant is recorded as having been given a "revised log". There is reference to the surveillance material for the afternoon of 2 June. A PII application is contemplated on 18 or 19 December.
23. A fourth conference was held on 14 December 2006. The appellant was present as were DCI Atherley, DS Ashton and others. It is clear that the surveillance material for the afternoon of 2 June 2006 was discussed. The appellant's position regarding a PII application and/or disclosure of information contained in the surveillance material is

noted as being that it would be reviewed after the evidence of MV. The note records: “No need for PII at this time. Review after evidence in chief....”.

24. In 2007 three trials in these criminal proceedings were commenced. The first trial began on 3 January 2007 and ended when Conrad Jones dismissed his legal team during the course of the evidence of MV. At the second trial (February/March 2007), the jury was unable to reach a verdict. The third trial commenced in July 2007. At its conclusion in August 2007, Conrad Jones was convicted. He was sentenced to 12 years imprisonment and was released on licence in June 2012.

*Subsequent events*

25. In 2013 Conrad Jones and his solicitor faced a separate trial on a charge for perverting the course of justice, of which each was acquitted.
26. During the course of those proceedings, the prosecution made a PII application in respect of the 2006 surveillance material to HHJ Inman QC who directed the prosecution to make an admission in the following terms:

“As far as the meeting at Nottingham railway is concerned, the Crown accepts that Conrad Jones did not go to Nottingham on 1 June 2006. On 2 June 2006, Conrad Jones is known to have been in Coventry until 14:25 when he was driving a blue BMW. He is known to have been in Coventry at 18:00 when he was driving a blue BMW. His whereabouts between those times is not known.”

27. It was this disclosure which led to an appeal by Conrad Jones in respect of the 2007 conviction. Instructed by the CPS, on 18 September 2013, the appellant settled a skeleton argument in response to the renewed application by Conrad Jones for leave to appeal. At para 12 it stated:

“...the fact that Conrad Jones was under surveillance at the time of his original trial was known to the Prosecution team but, in the light of this evidence and her fluidity in terms of timing, it was a considered view of all concerned that this material did not ultimately assist the defence or undermine the prosecution case so as to allow for its disclosure. That is a decision that was entirely appropriately taken in the circumstances and given the fact that he was under surveillance in circumstances which were clearly not disclosable in any event, the overall picture was such that a public interest immunity hearing was neither necessary nor justified by the material available which was, it is submitted obviously, not sufficiently powerful to warrant its disclosure”.

28. At the appeal Pitchford LJ gave the judgment ([2014] EWCA Crim 1337). In respect of the surveillance material Pitchford LJ at para 32 stated:

“We were informed that Mr Raggatt was aware of the surveillance material in late 2006 as a result of a consultation with junior counsel and the disclosure officer. He cannot now

recall the extent of the detail known to him. He took the view that since the witness was imprecise in her recollection of the date and time of the meeting between herself, Rachel Nally and the appellant the surveillance material was not relevant. We disagree profoundly. Following the trial for murder, in which Mr Raggatt QC and Miss Hancox were counsel for the prosecution, on 25 July 2006 Maria Vervoort took part in a recorded significant witness interview from which it is clear the purpose was to explore with her, among other things, the dates and times of her meetings with Rachel Nally (see paragraph 16 above). On 10 August 2006 she signed a witness statement based upon her answers in interview. If there had been any earlier doubt, there was none by 25 July 2006 that the meeting to which Ms Vervoort referred must have occurred, if it took place at all, on Thursday 1 June or Friday 2 June 2006. We fail to understand how the prosecution could have distributed a Note of Opening for the 2007 trial in which it was suggested that the precise date and time of the second meeting with Rachel "may well not matter". It was said:

"Rachel Nally had set the meeting up on his [Conrad Jones'] behalf but what matters is that it took place and what was said between them, not exactly when, which of course Maria Vervoort did not note or keep records about."

33. The prosecution was in possession of sensitive material the effect of which was altogether to exclude 1 June 2006 as the date of the second meeting and to cast considerable doubt upon 2 June 2006 as the alternative if, as Maria Vervoort maintained, she met Rachel and Conrad Jones early that afternoon. Furthermore, the prosecution knew that the defendant was putting forward an alibi for both days supported by other witnesses. Doing the best we can to avoid the temptation of hindsight we can only regard the failure to make the disclosure in early 2007 that was subsequently made in June 2013 as a lamentable failure of the prosecutor's obligations (see *R v H and Others* [2004] UKHL 3, [2004] 2 AC 134 at paragraphs 14, 18 and 36). Had it not been for the appellant's arrest on 16 November 2012 and his subsequent prosecution these matters may never have come to light. In the course of his judgment on behalf of the court in *Dunn*, Goldring LJ observed that the Court must assume that the prosecution had performed its duty to make appropriate disclosure of relevant material. That, of course, is the case unless the court has reason to doubt the proper performance of the prosecutor's obligations. Unhappily it was an assumption that proved to be inaccurate."

29. At para 35 Pitchford LJ recorded that the only occasion when MV claimed to have been threatened face to face by the appellant was at a meeting on 1 or 2 June 2006. He stated:

“... We do not accept that this was a peripheral issue in the context of the case against the appellant. On the contrary, it was central both to the witness’s credibility on the issue of intimidation by the appellant and to the particulars of activity by the appellant on which the prosecution relied against him....”

30. The court found that the CPS ought to have disclosed, but had not disclosed, the surveillance material in the Jones proceedings which material was relevant to the credibility of MV’s account of the Nottingham station meeting and also to an assessment of her credibility in general. The guilty verdict of Conrad Jones was deemed to be unsafe and the conviction of Conrad Jones was quashed.
31. Conrad Jones subsequently sued the CPS for damages in relation to his conviction. The focus of his claim was the non-disclosure of the surveillance material during the Jones proceedings. The CPS settled that claim by paying substantial damages to Conrad Jones. Neither Conrad Jones nor the CPS sought to bring a civil claim against the appellant.
32. On 16 January 2015 Conrad Jones made a complaint to the BSB as to: (a) the appellant’s role in the non-disclosure of the surveillance material during the Jones proceedings; and (b) an observation made by the appellant to the judge in the third trial on 31 July 2017. It was that complaint which resulted in the five charges.
33. The appellant now accepts, as he did before the Tribunal, that the surveillance material was disclosable in the Jones proceedings. It was material which “might reasonably be considered capable of undermining the case for prosecution against [Jones] or of assisting the case for [Jones]”. The appellant’s acceptance of this point means that: (i) the surveillance material ought to have been disclosed by the CPS in the Jones proceedings; or (ii) the PII application ought to have been made by the CPS in the Jones proceedings in connection with the surveillance material; or (iii) the CPS ought to have made admissions as to the known whereabouts of Jones on 1 June 2006 and on 2 June 2006. The appellant also accepts that as none of the above occurred during the Jones proceedings, there was a failure on the part of the prosecution in those proceedings.

### **The Tribunal proceedings**

34. At a hearing on 30 July 2020 the appellant applied to a “Directions Judge”, HHJ Jonathan Carroll, to strike out, or alternatively to stay, the proceedings brought against him by the BSB. He advanced four grounds in support of his application which may be summarised as follows:
  - (1) He was disabled from advancing a full response to the allegations against him by reason of legal professional privilege owed to the CPS and the police;
  - (2) He was disabled from advancing a full response to the allegations against him by reference to information which attracts public interest immunity;
  - (3) The inadequacy of the BSB investigation and disclosure; and
  - (4) Delay.
35. In a written ruling dated 17 August 2020, HHJ Carroll dismissed the application.



36. The substantive hearing before the Tribunal took place over sixteen days between 23 July 2021 and 2 June 2022. Key issues to be considered were what the appellant knew of the contents of the surveillance material and whether he made any decision and/or had given any advice in relation to disclosure of the material.
37. The Tribunal was listed to be a five-person panel due to the serious nature of the charges. On 2 July 2021 one barrister member withdrew from the panel due to professional commitments. On 18 February 2022, having heard the respondent's case against the appellant, a lay member of the panel withdrew due to illness. The remainder of the proceedings was heard and determined by the three panel members.
38. Charges 1, 2 and 3 related to the non-disclosure of the surveillance material. Charges 4 and 5 concerned the appellant's statement in court on 31 July 2007. Charges 1 to 3 were alternative charges brought pursuant to different subsections of para 301 of the Code of Conduct. Charge 2 which was found proved stated:

**“Charge 2**

**Statement of Offence**

Professional misconduct contrary to paragraph 301(a)(ii) and pursuant to paragraph 901.7 of the Code of Conduct of the Bar of England and Wales (8th edition) (“the Code of Conduct”).

**Particulars of Offence**

**Timothy Raggatt QC**, a barrister, engaged in conduct which was prejudicial to the administration of justice in that Mr Raggatt, when instructed as leading prosecution counsel in the prosecution of Mr Conrad Jones:

- i. decided (together with others in the prosecution team); and/or
  - ii. advised the Crown Prosecution Service,
- both prior to and during Mr Jones' trial in August 2007
- not to make:
- a. a PII (Public Interest Immunity) application in relation to surveillance material relating to events and Mr Jones' location on 1 and 2 June 2006; and/or
  - b. an admission in relation to that surveillance material to the effect of that eventually made by the prosecution on 27 June 2013.”

39. Charge 1 alleged that the appellant engaged in conduct “which was disreputable to a barrister” contrary to para 301(a)(i). Charge 3 alleged that the appellant engaged in conduct “which was likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute....”

contrary to para 301(a)(iii). Save for these identified differences the Statement and the Particulars of Offence were identical in charges 1, 2 and 3.

40. Charge 5 which was found proved stated:

**“Charge 5**

**Statement of Offence**

Professional misconduct contrary to paragraph 302 and pursuant to paragraph 901.7 of the Code of Conduct of the Bar of England and Wales (8th edition) (“the Code of Conduct”).

**Particulars of Offence**

**Timothy Raggatt QC**, a barrister, failed to assist the Court in the administration of justice in that Mr Raggatt (on behalf of the prosecution):

i. stated to the Court at the trial of Mr Conrad Jones in August 2007 that a meeting could have taken place in Nottingham between Mr Jones and Ms Maria Vervoot on 2 June 2006 between 1.30pm and 3pm; and/or

ii. refused to concede that such a meeting could not have taken place at that time.

In fact, Mr Raggatt knew, or ought to have known, the prosecution had in its possession surveillance material which showed Mr Jones was in Coventry on 2 June 2006 until 2.25pm and therefore, given it is approximately 53 miles between Nottingham and Coventry, the meeting could not have taken place in Nottingham on 2 June 2006 between 1.30pm and 3pm.”

41. Charge 4 was in identical terms save that the allegation contained in the Particulars of Offence stated that the appellant “recklessly misled the Court ...”.

*Evidence*

42. The BSB did not call witnesses to give oral evidence, witness statements were obtained and were treated as hearsay evidence. The BSB relied solely on documents to prove its case. The documents included surveillance material, DS Ashton’s email dated 21 September 2006 and the 2006 conference notes at which the appellant was present. Reference to the content of these documents was contained in open and in redacted passages in the open judgment of the Tribunal. The appellant gave evidence and was cross examined. He submitted many character references which were of a high order. Witness statements considered by the Tribunal included the following:

*Detective Sergeant Ashton*

43. In a witness statement dated 9 February 2021, DS Ashton referred to the conferences on 30 November, 11 and 14 December 2006 and stated:

“... the concerns I had raised appear to have been considered in some depth over those three conferences. ... Having refreshed my memory from these partial notes, [of the conferences] I recall Mr Raggatt advising that the material did not need to be disclosed, or a PII application made, at that stage because at that time the prosecution case did not rest on the meeting having taken place at a particular time, and there was time for Jones to have got to Nottingham and back between the surveillance sightings. He advised that the position should be reviewed if MV gave a particular time for the meeting in her evidence at trial.... I see that the concerns I raised [in the email of 21 September 2006] were considered in conference after my email was sent. Although Mr Raggatt took a different view to me over whether the surveillance material might undermine the prosecution or assist the defence, clearly the issue was addressed and I do not recall Angela Trotter or any of the other lawyers present disagreeing with Mr Raggatt’s advice that the issue should be kept under review.”

*Detective Chief Inspector Adrian Atherley*

44. In 2006 DCI Atherley was a senior investigating officer in the murder trial and in the Jones proceedings. In a witness statement dated 12 February 2021, DCI Atherley recalled attending several conferences with the appellant and his junior barrister. He could not recall precisely what was discussed at each conference but he did recall that the issues of the surveillance material and the telephone material were discussed at a “sensitive conference”, the date of which he could not recall.
45. Having reviewed notes made at the conference and his own handwritten notes in his day book for 11 December 2006 DCI Atherley stated:

“19. Having read all of these entries I recall that we discussed the surveillance material. I was concerned because some of this material supported the prosecution case and cast doubt on alibis that had been put forward by the defendants, I can't recall if this was specific to Jones or the other Mallard suspects. We also discussed the timings of Jones movements (as shown by the surveillance material) against Vervoot's account and whether the surveillance material could undermine or assist. Mr. Raggatt's view was that the way the indictment and prosecution case was to be put, Conrad Jones has been leading events aimed at disrupting the investigation and prosecution of murder; this has not required him to be at any specific location to prove the offence, but the situation would be kept under review.

20. I think that it was during this conference that we also discussed the question of whether to make a PII application with regards to the surveillance material; however as the view was that the surveillance material was not being relied upon by the prosecution as evidence and did not undermine the prosecution

or assist the defence then a PII application was not necessary at that time, but the situation should be kept under review.

21. I can also state that my recollection is that all present including John Davies and Angela Trotter from CPS and Sally Hancox were satisfied with the advice that was being provided by Mr Raggatt and to my knowledge they did not raise any objections or concerns. John Davies as the lead CPS lawyer is a very experienced and capable lawyer in my view, fair and thoughtful, based on my previous dealings with him on various serious cases. Like me he is not someone who would sit in awe of a QC and not raise concerns if he disagreed with the advice being given. He was very much a leader in the prosecution team and if he had had any reservations about the advice I have absolutely no doubt that he would have voiced them, as would I.”

*The Prosecutor’s duty to disclose*

46. The Tribunal set out the duty to disclose as follows:

“Duty to disclose

The Prosecutor’s initial duty to disclose is set out in the Criminal Procedure and Investigations Act 1996, section 3.

The prosecutor must - disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.

For the purposes of this section prosecution material is material - which is in the prosecutor's possession and came into his possession in connection with the case for the prosecution against the accused. Material must not be disclosed under this section to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly.

The Prosecutor’s Continuing Duty to Disclose is set out in the Criminal Procedure and Investigations Act 1996, section 7A. It provides as follows:

After the prosecutor has complied with section 3 or purported to comply with it, and before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case concerned. The prosecutor must keep under review the question whether at any given time (and, in particular, following the giving of a defence statement) there is prosecution material which - might reasonably be

considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, which has not been disclosed to the accused. If at any time, there is any such material the prosecutor must disclose it to the accused as soon as is reasonably practicable.

For the purposes of this section prosecution material is material - which is in the prosecutor's possession and came into his possession in connection with the case for the prosecution against the accused. Material must not be disclosed under this section to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly.”

*The Tribunal's reasoning and findings*

47. In respect of DS Ashton's witness statement dated 9 February 2021 the Tribunal stated:

“With the benefit of hindsight no one can doubt that DS Ashton was absolutely right to raise the matter in the way he did. It also seems very clear that if the surveillance material did preclude the meeting having taken place on the 1 June 2006 and provided only a very narrow window on the 2 June, that material should have been disclosed because it both undermined the prosecution case and assisted the defence case. Having regard to the sensitive nature of the surveillance material, Mr Raggatt should have advised the prosecution to proceed with a PII application and it seems likely that if he had done so at that application the Judge might well have ordered an admission to be made in relation to the surveillance material to the effect of that eventually made by the prosecution on the 27 June 2013.

We bear in mind of course the witness statements of DS Ashton are hearsay evidence. However, these statements are accompanied by a contemporaneous email which is, without doubt, highly significant.”

48. As to the note of conference on 14 December 2006, the Tribunal in a redacted passage, referred to its content and in a non-redacted passage stated:

“Mr Raggatt QC has clearly made a decision not to make the PII application at this time. His duty was to either disclose the material or to make a PII application as soon as reasonably practicable. There was of course a possibility of a review in the future of the surveillance material but that does not preclude a decision as to how to proceed at that time. We are satisfied so that we are sure that this issue was not simply forgotten thereafter – during those lengthy proceedings – and then in the Court of Appeal. Mr Raggatt QC did not advise that the surveillance material should be disclosed, nor did he make a PII

application. That non-disclosure may never have come to light but for the developments that took place after Conrad Jones' release from custody."

49. The Tribunal considered the fact that since 2006 the appellant had justified non-disclosure of the surveillance material and not making a PII application in a number of different ways. It considered his witness statements, the first of which stated:

"...I was and am still always mindful of my duty to the defence and to the Court. I believe the partial notes which have been produced show that I gave very careful consideration to this issue over a number of conferences, and that the issue was more complex than summarised in the email of 21 September 2006 from DS Neil Ashton upon the which the BSB relies and indeed those matters develop significantly from that date, with some material disclosed and other material obtained or clarified by the police and considered further. Clearly the picture developed, not only because it was discussed with other police officers in conference but because the surveillance material was reviewed and revised by the police as part of its presentation to me, with the police expressing their view in conference.

It seems clear from these partial notes that I must have considered that the issue of a possible PII application in respect of this material should be kept under review, in the light of any evidence that MV might ultimately give at Jones's trial. I have no recollection of how or the extent to which that position was kept under review and I have no recollection of any PII application or hearing(s) which followed. My solicitors have actively sought evidence and disclosure on this topic, and I do not understand why the BSB has not.

Although the picture is incomplete and my memory far from clear, I think the material shown to me at that time did not appear, in my professional judgment, materially to undermine the prosecution case to the degree necessary to render it disclosable in all the circumstances.

MV's witness statements were not precise as to all potentially relevant times and dates. The police had tried to get her to be specific, naturally and perhaps because they wanted to look for CCTV evidence of the alleged meeting, but she appeared to be unable to ascribe a definite time or date.

...

The covert material appeared to allow time in the afternoon of 2 June 2006 for Jones to have got from his home in Coventry to Nottingham and back (in whomsoever's car), between 2.24pm and 6.01pm – 3½ hours). I believe this is reflected in the notes of what police said at the two December 2006 conferences:

*“There is still a gap on the Friday afternoon”, “Don’t think it undermines our case” and “could be anywhere”....”*

I reflected those recollections of my instructions and discussions of late 2006 when I said in paragraph 12 of my skeleton [to the Court of Appeal para 29 above]....”

50. The Tribunal considered the evidence of the appellant. The relevant reasoning and findings are as follows:

**“Respondent’s Evidence**

We have carefully considered the response of the Respondent to each of the points. He accepted that he was familiar with the obligations to disclose, and that counsel has to ensure that the prosecution comply with that duty.

The Respondent accepted that disclosure or the PII application must be made as soon as reasonably practicable.

The Respondent accepted now that the surveillance material was almost certainly disclosable. He accepted that, looking back, the material should have been disclosed.

The passage in the CA judgment was put to him, namely:

“He (Mr Raggatt QC) took the view that since the witness was imprecise in her recollection of the date and time of the meeting between herself, Rachel Nally and the appellant [Conrad Jones] the surveillance material was not relevant”.

He explained in evidence that he said this in the Court of Appeal on the basis of documents that were incomplete and without having the assistance from Miss Hancox. In our view this does not explain why he sought to justify non-disclosure to the Court of Appeal in this way. There was no justification for the non-disclosure. The allegation clearly placed the prosecution under a duty to disclose or make a PII application.

The Respondent agreed in evidence that the trials proceeded without an admission that Conrad Jones was in Coventry on 1 June all day and on 2 June until 2.24pm. In our view the result was that the trial was unfair.

The Respondent did not dispute in evidence that the history of the case pointed to the conclusion that disclosure of the surveillance material was never made.

In our view the non-disclosure in these circumstances was a serious failure to comply with the disclosure obligations. It was

unjust in these circumstances, and it led to a miscarriage of justice.

We are also of the view that it remained the duty of the prosecution to deal with disclosure as soon as reasonably practicable. There was nothing in the circumstances which displaced that obligation. The sensitivity of the surveillance material clearly called for a PII application, but it could not justify any delay which would affect the fairness of the trial.

In his skeleton argument for the Court of Appeal, the Respondent had made clear both the decision which was made and the reason for it. He had stated as follows:

“... the fact that Conrad Jones was under surveillance at the time of his original trial was known to the Prosecution team but, in the light of MVs evidence and her fluidity in terms of timings, it was the considered view of all concerned that this material did not ultimately assist the defence or undermine the prosecution case so as to allow for its disclosure. That is a decision that was entirely appropriately taken in the circumstances and given the fact that he was under surveillance in circumstances which were clearly not disclosable in any event, the overall picture was such that a public interest immunity hearing was neither necessary nor justified by the material available which was, it is submitted obviously, not sufficiently powerful to warrant its disclosure”.

In the context of these proceedings this passage is highly significant. In it Mr Raggatt QC states the view that was taken, the decision which was made and gives his justification for it. This undermines the submission made before us that no decision was ever made. In our view the approach of the prosecution team was wholly wrong. We strongly disagree with it and with the decision which was then made.

In the course of his evidence, Mr Raggatt QC made it clear that he had no recollection of some of the material due to the fact that the events took place very long ago. For example, he had no recollection of the email from DS Ashton.

We are satisfied on the evidence before us that he had knowledge of DS Ashton's email at the time and gave advice on the issues it raised. That is because DS Ashton said in his email that he wished for his concerns to be brought to the attention of Counsel. This was then followed by instructions to Mr Raggatt QC to provide written advice “setting out how Counsel wishes to disclose to the defence the substance of the E-Mail...”.



Similarly, Mr Raggatt QC had no recollection of the advice attributed to him by DCI Atherley. We accept the evidence of DCI Atherley, who wrote his note soon after the advice was given.

When asked what the difference was between the phone evidence and the surveillance evidence, Mr Raggatt QC said it was the sensitivity and security of it which made it a different species of disclosure – that made the process more complex. That was relevant to the context and the management, though not the principle.

In our view, the sensitivity and security of the surveillance material may well have necessitated a PII application, but they should not have affected the obligations of disclosure or the way in which they were complied with.....

In his evidence Mr Raggatt QC went on to explain the non-disclosure at that time as follows:

“I don’t think I ever got to a final position. The decision was ‘for the time being’ because of various competing factors. The most important was the timing of that disclosure because of the sensitive circumstances in which the disclosure had to be managed. The circumstances were sensitive because of the ongoing operation which was highly sensitive. The decision to postpone a decision may have been influenced by the ongoing operation.

I was given the impression that lives could be endangered if a wrong step was taken which affected the ongoing operation. That is the impression I now have based on the material we now have, which is obviously incomplete.

He later added that this was a “reconstruction and speculation at best”. It was “teamwork and consultation”. “You have to take into account ongoing police operations”. “I advised the CPS. I was the head of the team. I hope I was respected. I am keen on consensus.”

In our view Mr Raggatt QC was not entitled to reach that decision nor to give the advice that he did. He departed from the rules which govern disclosure when he was not entitled to do so.

When it was put to Mr Raggatt QC that the obligation was to deal with disclosure as soon as reasonably practicable, he said:

“A premature application would be folly because there may not have been a complete picture. It may impact on all sorts of things, of which the ongoing operation is only one”.

Mr Raggatt QC made it clear that the surveillance evidence would not be ever-present in his mind because there are other cases and “things happen in one’s life”. However, he did not disagree with the proposition that, assuming that MV was right about the times, the jury were entitled to know that Conrad Jones could not have been at the meeting before 3.30pm.

In the context of trial 1 Mr Raggatt QC did not agree that it was incumbent on him to undertake a review after MV came up to proof. He said the state of things was chaotic once defence counsel was sacked and no one could foresee what would happen next.

Later, Mr Raggatt QC did agree that “in a perfect world”, if he had decided that his decision should be subject to review, it was then incumbent on him to ensure that a review does take place.

In his evidence in relation to charge 4, Mr Raggatt QC made it clear that at the time of his intervention the surveillance evidence was not in his mind. If it had been, “it is unlikely that I would have made that point”. When it was then put to him that he should have had it in mind throughout the trials he did not agree.

It was put to Mr Raggatt QC that the failure to disclose or make a PII application prejudiced the administration of justice. He responded that “the conviction was quashed and that is all one can say”. He later added “It resulted in a very guilty man getting away with something. It is a conviction that I believed at the time was a proper conviction that was quashed”. “I don’t dissent from what they found. I thought at the time that Jones had a fair trial”.

We do not agree. The failure to disclose or make a PII application resulted in an unfair trial. It resulted in prejudice to the administration of justice. Conrad Jones was a victim of a miscarriage of justice in relation to that allegation.”

### *The Tribunal’s determinations*

51. The relevant determinations are:

#### **“Charge 2**

We have concluded that charge 2 is proved. From the entire course of conduct of Mr Raggatt QC, which includes justifications for non-disclosure and failure to disclose or make a PII application throughout, we conclude that Mr Raggatt QC decided not to make a PII application in relation to the surveillance material relating to events and Conrad Jones’s location on the 1 and 2 June 2006. There is no other conclusion that we could arrive at which is consistent with this long course of conduct. It follows that we are sure, consistent with the burden

and standard of proof required in relation to charge 2 which is subject to the criminal burden and standard that charge 2 is proved, not only in respect of the advice given but also the decision which we are sure he made.

...

### **Charge 5**

We have found Charge 5 proved to the criminal burden and standard on the basis that Mr Raggatt QC ought to have had the surveillance evidence in mind because he clearly had a duty to review the decision not to disclose the surveillance material and not to make a PII application in respect of it. Mr Raggatt QC had also indicated that he would review his decision.

...

Mr Raggatt QC therefore refused to concede that there was not sufficient time for the telephone 991 to travel from Nottingham between the two telephone calls at 1:30pm and just after 3pm respectively. He also refused to concede that the meeting could not have taken place between those times in Nottingham. We have taken into account the evidence that Mr Raggatt QC has given about that, and we accept that at that time he would not have been thinking about the surveillance material. However, we have come to the conclusion so that we are sure of it that at that time he ought to have known of the fact the prosecution had in its possession surveillance material which showed that Conrad Jones was in Coventry on 2 June until 2:25pm, and therefore given that it is approximately 53 miles between Nottingham and Coventry, the meeting could not have taken place in Nottingham on 2 June between 1:30pm and 3pm.”

52. On 2 June 2022 the Tribunal imposed the sanctions upon the appellant set out in paragraph 2 above.

### **Grounds of appeal**

53. 31 grounds of appeal and a 53-page skeleton argument were submitted on behalf of the appellant. Within the skeleton argument the many grounds of appeal were formulated as follows:
- (1) The Tribunal ought to have concluded that a fair trial in 2021/2022 was not possible and/or that it could not safely convict on any charge given the deficiencies in the “quality” of the evidence before it.
  - (2) The Tribunal did not approach the evidence in the correct manner.
  - (3) Serious procedural irregularity and unfairness to the appellant in the manner in which the charges were prosecuted. This concerned: (i) the constitution of the Tribunal and (ii) the conduct of the hearing.

- (4) The Tribunal's conclusion as to what the appellant knew about the surveillance material in late 2006/2007.
- (5) The Tribunal's conclusion that the appellant "advised" and "decided" as set out in the Particulars of Offence.
- (6) The Tribunal's criticism of the appellant's "decision" and "advice" for the purposes of charge 2.
- (7) The Tribunal's interpretation of para 301(1)(a)(ii) of Code of Conduct for the purpose of determining charge 2.
- (8) The Tribunal's failure to consider whether the 31 July 2007 intervention made out the Particulars of Offence for charge 5.
- (9) The Tribunal's conclusion that the appellant "ought to have known" on 31 July 2007 the fact asserted in the Particulars of Offence for charge 5.
- (10) The appeal against sanction.

### **Ground 1: The Tribunal ought to have concluded that a fair trial was not possible**

#### *The parties' submissions*

54. On behalf of the appellant, Mr McPherson KC submitted that, irrespective of HHJ Carroll's decision on the strike out application, the Tribunal had failed to consider for itself at the end of the proceedings whether the appellant had had a fair hearing. The long passage of time since relevant events meant that the materials on which the BSB relied were incomplete. The Tribunal had, for example, been supplied with no internal CPS communications from either 2006/2007 or 2013. Such communications would have shed light on the CPS approach to disclosure and whether it shared the appellant's view of disclosure obligations. There was an absence of relevant witness evidence. Given the deficiencies in the evidence, the Tribunal could not safely find any charge proved.
55. Mr McPherson contended that the overall delay was compounded by the BSB's excessive delay in obtaining documents and by the supply of documents from the BSB to the appellant in a piecemeal way. A fair trial in 2021/2022 was not possible.
56. Mr McPherson submitted in the alternative that, even if a fair trial was in principle possible, the Tribunal had failed to deal with the question of delay in its decision. The prejudice caused to the appellant by delay ought to have weighed heavily in the decision. The failure to deal with matters relating to delay amounted to a serious omission on a fundamental matter and rendered unsafe any findings of fact. Mr McPherson conceded however that the proceedings did not amount to an abuse of process, arguing instead that the passage of time and the BSB's unacceptable delay were relevant factors that the Tribunal had ignored.
57. On behalf of the BSB, Mr Campbell KC submitted that HHJ Carroll had previously considered the reasons for delay in detail and concluded that the proceedings were not unfair. Although not every document that existed in 2006 and 2007 was still available, a very substantial volume of documentary evidence was before the Tribunal. There

was more than sufficient evidence for the Tribunal to make findings to the criminal standard in relation to the appellant's advice on the surveillance material. The Tribunal's decision demonstrated that it had taken into account the passing of time when considering the evidence.

### *Discussion*

58. HHJ Carroll had considered as part of the strike out application whether the proceedings against the appellant amounted to an abuse of process. In his written ruling, he summarised the two categories of abuse which should cause a court to stay criminal proceedings. Those categories are: (i) cases where it will be impossible to give the accused a fair trial; and (ii) cases where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case (*R v Maxwell* [2010] UKSC 38, [2011] 1 W.L.R. 1837, para 13, per Lord Dyson JSC). HHJ Carroll recorded that it had not been suggested before him that the second category applied.
59. In his consideration of the first category, HHJ Carroll set out the chronology of events since 2005. He noted that Conrad Jones had initiated his complaint to the BSB in January 2015. He set out the history of the BSB's handling of the complaint. He considered that the appellant and his legal advisers had sought "exceptionally wide ranging disclosure" which had led to "an equally wide ranging" request for waiver of legal professional privilege by the CPS and the police. He accepted that the BSB may have been slower to grapple with the obtaining of waiver of privilege than ought to have been the case. He observed that the timetable for the review of the extent to which the sensitive surveillance could be disclosed within the Tribunal proceedings was "unfortunate."
60. Weighing the various factors, he was not persuaded that the reasons for the delay were only attributable to the BSB's, as opposed to the appellant's, conduct of the proceedings:
- "Much of the delay relates to the extent of [the appellant's] requests for disclosure/evidence, over the extent of the waiver of privilege sought and granted. Overall in the extensive correspondence, there seems little focus, in particular from [the appellant's] solicitors, on the actual primary and narrow issue of [the appellant's] state of knowledge of the existence of the surveillance material...
- Whilst there are in fact points to be made about the speed (or otherwise) of the BSB investigation, in my judgement having regard to the correspondence it seems that much of the delay is as a result of the unreasonably wide range of the material being sought by [the appellant's] solicitors and the consequential unreasonably wide 'general waiver' requested of the CPS and [the police] on what is inevitably a sensitive area of materials."
61. In relation to witnesses, HHJ Carroll accepted that "the likely detail and accuracy of memories so far after the event is entirely diminished." He held however that the BSB was entitled to rely on documentary evidence. It was open to the appellant to approach

any potential witnesses with a view to calling them if he wished. If the absence of any witness was to prevent the Tribunal from being sure of any matter, the appellant would have the advantage of the benefit of the doubt.

62. HHJ Carroll concluded that the factual matrix on the narrow scope of the proceedings was well covered by the documents. He held that a fair trial remained possible and that no prejudice of sufficient gravity had been demonstrated so as to meet the high bar necessary to justify a stay or a dismissal of the charges. He rejected the appellant's application to strike out or stay proceedings as an abuse.
63. At the appeal, Mr McPherson did not pursue the argument that the proceedings were an abuse of process: his submissions were focused upon the general principles of fairness. We accept that the Tribunal had a duty to ensure the fairness of the hearing conducted before it. However, HHJ Carroll had given a detailed ruling relating to the impact of delay. There was no reason for the Tribunal to deal afresh, and for a second time, with matters that HHJ Carroll had considered and rejected. We are not persuaded that the recasting of an abuse argument as a fairness argument (which is upon analysis what this part of the appeal amounts to) adds any new dimension.
64. In our judgment, HHJ Carroll was entitled to reach the conclusion that the BSB could fairly and properly bring charges on the basis of the available documentary evidence. The Tribunal was thereafter entitled to hear and determine the proceedings on the basis of the documentary evidence before it and on the basis of the appellant's own evidence. That is what it did.
65. In reaching its conclusions, the Tribunal took into consideration that, owing to the passage of time, the appellant had no recollection of some of the material on which the BSB relied and that he could not recall the advice attributed to him by others. We do not regard the Tribunal's failure to make more detailed reference to the impact of delay as having any material effect on the outcome of the proceedings.
66. In summary, there was nothing about the age or nature of the evidence that made the proceedings unfair.

## **Ground 2: The Tribunal did not approach the evidence in the correct manner**

67. The appellant contends that the Tribunal should have taken as its starting point the fact that it was "inherently improbable" that the appellant acted in the manner alleged by the BSB given his exceptional character references; this inherent improbability warrants a heightened examination of the evidence (*R (on the application of D) v Life Sentence Review Commissioners* [2008] UKHL 33, [28]).
68. Further, as the Tribunal recognised that primary facts must be proved to the criminal standard, it should have conducted a detailed analysis as to which details of the surveillance material the appellant was aware of and which documents were provided to him in 2006/7. The appellant accepts that he was provided with DS Ashton's email but it was not demonstrated to the criminal standard that he was provided with anything else relating to the window on 2 June 2006 when the Nottingham station meeting could have occurred. The contemporaneous conference notes from October to December 2006 contain inaccuracies, they are not verbatim records and their authors are unknown. None of the notes relied upon were those of the appellant.

*Discussion*

69. It is clear that the Tribunal was aware of the appellant's standing within the profession. It referred to his "many outstanding references" and noted that he "is a man who has truly scaled the heights of the profession". Given that the appellant now accepts that there was a failure by the prosecution to disclose the surveillance material, and also accepts the conclusions of the Court of Appeal, a submission that it was inherently improbable for the appellant to act in the alleged manner, goes nowhere.
70. We accept the BSB's contention that the Tribunal was well aware of the burden and standard of proof. In its determination the Tribunal provided a detailed summary of the relevant evidence. We accept that not every document in existence in 2006/2007 was available to the Tribunal, but a substantial volume of documentary evidence was available. In our view this provided a sound evidential basis for the Tribunal to make findings to the criminal standard in respect of the appellant's knowledge of, advice and any decision in respect of the relevant surveillance material.

*The appellant's knowledge and decisions made*

71. At the core of some of the grounds of appeal are the issues of what was the extent of the appellant's knowledge in October – December 2006 of the content of the surveillance material and what, if any, advice did he give or decisions did he make.
72. There can be no dispute that by the time of the conference on 14 December 2006 surveillance material relating to the movements of Conrad Jones on 1 and 2 June 2006 had been viewed by the appellant and members of the prosecution team. Whatever point is now taken as to exactly what was seen and known by the appellant during those conferences, we accept, as did the Tribunal, that from his receipt of DS Ashton's email dated 21 September 2006, the appellant was on notice of an issue concerning the evidence of MV as to a meeting on 1 or 2 June 2006. This was the only occasion upon which MV alleged she had a face to face meeting with Conrad Jones.
73. When interviewed on 25 July 2006, and in her statement dated 10 August 2006, MV had identified 1 and 2 of June as being the relevant dates for the face to face meeting. (It was evidence she repeated during the trials and it was the basis of the cross examination of MV.) In our view, a description of MV's fluidity in terms of timings does not fairly or accurately reflect what she said in her statements, both of which were or should have been read by the appellant in the autumn of 2006.
74. The surveillance material for 2 June records that at 14:23 Conrad Jones, driving a BMW, pulls up outside his house in Coventry. He walks into it for one minute and then drives away in the BMW. At 18:01 he arrives back at the house driving the BMW, he goes in for two minutes before driving away. The evidence of MV was that the meeting at Nottingham railway station took place in the early afternoon at 1, 1:30 or 2pm, by 3 to 4pm she was back in Burton-on-Trent.
75. Critically, at no time during 1 and 2 June, did MV's phone cell site in the Nottingham area. During the available time window on Friday 2 June, she continued to cell site in the Derby/Burton area. This evidence was available at the prosecution pre-trial conferences and was disclosed to the defence.

76. We are satisfied that the content of DS Ashton’s email properly alerted the appellant and the prosecution team to the fact that Conrad Jones could not have met with MV on 1 June 2006 and the only window of time on 2 June 2006 was between 14:24 hours and 18:01 hours when in theory, he could have travelled to Nottingham. The problem with such a theory is that MV said that she had travelled back to Burton by 3 – 4pm. We are also satisfied, having considered the conference notes, which are supported by the witness statements of DS Ashton and DCI Atherley, that entries relating to the surveillance material relating to 1 and 2 June were discussed at the conferences in the autumn of 2006 which the appellant attended. Given the concerns raised in DS Ashton’s email, this would have been the appropriate way forward.
77. The Tribunal noted that on 27 November 2006 instructions were sent to the appellant to advise upon a PII application in relation to the surveillance material for a hearing then contemplated for 30 November 2006. Subsequent communications between the CPS and the listings department at Birmingham Crown Court took place. They were aimed at fixing a PII hearing to coincide with the Recorder sittings of the appellant, to be held before the trial judge on 20 December 2006. The hearing did not take place but the planning is consistent with the fact that surveillance material, relevant to movements of Conrad Jones on 1 and 2 June, was being viewed and discussed in conferences which is borne out by the notes of those meetings.
78. Having considered the evidence before the Tribunal which included the email of DS Ashton, the identified witness statements, the surveillance material, the subsequent instructions to counsel and the conference notes, we are satisfied that by the conclusion of the conference on 14 December 2006 the appellant was aware of: (i) the substance of surveillance material which demonstrated that Conrad Jones was absent from his home in Coventry between 14:24 and 18:01 hours on the afternoon of 2 June; (ii) that MV alleged that a face to face meeting took place in the early afternoon of 2 June and that she was back in Burton-on- Trent between 3 to 4pm; (iii) that cell site evidence of her phone did not support her account; (iv) in his defence statement Conrad Jones was setting out alibis for 1 and 2 June which were relevant to what was contained in the surveillance material.
79. It follows, and we so find, that the Tribunal was entitled to conclude that by December 2006 the appellant was aware of the substance of the surveillance material. In our judgment this was critical to the advice which he gave on 14 December 2006.
80. The note of the conference on 14 December 2016 records:
- “TR [the appellant] – will review after her evidence.
- ....
- No need for PII at this time.
- Review after evidence in chief...”

Implicit in the decision to review was the preceding decision - namely that there was to be no PII application and/or disclosure of surveillance material as at 14 December 2006. Consistent with that decision is the fact that the proposed hearing on 20 December 2006 at which a PII application was to be made by the appellant did not take place. We are



satisfied that the Tribunal was correct to find that in December 2006 the appellant made the decision and gave advice not to make a PII application or otherwise disclose the surveillance material. The Tribunal recorded the possibility of a review in the future but rightly observed that such a review did not preclude a decision as to how to proceed in December 2006.

81. We agree with the determination of the Tribunal that the decision in December 2006 not to seek a PII hearing from which disclosure of the surveillance material would follow was wrong. The material undermined the prosecution case, it was material which assisted the defence and was also relevant to the alibi of the defendant. The appellant's decision was in breach of the prosecutor's duty to disclose as soon as is reasonably practicable pursuant to the Criminal Procedure and Investigations Act 1996 and the Tribunal was correct so to conclude.
82. The appellant made the decision in his role as leading counsel of the prosecution team. It was his decision and he must take responsibility for it. Whether or not it was supported by others in the team cannot detract from that fact.
83. We accept the contention of Mr Campbell that a further reason given by the appellant, namely the cogency and the powerfulness of the witness MV, was not a reason to withhold disclosure. There is only one test for disclosure, issues of cogency and weight are for the jury.

### **Ground 3: Serious procedural irregularity and unfairness**

#### **(i) The constitution of the Tribunal**

##### *The parties' submissions*

84. Mr McPherson submitted that the nature of the charges required a five-person tribunal. He emphasised that the two members of the original constitution who had withdrawn (Ms Watson and Mr Walsh) were the only members who worked outside the criminal justice system. The remaining members were a Circuit Judge undertaking criminal cases (the Chair), a barrister with significant past experience of criminal cases (Ms Zouq) and a retired Superintendent in the Metropolitan Police Service (Ms Stephenson).
85. Mr McPherson submitted that the remaining members would doubtless have been influenced by their own professional experience about what should have been done by the appellant. Ms Watson (a family law specialist) and Mr Walsh (who had experience in the regulation of various professions) would have approached the issues in a different way; they would have provided a necessary counterbalance by way of probing and testing any assumptions made by the Chair and other members. The lack of balance either rendered the hearing unfair or was a factor that could be weighed in deciding whether the proceedings as a whole were unfair.
86. Mr McPherson also complained that Mr Walsh, who had heard the BSB's opening of the case, would have discussed the merits of the charges with the other members of the panel. He had been party to two substantive decisions during the course of proceedings (the provision of a *Goodyear* indication and the determination of the appellant's submission of no case to answer). He would have influenced the other panel members. Whereas the Chair and barrister member would have been able to draw upon their legal

training to put Mr Walsh's views to one side, Ms Stephenson as a lay member should be treated like a juror. She could not be expected to put Mr Walsh's views out of her mind when deliberating with the other remaining panel members on the necessary decisions.

87. Mr Campbell submitted that the Tribunal was at all times validly constituted in accordance with the relevant disciplinary regulations. If the Tribunal had decided after Ms Watson withdrew that it was necessary to proceed with five members, an adjournment would have been required which was plainly undesirable. If it had decided not to proceed after Mr Walsh had become indisposed, the proceedings would likewise have been adjourned for a significant period which would have resulted in undue delay.

### *The Disciplinary Regulations*

88. By virtue of regulation E139 of the BSB Disciplinary Tribunals Regulations ("the Regulations"), a Disciplinary Tribunal must consist of either three or five persons. A five-person panel must be chaired by a judge and have two lay members and two barrister members (reg E140). A three-person panel must be chaired by either a judge or a KC and have one lay and one barrister member (reg E141).
89. All panel members (including the Chair) are nominated by the President of the Tribunal. In deciding who will sit on the panel, the President may have regard to the nature of the charges and to the identity of the person against whom the charges have been made (reg E143). Lay and barrister members must be selected from the pool appointed by the Tribunal Appointments Body (reg E142). If a vacancy on the panel arises before the substantive hearing of the charges, the President must choose another member to fill that vacancy (reg E147).
90. A three-person panel may impose a variety of sanctions (including a fine) but may not impose the sanction of disbarment and may only impose suspension from practice for up to 12 months (The Bar Tribunals & Adjudication Service Sanctions Guidance, version 5, 15 October 2019, para 5.4; version 6, 1 January 2022, para 6.35a).
91. There is express provision for diminution of the panel after it has been convened. In this regard, reg E149 provides:

"The proceedings of a five-person panel will not be invalidated on the sole ground that after the Convening Order has been issued (in accordance with rE132 above), one or more of the members becomes unable to act or is disqualified from acting, provided that:

1. the Chair and at least one lay member and one barrister member are still able to act and are present throughout the substantive hearing;
- and
2. the number of members present throughout the substantive hearing of the charge is not reduced below three."

### *Discussion*

92. As Mr Campbell emphasised, there are two separate decisions in issue: (i) the decision to proceed with four members when Ms Watson withdrew; and (ii) the decision to continue when Mr Walsh withdrew.
93. As to the first of those decisions, Mr McPherson conceded that a four-person panel is validly constituted under reg E149 if an appointed panel member becomes unable to act. The Tribunal therefore had the power to hear the case after Ms Watson withdrew.
94. The appellant applied for an adjournment on the grounds that a five-person panel was needed in light of the seriousness and complexity of the issues. He submitted that a five-person panel would provide greater fairness or the appearance of greater fairness.
95. The Tribunal rejected the adjournment application for reasons that the Chair read into the record on 26 July 2021. The Tribunal noted that Ms Watson had withdrawn on 2 July 2021, three weeks before the hearing was due to commence. It took into consideration that there were only 15 barristers available to sit on Disciplinary Tribunals overall and none was available to sit on the panel. Any adjournment would have caused a delay of around six months or longer. Such further delay could not be justified in proceedings which related, in the main, to events in 2007.
96. The Tribunal did not accept that a five-person panel would provide greater fairness. It was satisfied that the hearing would comply with the Regulations, and be fair to both sides, without an adjournment.
97. In our judgment, the Tribunal gave proper and adequate reasons for refusing to adjourn. The decision reveals no error of principle or approach and was within the ambit of the Tribunal's discretion. There are no grounds for this court to interfere with the decision which raises no real question of injustice or procedural irregularity.
98. As to the decision to continue the hearing when Mr Walsh withdrew, reg E149 permits a Tribunal to proceed with three members if one or more members has become unable to act during the course of the hearing, and thus may have been a party to decisions or discussions with the members who continue. The Tribunal notified its decision refusing to adjourn in an email dated 28 February 2022. By that stage, the Tribunal had already sat for five days in July 2021. We accept Mr Campbell's submission that any adjournment would have caused significant delay in already long-running proceedings.
99. We do not accept that the nature of the charges or the issues in the case necessitated a five-member panel. The principal distinction between a five- and three-person panel appears to be the range of sanctions that a three-person panel may impose. As we have set out above, the most severe sanction available to a three-person panel is a 12-month period of suspension from practice. We are unimpressed by the proposition that the fairness of the proceedings depended on the size of the panel. The size and constitution of the panel was a question for the Tribunal and not for the appellant or his lawyers to determine.
100. That the three remaining members of the Tribunal all had experience of the criminal justice system did not make it unfair for them to hear the charges. Having been appointed to sit on Disciplinary Tribunals and selected for the case, we reject the submission that they would have been unable to judge the charges objectively or that their backgrounds made them incapable of exercising independent judgment. The

analogy between lay members and jurors is a red herring. (We note, in any event, that a judge is not always bound to discharge an entire jury simply because one or more jurors is discharged part-way through a trial.) We heard no properly articulated argument on actual or apparent bias; nor could such an argument properly be raised. It is nothing to the point that the appellant disliked the panel's professional backgrounds. It was not for him to pick and choose his tribunal.

101. For these reasons, the Tribunal was entitled to hear and decide the charges with three members.

## **(ii) The conduct of the hearing**

### *The parties' submissions*

102. Mr McPherson submitted that there had been excessive and inappropriate interventions by the Chair throughout the hearing, particularly during Mr Campbell's cross-examination of the appellant and the closing submissions made on the appellant's behalf. During the course of the two days of the appellant's evidence, the Chair had intervened to ask questions on over 600 occasions with 75 significant interventions. He frequently took over cross-examination from Mr Campbell and embarked on lines of questioning on topics that the BSB had not itself explored. Mr McPherson submitted that the Chair's questions were often accusatory and complex (rolling up several questions or topics into one question). The interventions went far beyond the legitimate task of seeking to clarify or understand the appellant's evidence.
103. Mr McPherson emphasised that the Chair's interventions had continued to the extent that he had been interrupted nearly 950 times during the course of the first three days of his closing submissions (the fourth day of his submissions brought about a change in the Chair's approach: he had not intervened). The Chair had dominated the hearing because, by contrast, the other members of the panel had hardly intervened at all. The Chair's interventions had breached the relevant guidance on the conduct of Disciplinary Tribunals and had prevented a fair hearing because the appellant had been hindered in the presentation of his defence.
104. Mr Campbell submitted that the Chair's interventions did not render the hearing unfair. The appellant was able to give all the evidence he wished to give and (through his counsel) to make all the submissions he wished to make. The Chair had raised matters of concern during the course of the hearing which had enabled the appellant to give full evidence and make full submissions on all the relevant issues. As the appellant's evidence in chief was very largely given in two detailed witness statements, the majority of his oral evidence was taken up by cross-examination. It was the BSB rather than the appellant that would be likely to be prejudiced by interruptions in its cross-examination. The Chair did not use any ill-tempered, rude or offensive language.
105. As to the input of Ms Zouq and Ms Stephenson, Mr Campbell submitted that they were experienced panel members. There was no proper basis for concluding that they did not contribute to the decision or that they were in any sense overawed by the Chair.

### *Legal framework*

106. In *Jones v National Coal Board* [1957] 2 QB 55, the trial judge had intervened during the defendant's evidence, at times conducting the examination of a witness himself and at times protecting a witness against questions he considered misleading. Giving the judgment of the court, Denning LJ (at p. 63) acknowledged that the judge had been well-motivated. He had intended by his interventions to understand the details of the case and to avoid the undue harassment of witnesses in cross-examination. Denning LJ continued:
- “Nevertheless, we are quite clear that the interventions, taken together, were far more than they should have been. In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question ‘How’s that?’ His object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not Lord Eldon L.C. who said in a notable passage that ‘truth is best discovered by powerful statements on both sides of the question’?: see *Ex parte Lloyd* (1822) Mont 70, 72n. And Lord Greene M.R. who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses, ‘he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict’: see *Yuill v Yuill* [1945] P. 15, 20; 61 T.L.R. 176; [1945] 1 All E.R. 183.”
107. This passage makes plain that, in determining whether a judge's interventions were appropriate, an appellate court should consider the effect of those interventions “taken together.” It may be that many or even most of the interventions, taken individually, would be appropriate if intended to clarify a party's case but that, as a whole, they may have the effect of preventing the effective examination of witnesses or articulation of submissions.
108. There is a distinction to be drawn between interventions made during the examination of witnesses and those made during submissions. As Denning LJ observed at p. 65 of *Jones*, “interventions should be as infrequent as possible when the witness is under cross-examination” because “the very gist of cross-examination lies in the unbroken sequence of question and answer” and because the cross-examiner is “at a grave disadvantage if he is prevented from following a preconceived line of inquiry.”
109. In contradistinction to the law of bias, the risk of unfairness through judicial interventions does not depend on appearances or on what an objective observer of the process might think of it. Rather, the risk is that the judge's descent into the arena “may so hamper his ability properly to evaluate and weigh the evidence before him as to impair his judgment, and may *for that reason* render the trial unfair” (*London Borough of Southwark v Kofi-Adu* [2006] EWCA Civ 281, [2006] H.L.R. 33, para 146, per Jonathan Parker LJ, giving the judgment of the court; emphasis in the original). We

accept Mr Campbell's submission that the question for this court on appeal is whether the hearing was unfair as a matter of objective assessment.

110. The *Kofi-Adu* case emphasises at para 145 that interventions by the judge in the course of oral evidence (as opposed to interventions during counsel's submissions) must inevitably carry the risk of the judge descending into the arena and that:

“[t]he greater the frequency of the interventions, the greater the risk; and where the interventions take the form of lengthy interrogation of the witnesses, the risk becomes a serious one.”

111. Nevertheless, the question whether judicial interventions are unfair “cannot be decided by a simple process of counting questions ... It depends on the nature of the case, the skill of counsel, the tone and purpose of the interventions and many other factors” (*Almeida v Opportunity Equity Partners* [2006] UKPC 44, para 99). It is a fact-specific assessment where all the circumstances of the proceedings must be taken into account. Mr McPherson referred us to the facts of other cases but we have not found his citations to be of assistance to our case-specific analysis.

#### *Interventions during the evidence*

112. In support of his submissions, Mr McPherson provided us with a schedule of the Chair's non-trivial interventions taken from the transcripts of proceedings before us. We have considered the schedule but it is important to place the individual interventions in context. For that reason, we have also considered the transcripts themselves.
113. A flavour of the Chair's interventions is provided in the following examples. The appellant's evidence commenced on 7 March 2022. On that day, during Mr Campbell's cross-examination, the Chair intervened with the following string of questions (retaining the use of the word “Chairman” in the transcripts provided to us):

“THE CHAIRMAN: Yes. Forgive me, Mr. Campbell, if this is a point you were coming to...

MR CAMPBELL: Please carry on.

THE CHAIRMAN: The point is that [Counsel for Mr. Jones] was clearly competent and able, has got so far by using the phone evidence and, of course, the witness then says, ‘I did not have the phone on the day’ but he can still establish the gaps... He has got so far. If he had available to him surveillance evidence that shows that Mr. Jones was still in Coventry at 2.24, an hour's drive would take him to 3.24, with a witness who was saying she was back in Burton between three and four, is it not inconceivable that he would not have used it?

MR RAGGATT: It is very likely that he would, yes, I agree. I do not quarrel with that at all. In my supplemental statement I hope I made clear that I do not quarrel with that at all.

THE CHAIRMAN: The trial would have looked very different because it would have featured in the summing-up, inevitably?

MR RAGGATT: Yes. If it had all been disclosed it would also, I think, have led to cross-examination of Conrad Jones about a false alibi and that might have been disastrous for Conrad Jones if we are in the business of speculating. That is speculation. I do not quarrel with the fundamental proposition that you have asked. But, of course, July 2007 was quite a long time after the events of late 2006, as I am sure -- as is obvious.

THE CHAIRMAN: The point that is really troubling me, because I am concerned about it and it is something that the Panel will have to consider carefully and conscientiously, is that the history of the case points to the inevitable conclusion that this disclosure was not made?

MR RAGGATT: I do not believe that I have quarrelled with that. Indeed I think I have said it in terms in my supplemental witness statement, that that is a conclusion which you might well come to. If you do, well, that is a matter, of course, for the Panel. I am simply saying that in 2022 my memory is such that it is non-existent. But, yes, of course, I do not know one way or the other and I do not want to engage in a form of guesswork.

THE CHAIRMAN: Yes, it is not something that you would be expected to remember now. Of course, I understand that. However, I refer to the history of the matters, in other words the history as it builds up, including the Court of Appeal, what happened there, what happens in cross-examination, what happens in summing-up. It is just, 'inconceivable' is the word that this disclosure was made because short of everyone involved being (indistinct), which does not appear to have been the case, these matters would have loomed large, would have been referred to again and again?

MR RAGGATT: All I think I have ever said is that the decision in 2006 was a sustainable decision. By the time of the third trial matters should have been disclosed. I can see that one might have come to a very different view. But on the basis there was no disclosure made, what I assert, I hope as powerfully as I can, is that that was an innocent error. It was not in any way malign or deliberate or any such thing. If that happened then it was a mistake..."

114. The Chair in this exchange took over the reins from Mr Campbell. He asked multiple questions in succession. Some of the questions are phrased so that they are lengthy.
115. On the same day, the Chair asked another series of questions:

"THE CHAIRMAN: Can I interrupt, forgive me again. I want to hear these matters because it may help our discussions later on.

MR RAGGATT: Yes, of course.

THE CHAIRMAN: Malign and so on are not the words I would use. Say there is a conflict of interest and let me put one possibility to you, here is a witness who is a very significant witness also in a murder case (indistinct)

MR RAGGATT: The murder case was over ----

THE CHAIRMAN: Maybe it was but it is still due to go to the Court of Appeal and so on and ----

MR RAGGATT: (Indistinct) her evidence in the murder case, such as I remember it, did not relate to Conrad Jones and was supported, as I remember, it is a long, long time ago, by a cell site and phone messages that confirmed the things she said.

THE CHAIRMAN: However, when her credibility was later called into question some convictions were quashed?

MR RAGGATT: I did not conduct that appeal.

THE CHAIRMAN: No, I am not saying you did. What I am saying is in the position that you were, that you are relying on this witness in another case as well, would it not have been simpler to take it all to the judge and say, 'There you are judge, you are not saddled with my potential conflict (indistinct) worries maybe about the witness, may be about the other operations, events, operation, which was ongoing and was sensitive and where there may have been people at risk, there you are judge you are not saddled with all of that, you decide, you tell me'. Why not do that?

MR RAGGATT: I wish we had. I wish we had. It got lost somehow, I do not know how or why. That is why I hope with frankness and I hope with integrity I acknowledge that a mistake has occurred.

But with respect, there is all the difference in the world between acknowledging that a mistake has occurred and attributing to me some sort of oblique reasoning or approach.

THE CHAIRMAN: Yes, oblique, malign, all those words we can put on one side?"

116. The transcript shows that Mr McPherson interrupted at this stage, contending that the Chair's questions went beyond the case mounted against the appellant by the BSB. After some discussion with Mr McPherson, the Chair responded as follows:

"THE CHAIRMAN: Yes, you are misunderstanding what I am doing. What I am doing, I feel, is fairer because if it is something that we might raise amongst ourselves or that I might raise with



my colleagues in due course, however the case is put, it is fairer for me to get Mr. Raggatt's reaction to it now by way of a question than not to. I can (indistinct) not applicable, but it is fairer to put it to him and not least because also you will bear in mind that if, in due course, there is a result one way or the other and reasons are given, it is much fairer to have put a process of reason to a respondent than not have done so. In fact I take the view that I am almost duty-bound to make sure that various potential criticisms are put, whether by Mr. Campbell on behalf of the BSB or on behalf of the Panel by me. It is much fairer and probably the duty to do so rather than sit tight, wait for the final decision to be made and then express opinions which were never put and then you would complain about that.”

117. As we have said, these passages give a flavour of how the Chair would intervene. We accept that he intervened frequently and often at length during the appellant’s oral evidence.
118. Mr McPherson submitted before us that the Chair intervened to a greater degree than permitted by the Disciplinary Tribunals Guidance for Disciplinary Pool Members & Clerks as then in force (Bar Tribunals & Adjudication Service; revised August 2017). That Guidance stipulates that the Chair is responsible for the general conduct of the hearing including as to when the panel (which must in context include the Chair) should put questions to the defendant. The Chair must ensure that the panel members (which must by implication include the Chair) do not interfere “excessively.”
119. We are not persuaded that the interventions were excessive such that they rendered the hearing unfair. The exchanges that we have highlighted (which are typical of the Chair’s approach) demonstrate that Mr McPherson was able to engage with the Chair on the nature and extent of the interventions. The appellant had no difficulty in giving his answers.
120. We have some sympathy with the Chair’s endeavours to ensure that the appellant gave full answers to key questions. Not least, the appellant fell back on the content of his witness statements on numerous occasions and appears to have shown a repeated reluctance to enter into further detail. The Chair was entitled in the circumstances to seek to draw out his evidence away from the statement and towards the specific questions on which his oral evidence was sought.

*Interventions during closing submissions*

121. During the course of Mr McPherson’s closing submissions on 10 March 2022, the Chair interrupted him and said:

“But Mr McPherson - I am sorry to interrupt you - this is a case where in some ways it is blindingly obvious. If you are accusing someone of being in a particular place at a particular time and you know that you have material which shows that he was not there, that he was elsewhere - particularly if it is an alibi case - it is blindingly obvious.”

122. The Chair's reference to the "blindingly obvious" is florid in tone. We do not, however, accept the submission that it demonstrates pre-judgment of an issue. By the time of this intervention, the hearing was in its ninth day. It revolved around what HHJ Carroll had properly described as a narrow point such that the Tribunal was familiar with the evidence and issues. It is unreal to suggest that the Tribunal (through its Chair or otherwise) should at that advanced stage be unable to articulate a major concern without fear of being accused of pre-judgment. We do not accept that the Chair was in this or any other passage of the transcripts expressing a concluded view of the dispute between the parties.

123. On the same day, the Chair interrupted Mr McPherson as follows:

“THE CHAIRMAN: If you stood up in court and made an allegation and knew at the time that that allegation could not be right, then presumably you have decided to do that.

MR McPHERSON: No, that is not what charged. I am seriously troubled at this stage that you are not having regard to the charges and appear to be forming in your own mind that this is a tribunal---

THE CHAIRMAN: I will in due course of course apply my mind strictly to the charges. But what I am challenging you on is the principles of plain ordinary justice. And the reason why I am challenging you about that is that Charge 2 - which the BSB say is the main charge - is about prejudicing the administration of justice.

MR McPHERSON: We will come to the law on that.

THE CHAIRMAN: The role of a prosecution counsel is to be a minister of justice. If something is unjust and unfair, then you ought to know it in your bones if you are an advocate in criminal courts prosecuting. But you take a more precise literal approach to the words, and I appreciate that is what you are here to do.

MR McPHERSON: Can I say, I do not take a precise literal approach, I take the legal approach. And this case is not about what is right in someone's bones. This case is about whether or not the BSB has proved what is charged. And the charge that---

THE CHAIRMAN: Is it about fairness and justice? Or not about that at all?

MR McPHERSON: So fairness and justice for Mr Raggatt, absolutely.

THE CHAIRMAN: No. Fairness and justice for Mr Jones.

MR McPHERSON: No, it is not.

THE CHAIRMAN: It is not?

MR McPHERSON: That was the court of -- oh, my Lord. Sir, please do not write down that as an answer.

THE CHAIRMAN: Well, I am. You have just said it is not about fairness and justice to Mr Jones. I am writing that down.

MR McPHERSON: This case is not about finding Mr Raggatt guilty just because Mr Jones had an unfair trial..."

124. We do not consider that this exchange (in which Mr McPherson's ability to fight his client's corner is clear) went outside the ambit of legitimate albeit vigorous judicial questioning in search of answers to questions on a relevant topic. Mr McPherson's reference in the passage we have quoted to the fairness of the disciplinary proceedings could be readily interpreted as deflecting from the self-evidently different question of the fairness of Conrad Jones' trial with which the Chair was plainly concerned at this juncture. We reject the submission that the exchange demonstrates that the Chair was not concerned with the fairness of the proceedings before the panel, which is the point that Mr McPherson was forcefully making to the Chair at that stage.

125. Later on the same day, the Chair intervened as follows:

"THE CHAIRMAN: You do not actually need to be talking in terms of professional misconduct if it is unfair and unjust to allege against someone that he was in a particular place and you know that he was not. You would not do it.

MR McPHERSON: No, no, no. Sir, I think you and I are at cross-purposes. You appear to have formed the view that the test [for professional misconduct] is irrelevant because Mr Raggatt knew that someone was at a particular time when he could not have been.

THE CHAIRMAN: I would not put it like that. It seems to me the test would be obvious to anyone who knows what justice means and knows what being a minister of justice means.

MR McPHERSON: Okay. Well, I---

THE CHAIRMAN: And it means that you do not accuse a person of being in place A if you know that he is in place B.

MR McPHERSON: Well, that is not what this case is about. This case is about whether or not Mr Raggatt's views on disclosure at a particular point in time were or were not worthy of a finding of breach of professional misconduct.

THE CHAIRMAN: This case is about the administration of justice. This case is about -- he is charged with doing an act which prejudiced the administration of justice.

MR McPHERSON: He is.

THE CHAIRMAN: And if what he did was unjust and unfair, that is Charge 2.

MR McPHERSON: No, it is not. We will come back to that. But the reason it is not, in a nutshell, is because you are not looking at what Mr Raggatt did.”

126. Our view is again that the exchange represents robust questions by the Chair which were duly met by robust answers by counsel. It does not indicate that the Chair had closed his mind.
127. On that same day, Mr McPherson complained in terms that he was rarely allowed to finish a submission before being interrupted. We do not accept, however, that he was prevented from fully putting the appellant’s case over the course of his submissions as a whole. Nor do we regard the relative quietness of the other panel members as demonstrating – or even indicating - that they would have been less than fully involved in deciding the issues together with the Chair.
128. For these reasons, we are not persuaded that the Chair inappropriately entered into the arena or that his conduct made the proceedings unfair.

**Ground 4: The Tribunal’s conclusions as to what the appellant knew about the surveillance material in late 2006/2007**

129. It is the appellant’s case that none of the charges could be properly determined without the Tribunal making findings of fact as to what the appellant knew about the surveillance material (and what it in fact showed) in late 2006. The conduct alleged in charge 2 was dependent upon what the appellant had known of the surveillance material at the time. Charge 5 required the respondent to prove to the criminal standard: (i) that as at 31 July 2007 the appellant knew that the surveillance material showed Conrad Jones in Coventry on 2 June 2006 until 2:25pm and that because it is approximately 53 miles between Nottingham and Coventry, the Nottingham railway station meeting could not have taken place on 2 June 2006 between 1:30pm and 3pm; or (ii) that as at 31 July 2007 the appellant ought to have known of the same.
130. Reliance is placed upon the fact that the BSB opened its case on the basis that the entirety of the surveillance material had been sent to the appellant on 27 November 2006, it was later conceded that this could not be correct.
131. The appellant contends that the documents before it enabled the Tribunal to conclude with confidence only that the appellant had been sent DS Ashton’s 21 September email. Exactly who said what about the surveillance material in conferences, what the appellant’s contemporaneous knowledge had been in late 2006 as to the detail and content of the surveillance material and what such material demonstrated as to the whereabouts of Conrad Jones on 1, 2 June 2006 were conclusions which the Tribunal should have reached on the evidence. Its findings lacked analysis and overlooked the need to consider and make findings on this key factual matter. Further the findings appear to proceed on the assumption that because the wider prosecution knew of the detail in the surveillance material, the appellant must also have had such knowledge.

132. It follows that the Tribunal did not approach the evidence in a correct manner and its subsequent conclusions as to the appellant's knowledge and conduct in 2006/2007 were flawed.

*Discussion*

133. The BSB contends, and we agree, that the Tribunal was entitled to conclude that the appellant was aware of the substance of the surveillance material at the time he gave advice in 2006 (paras 71 – 80 above). The Tribunal made a specific finding that the appellant had knowledge of DS Ashton's email of 21 September 2006 and gave advice in relation to the issues it raised. It also accepted DCI Atherley's evidence as to the advice the appellant had given. The Tribunal set out in some detail the evidence from DS Ashton and DCI Atherley in respect of the notes of the conference with the appellant.
134. The substance of what the surveillance material showed was accurately summarised in DS Ashton's email. It is directly relevant to two days, 1 and 2 June 2006. On 2 June it is confined to a period in the afternoon. It was to this restricted time frame that the Tribunal correctly directed itself. It had the material on which to make its findings and that is what it did. Whatever limitations are identified in the notes of the conferences, it is clear that the details of the relevant surveillance material were discussed at the conferences in 2006 which were attended by the appellant in his role as leading counsel of the prosecution team. This is also confirmed by the statement of DCI Atherley. It is of note that the appellant told the Court of Appeal that he "was aware of the surveillance material in late 2006 as a result of the consultation with junior counsel and the disclosure officer."
135. In our view the Tribunal was entitled to be satisfied to the criminal standard that the substance of the surveillance material, relevant to the time restricted issue of 1 and 2 June 2006, was known to the appellant by, at the latest, 14 December 2006. The issue of the appellant's knowledge on 31 July 2007 is addressed in respect of Ground 9.

**Ground 5: The Tribunal's conclusion that the appellant "advised" and "decided" as set out in the Particulars of Offence of charge 2**

136. Before the Tribunal, it was the appellant's contention that the Particulars of Offence required the BSB to prove that the appellant had reached a settled and final position in 2006/2007 upon the issue of the disclosability of the surveillance evidence. Further, that he had made a positive and final decision and provided positive and final advice that the surveillance material was not disclosable and that a PII application and/or admission need not be made. The charge encompassed the act of "commission" not "omission". It was the BSB's position that the wording of the Particulars was sufficiently wide to encompass a situation where no definitive positive decision/advice had been made or given.
137. The appellant submits that the Tribunal did not grapple with this issue in its findings. Even if the Tribunal determined that it was unnecessary to do so by reason of its findings that the appellant had "decided" not to make a PII application or any admission by 14 December 2006, the appellant maintains that any such decision had been made only "at this time" and that further consideration would be given as the trial progressed.

138. The appellant submits that the documentary evidence in respect of the 14 December 2006 conference is consistent with the appellant having made no positive or final decision as to the disclosure of the surveillance material, or to making of admissions and/or a PII application. Having so advised, what was contemplated was that such matters would be further considered in the future. Such a position is inconsistent with the appellant having reached and expressed a final, definitive view on these matters.
139. It is accepted on behalf of the appellant that there is no contemporaneous documentary record of the matter being revisited or discussed after 14 December 2006. The appellant's evidence to the Tribunal was that the matter appeared to have "slipped through the net".

*Discussion*

140. For the reasons given at paras 71 - 80 above, we are satisfied that the Tribunal was entitled to find, as do we, that in December 2006 the appellant made a decision and gave advice not to make a PII application or otherwise disclose the surveillance material. As the Tribunal properly found: "There was of course a possibility of a review in the future of the surveillance material but that does not preclude a decision as to how to proceed at that time."
141. The Particulars of Offence state that the appellant:
- “(i) decided ... and/or
  - (ii) advised the Crown Prosecution Service
- both prior to and during Mr Jones' trial in August 2007
- not to make:
- a PII ... application ... and/or
  - an admission in relation to the surveillance material ....”
142. What the Tribunal found was that such a decision was made by the appellant on 14 December 2006. It is recorded in the conference notes. The decision was never revisited, still less reconsidered, during the course of the Jones proceedings in 2007. There was no need for the Tribunal to grapple with the concept of omission as the relevant facts in the Particulars of Offence were made out upon the evidential basis of what the appellant had done.

**Ground 6: The Tribunal's criticism of the appellant's "decision" and "advice" for the purpose of charge 2**

143. The essence of this ground of appeal is that as the Tribunal gave no or no adequate consideration as to what surveillance material the appellant had at the relevant time, it could not properly reach a conclusion as to any alleged decision or advice given by the appellant. The appellant contends that the criticism was made impermissibly through the prism of hindsight, the Tribunal reached its view on what the appellant should have done and was to be criticised for doing so on the basis of what it, the Tribunal, knew in

2021/2022 of the surveillance material and not what the BSB had shown to the criminal standard that the appellant had known in 2006 and 2007.

144. Further, it is contended, that the Tribunal overlooked other evidence in particular that neither Miss Hancox, the appellant's junior, nor the CPS contradicted or questioned the advice and views which the appellant was expressing in consultation. In the civil proceedings the CPS did not seek to blame the appellant for non-disclosure nor did it seek any contribution from him towards the damages later paid to Conrad Jones.

#### *Discussion*

145. In paras 71 – 80 above we have addressed the issue of what the appellant knew based upon the material available to him. As previously stated, the appellant was leading counsel, he led the prosecution team. It was his advice which was specifically sought in the 30 November 2006 instructions to counsel. Whether others did or did not agree with the appellant's view cannot detract from the decision which he made as the leader of the prosecution team.

#### **Ground 7: The Tribunal's interpretation of para 301(1)(a)(ii) of the Code of Conduct for the purpose of determining charge 2**

146. The eighth edition of the Code of Conduct of the Bar of England and Wales (applicable at the material time) provides at para 301(a):

“A barrister...must not:

(a) engage in conduct whether in pursuit of his profession or otherwise which is:

(i) dishonest or otherwise discreditable to a barrister;

(ii) prejudicial to the administration of justice; or

(iii) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.”

Charge 2 was brought under para 301(a)(ii), alleging that the appellant had engaged in conduct that was prejudicial to the administration of justice.

147. Mr McPherson submitted that para 301(a) sets out a “waterfall” of misconduct that a barrister must not commit. The top of the waterfall is “dishonest or otherwise discreditable” conduct which can only be intentional or (in the case of discreditable conduct) reckless. At the bottom of the waterfall is conduct “likely” to diminish public confidence. The test of likelihood is an objective one, importing strict liability. At a point between proof of dishonesty and conduct to which strict liability attaches is conduct that is “prejudicial to the administration of justice.” This language makes no reference to likelihood and so imports the need for mens rea (whether intention or recklessness). There was no evidence before the Tribunal to suggest that the appellant had withheld relevant material from the defence or from the court either intentionally or recklessly. The BSB had not proved any form of mens rea to the criminal standard or at all.

148. In support of his submissions, Mr McPherson referred to the Solicitors Regulation Authority (“SRA”) Guidance on the equivalent provision of the SRA Code of Conduct for Solicitors which refers to the duty of solicitors to uphold the proper administration of justice. The SRA Guidance gives examples of the sort of conduct that would breach that duty, such as misleading the court, or knowingly or recklessly allowing the court to be misled.
149. The examples in the SRA Guidance cannot, however, be exhaustive. The Guidance does not say in terms that it applies only to intentional or reckless conduct. It is not binding on this court and was not binding on the Tribunal. Any failure by the Tribunal to consider the SRA Guidance was immaterial because there was no duty to apply it.
150. The same reasoning applies to those passages of the more recent BSB Handbook to which Mr McPherson referred us and which have replaced the provisions of the older Code of Conduct. Under the provisions of the Handbook, barristers must observe their duty to the court in the administration of justice (Core Duty 1) and they owe a duty to the court to act with independence in the interests of justice (rule C3). As part of the interests of justice, barristers must not knowingly or recklessly mislead the court or attempt to mislead the court (rule C3(1)). While this part of the Handbook refers to knowledge and recklessness, it is not our task to map the Handbook’s rules onto the Code of Conduct. We agree with Mr Campbell that the later provisions of the Handbook are not a reliable or appropriate aid to construction of the Code.
151. Mr McPherson relied on the decision of the Solicitors Disciplinary Tribunal in *SRA v Ip* (Case No 11615-2017, 4 October 2017, unreported) as containing examples of conduct prejudicial to the administration of justice expressed in terms of intentional or reckless acts. The case related to a solicitor’s failure to give sufficient consideration to the merits of his client’s claims in immigration law and his encouragement to clients to make applications to the court without analysing whether this was appropriate (*Ip*, para 144; see also para 163 which is in similar terms). We do not regard the passages to which we were referred as assisting us in the interpretation of charge 2. The passages do not set out any points of law or principle but amount to an analysis of the facts of the case before the SRA. The facts of other cases cannot be decisive in the task of interpreting the language of the charges that the appellant faced.
152. Mr McPherson drew our attention to Lord Hoffmann’s observation in *Arthur JS Hall & Co v Simons* [2002] 1 A.C. 615, 686E-F that the possibility of a claim in negligence was traditionally regarded as favouring immunity from liability in the conduct of litigation because a claim might inhibit the lawyer from acting in accordance with his or her overriding duty to the court. Any such inhibition would be prejudicial to the administration of justice. We do not see the relevance of Lord Hoffmann’s remarks to any of the issues in the present case.
153. More generally, we do not accept that the three categories of misconduct in para 301(a) form a hierarchy of the sort that Mr McPherson’s waterfall metaphor would suggest. The three elements of para 301(a) do not represent a decreasing scale of seriousness. They do not represent some unstated scale relating to the state of mind of the person committing the misconduct. They encapsulate three related but different public interests which underpin the rule of law: the integrity of the Bar, the administration of justice, and public confidence in the justice system. We do not accept that only intentional or reckless conduct is capable of harming these important public interests.



154. Mr McPherson was ultimately forced to accept that making a mistake may - in some contexts - give rise to “prejudice to the administration of justice.” He was right to make that concession. We accept that unintentional errors that are minor, or that are subsequently corrected, may be more difficult to cast as prejudicial to the administration of justice. That is a far cry from the failure of prosecuting counsel to draw exculpatory material to the attention of the defence and to the attention of the Crown Court in proceedings where a person’s liberty is at stake.
155. The appellant’s view that the Court of Appeal was wrong not to order a retrial (which may have secured a conviction even after proper disclosure) is irrelevant and would not have vindicated the appellant. In our judgment this attitude displays some lack of insight into the seriousness of the misconduct with which the Tribunal was concerned.
156. As the Court of Appeal made plain, the failure in the present case related to a central issue in the prosecution case and to a key element of the defence raised to a serious criminal charge (para 35). Against that background, the Tribunal was entitled to conclude that the appellant’s conduct was prejudicial to the administration of justice.

**Ground 8: The Tribunal’s failure to consider whether the 31 July 2007 intervention made out the Particulars of Offence for charge 5**

*The parties’ submissions*

157. Mr McPherson submitted that the Tribunal was wrong to conclude that the appellant’s conduct satisfied either of the limbs of the Particulars of Offence for charge 5. He had neither stated to the court in the 2007 trial that a meeting between Conrad Jones and MV could have taken place in Nottingham on 2 June 2006 between 1:30pm and 3:00pm; nor had he refused to concede that such a meeting could not have taken place at that time. In the impugned intervention on 31 July 2007, the appellant had done no more than advance the narrow proposition that the prosecution did not accept that a particular phone could not have made a return journey to Nottingham within an approximately 90-minute timeframe.
158. Mr Campbell submitted that the Tribunal was entitled to conclude that the appellant had refused to concede that a second meeting could not have taken place between 1:30pm and 3:00pm in Nottingham. By focusing in his submissions on what the appellant had said to the judge about the location of the 991 phone, Mr McPherson had adopted an unrealistically narrow interpretation of the appellant’s intervention and the reason behind the intervention. The point of the intervention was that the appellant did not want to concede that there had been no second meeting on that date within that timeframe and wanted the possibility of a meeting at that time to be left open to the jury. However, he ought to have known that a meeting could not have taken place between Conrad Jones and MV between 1:30pm and 3:00pm because Conrad Jones was in Coventry until 2:25pm.

*Discussion*

159. The appellant’s intervention came part-way through defence counsel’s cross-examination of MV. During that part of the cross-examination, the defence were seeking to establish that MV’s 991 phone could not plausibly have travelled from Burton-on-Trent to Nottingham in the relevant timeframe for a meeting with Conrad

Jones on 2 June 2006. After asking MV a series of questions about the use of the phone by detailed reference to the available cell site evidence, defence counsel put the following proposition to MV:

“Not time, on any showing, I suggest, for your phone, if it was in your possession, to have gone to Nottingham, had a fifteen to twenty minute meeting and returned, assuming that you got the train immediately going to and coming back from Nottingham.”

160. In her response, MV agreed with defence counsel’s proposition. The judge then raised a difficulty with the composition of the jury bundle and the appellant said:

“In fairness to the witness, it ought to be sorted out, and perhaps I could mention a matter briefly to you as well. ”

161. The judge sent the jury out and the appellant informed the court that the prosecution were concerned about the line of cross-examination relating to the 991 phone:

“A moment or two ago my learned friend put a proposition to the witness in relation to [the phone with number ending] 991 that the witness might be thought to acknowledge. Even if she is actually acknowledging it because she understands it fully, which I beg to doubt, the fact is we don’t accept that it’s a valid proposition. The proposition concerns the following: a gap in time on 2nd June between just after half-past-one and just after three o’clock when 991 neither makes nor receives any call or message of any description. The proposition was that there wasn’t time then for 991 to travel to or from Nottingham. I don’t accept that that’s a valid proposition for a number of reasons. There’s absolutely no evidence about what the train times were on that given day, that I am aware of, and I think no means of checking it. Secondly, the cell site material in relation to the particular cell itself gives no indication of its coverage and the extent of its coverage, or where within the coverage radius that might have been, even if it was. And that is of course on the assumption that the phone was in the exclusive possession of Miss Vervoort that day, but that’s another matter altogether. I don’t want the witness to be thought to be acknowledging something which I would respectfully submit is frankly based upon highly doubtful supposition, and I think that ought to be made clear to her at some point.”

162. We pause there to note that the only conceivable reason for the defence questions about the 991 phone was that the location of the phone in Burton-on-Trent could assist the defence in establishing that there was no second meeting between Conrad Jones and MV. The appellant would have grasped the purpose of the questioning at the point when he took the initiative and decided to raise his concerns with the court.

163. Even if the matter were not clear when the appellant started his intervention, the judge proceeded to clarify the defence case:

“JUDGE ORME: Your case is that there was no second meeting full stop?”

MR. BENSON: Absolutely.”

164. The matter having been squarely raised by the defence with the court, the appellant plainly should have disclosed to the court that a meeting between Conrad Jones and MV could not possibly have taken place between 1:30pm and 3:00pm on 2 June because Conrad Jones was in Coventry until 2:25pm. Irrespective of the lack of documentary evidence about train times for MV’s travel, common sense ought to have prevailed. Any form of transport so rapid that it might convey Conrad Jones from Coventry to Nottingham for a meeting within the parameters that had spurred the appellant into intervening was illusory. We are in no doubt that the appellant ought to have conceded as much.
165. Mr McPherson emphasised that the appellant was not asked to make a concession such that it was inapt for charge 5 to state that he “refused” to concede. We do not agree. The appellant’s duty to assist the court in the administration of justice was not limited to points or questions put to him. He continued throughout the discussion with the judge to explain the prosecution case that there could have been a meeting between 1:30pm and 3:00pm on 2 June. We are satisfied that the Tribunal was entitled to conclude that he refused to make any concession.

**Ground 9: The Tribunal’s conclusion that the appellant “ought to have known” on 31 July 2007 the facts asserted in the Particulars of Offence for charge 5**

166. It is the appellant’s case that the Tribunal correctly rejected the BSB’s case that when the appellant spoke the words contained in charge 5 he had in fact known that “...the prosecution had in its possession surveillance material which showed Jones in Coventry on 2 June 2006 until 2:25pm and therefore, given that it is approximately 53 miles between Nottingham and Coventry, the [Nottingham station meeting] could not have taken place in Nottingham on 2 June 2006 between 1:30pm and 3pm”.
167. The Tribunal’s conclusion that the appellant “ought to have known” the relevant facts was reached not because it concluded that the appellant had once known such information but had forgotten the same but rather because the appellant “...ought to have had the surveillance material in mind because he clearly had a duty to review the decision not to disclose the Surveillance Material and to make PII application in respect of it”.
168. The appellant contends that this conclusion works only if the Tribunal had concluded that the appellant had not reached the final conclusion in/after December 2006 on the disclosability of the surveillance material, that the appellant had not in/after December 2006 made a final decision as to whether the PII application or admission should be made. The Tribunal did not make those factual findings.

*Discussion*

169. We do not accept the appellant’s contention. As we stated in para 80 above, the fact that the appellant had in mind to review the position regarding disclosure of the

surveillance material following the evidence of MV does not preclude a decision not to disclose the same in December 2006.

170. The appellant's case is that the need to review had "slipped his mind" or "slipped through the net". Accepting that position, we agree with the Tribunal's conclusion that on 31 July 2007 the appellant "ought to have known" the facts asserted in the Particulars of Offence. MV had given relevant evidence at trials one and two. Trial two followed closely upon the first trial which had commenced on 3 January, a matter of weeks after the 14 December 2006 conference. We have difficulty understanding how it was that this matter simply "slipped through the net". This material was directly relevant to a core aspect of MV's evidence namely when the alleged face to face meeting with Conrad Jones had taken place. As was observed by the Court of Appeal, it was also relevant to the credibility of MV on the issue of intimidation by Conrad Jones. Given the nature and relevance of the material, the appellant "ought to have known" the facts asserted in the Particulars of Offence in charge 5 and the Tribunal was correct so to find.
171. For the reasons given, the appeal in respect of the Tribunal's findings of the appellant's breaches of the Code of Conduct as set out in charges 2 and 5 is dismissed.

### **Ground 10: The appeal against sanction**

#### *The availability of suspension as a sanction*

172. We turn to the question of sanction. It was common ground that version 6 of the Bar Tribunals and Adjudication Service Sanctions Guidance was applicable. Under para 6.35 of that Guidance:

"A suspension is a public protection sanction that should only be imposed where there is ongoing risk to the public, which includes clients and/or professional colleagues..."

173. The Tribunal considered this passage with its reference to risk to the public but declined to apply it, imposing a 12-month suspension from practice on the different ground that a suspension was necessary to maintain public confidence in the profession.

#### *The parties' submissions*

174. Mr McPherson submitted that, on the plain wording of para 6.35, a suspension from practice may not be imposed unless a barrister presents an ongoing risk to the public. As there was no finding that the appellant posed such a risk, the Tribunal was wrong in principle to impose a period of suspension and should have imposed a fine as a lesser sanction. The fine could have been at the top end of the range (up to £5,000 for misconduct occurring before 31 March 2009: Sanctions Guidance, para 6.15). If a fine alone were insufficient, the Tribunal could have combined it with another sanction permitted under the Guidance, such as advice as to future conduct or a reprimand.
175. In support of this submission, Mr McPherson made three principal points. First, under the Sanctions Guidance, even serious misconduct is punishable by a fine. The Guidance expressly states, for example, that serious conduct that does not warrant a suspension to protect the public interest should be punished with a high level fine (para 6.16). Fines

are “designed to mark serious misconduct” in circumstances where there is no “ongoing risk to the public” (para 6.18). Even if the appellant was guilty of serious error, the gravity of his offending fell within the gravity contemplated by the imposition of a fine.

176. Secondly, para 6.35 of the Sanctions Guidance expressly states that a suspension is appropriate “only” where there is a risk to the public. Disbarment, on the other hand, may be imposed both in order to protect the public and also in order to maintain public confidence in the profession (Sanctions Guidance, para 6.37). The Tribunal ought to have respected that distinction.
177. Thirdly, the introduction of the sixth version of the Sanctions Guidance (which was, as we have said, the applicable version in this case) had marked a significant change of approach. Under the older fifth version, a suspension was regarded as appropriate both in cases where the barrister represented a risk to the public and in cases where the behaviour was so serious as to undermine public confidence in the profession. The Tribunal had ignored this significant change and had imposed a suspension on public confidence grounds as if it was applying the older guidance.
178. Mr Campbell accepted that it is curious that the Sanctions Guidance states that disbarment but not suspension may be imposed in cases of misconduct that undermines public confidence in the profession. Nevertheless, he submitted that the Sanctions Guidance is simply guidance and should not be interpreted with the rigour of a statute.
179. Mr Campbell submitted that the Sanctions Guidance needs to be read and considered as a whole. The Tribunal considered that para 6.35 should be read alongside (i) the purpose of imposing a sanction, which includes the maintenance of public confidence and trust in the profession; and (ii) the indicative sanctions set out in the Guidance in relation to misconduct affecting the administration of justice. The Tribunal was entitled to take such an approach. It would be irrational if a suspension (by contrast with disbarment) could only be imposed where there is a need to protect the public, whatever the impact of the misconduct had been on public confidence in the profession.
180. Mr Campbell submitted in the alternative that a tribunal is entitled to depart from the Sanctions Guidance. In this case, the Tribunal found that the impact on public confidence in the legal profession was “very real”, and that the misconduct led to a wrongful conviction and to Conrad Jones serving 6 years of a 12-year sentence. It was entitled to impose a suspension where there was a need to maintain public confidence in the profession but a sanction less than disbarment was appropriate.
181. Mr Campbell drew our attention to the Tribunal’s findings that the appellant showed a lack of remorse and a lack of insight into his past conduct, which suggested that a risk to the public remained. It was not necessary for the Tribunal to state the existence of this risk in terms.

### *The Sanctions Guidance*

182. The Sanctions Guidance sets out the various sanctions available for breaches of the Handbook and “gives broad indications of the circumstances where they might be appropriate to use” (section 6.1). The purpose of sanctions is set out in the Guidance and includes both the protection of the public and the maintenance of public confidence in the profession:

“2.2 The purposes of applying sanctions for professional misconduct are to:

- i. Protect the public and consumers of legal services.
- ii. Maintain public confidence and trust in the profession and the enforcement system.
- iii. Maintain and promote high standards of behaviour and performance at the Bar, and
- iv. Act as a deterrent to the individual barrister or regulated entity, as well as the wider profession, from engaging in the misconduct subject to sanction.

2.3 The purposes above are non-hierarchical and any or all may apply in a particular case. Sanctions under a regulatory enforcement regime should not be imposed to punish. It may be that the impact of a sanction will have a punitive effect, but panels must ensure that any sanctions are only imposed to meet the purposes listed above.”

183. The fundamental principle of sanctioning is that any sanctions imposed should be proportionate, weighing the interests of the public with those of the practitioner (para 2.4). Tribunals are not bound to impose a sanction in the manner indicated by the Guidance but may exercise their own discretion provided that an appropriate and proportionate outcome is achieved:

“1.4 It must be stressed the Guidance is just that, it is not intended to fetter panels’ discretion to impose sanctions that are appropriate and proportionate in the individual circumstances of a case. Panels must exercise their own judgement when deciding on the sanctions to impose and give reasons in all cases for doing so.”

184. The same passage stipulates that, if panels depart from the Guidance, it is essential that clear written reasons are given for the departure.

185. The general methodology for sanctioning consists of six steps set out at para 3.3 of the Guidance:

- “i. Determine the appropriate applicable Misconduct Group for the proved misconduct as set out in Part 2.
- ii. Determine the seriousness of the misconduct by reference to culpability and harm factors.
- iii. Determine the indicative sanction level for the proved misconduct.
- iv. Apply aggravating and mitigating factors.

v. Consider the totality principle and determine the final sanction(s); and

vi. Provide written reasons for the sanctioning decision.”

186. It is not disputed that the appropriate “Misconduct Group” was Group G which deals with misconduct affecting the administration of justice and covers breaches of barristers’ general duties to the courts including the failure to comply with disclosure obligations. The indicative sanctions for Group G have a range that goes from suspension of over 12 months to disbarment for an upper range offence (involving significant culpability and significant harm) to a fine for a lower range offence (involving low culpability and limited or no harm). The Guidance states that panels have discretion to impose sanctions outside the range where there are good reasons for doing so. Written reasons should be given for such a departure (Sanctions Guidance, Part 2, Section G).

187. In relation to the consideration of aggravating and mitigating factors, the Sanctions Guidance states:

“1.5 It should also be stressed that the factors to be considered when determining the appropriate sanctions in relation to culpability and harm and aggravating and mitigating factors (see Part 3, Annex 2), are not exhaustive. It would be impossible to list all factors that might be relevant in any individual case. Therefore, the absence of reference to a particular factor in this Guidance should not be taken as an indication that it cannot, or should not, be taken into account. Panels should use their judgement, and record in the written reasons all factors that have been considered when reaching the decision on sanction.”

188. These various passages from the Guidance show that individual Disciplinary Tribunals have substantial discretion in their assessment of the seriousness of misconduct and the appropriate sanction. The determination of sanction is a fact-based and context-specific process.

### *Discussion*

189. We agree with Mr Campbell that para 6.35 of the Sanctions Guidance is curious in that it appears to exclude a suspension for behaviour so serious as to undermine confidence in the profession. We are unable to discern any good reason for such an approach. We have been presented with no explanation for the distinction between disbarment and suspension in this regard.

190. We are not persuaded that – irrespective of a person’s culpability and the harm caused by acts of misconduct – a Disciplinary Tribunal is barred from imposing a suspension unless it states in terms that the barrister represents an ongoing risk to the public. Neither common sense nor principle dictates such an outcome.

191. In the present case, the Tribunal followed the six-step method set out in para 3.3 of the Sanctions Guidance. It reasonably concluded that the misconduct fell within the upper range of seriousness in Group G such that the indicative sanction started at a suspension

of over 12 months. It confronted para 6.35 and decided to depart from it. Given the flexibility of the Sanctions Guidance which is intended to be non-prescriptive, the Tribunal was entitled to adopt that approach. It was entitled to conclude that the interests of public confidence and trust in the profession justified a suspension in light of the seriousness of the appellant's misconduct. It gave proper and adequate written reasons for its decision and made no error of principle.

*Other arguments on sanction*

192. Mr McPherson made a number of supplemental points attacking the Tribunal's approach to culpability and harm. He submitted that the Tribunal should not have treated the misconduct as intentional or as amounting to a course of conduct. The imposition of a suspension failed to reflect that any failings by the appellant had been shared by others in the prosecution team. There was no justification for the Tribunal's finding that the appellant lacked remorse or that he lacked insight into what he had done. Mr McPherson submitted further that the Tribunal gave inadequate weight to the appellant's eminent public service at the Bar and to the fact that over 15 years had elapsed since the relevant events with no evidence that the appellant had since then done anything other than serve the profession with distinction. However, in our judgment, the Tribunal had all these points properly in mind and dealt with them adequately in its detailed decision on sanction, reaching conclusions that were open to it on the evidence which it had heard and read.
193. Mr McPherson submitted in writing that there was inconsistency between the respective sanctions imposed on charges 2 and 5. He did not give details of the inconsistency in his skeleton argument and did not develop this submission orally. It suffices to say that neither the 12-month period imposed on charge 2 nor the 3-month period imposed on charge 5 was excessive and there is no real point on disparity. The Tribunal had in mind the principle of totality when it ordered the suspensions to run concurrently. We see no error of approach.
194. Mr McPherson submitted that the sanctions on both charge 2 and charge 5 were manifestly excessive. This court on appeal carries out a review of the decision below and not a rehearing (CPR 52.21(1)). The Tribunal heard evidence and submissions from the parties over the course of many days. It was in the best position to assess the appellant's culpability and the harm caused by his misconduct. It was in the best position to weigh the aggravating and mitigating factors. It was in the best position to determine the appropriate and proportionate sanction.
195. No purpose would be served by repeating the Tribunal's assessment of the seriousness of the misconduct, the harm caused, and the appellant's lack of insight into his own actions – with which we agree. The Tribunal was entitled to conclude that these factors outweighed his highly exceptional character references, the passing of time and other undoubtedly strong mitigating factors. The sanction was neither excessive nor disproportionate. There are no grounds for this court to interfere. Accordingly the appeal against sanction is dismissed.
196. As nothing in the confidential bundle is anything other than consistent and supportive of our findings, there is no closed judgment.