Neutral Citation Number: [2019] EWHC 67 (Admin)

Case No: CO/2720/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/01/2019

Before :

THE RIGHT HONOURABLE LORD JUSTICE GREEN
THE HONOURABLE MRS JUSTICE CARR DBE

- -

Between :

ALEXIS MAITLAND-HUDSON	**Appellant**
- and -	
SOLICITORS REGULATION AUTHORITY	**Respondent**

- -
- -

Mr Jonathan Cohen QC (instructed by **Russell-Cooke LLP**) for the **Appellant**
Mr Mark Cunningham QC and Mr Edward Levey (instructed by **Bevan Brittan LLP**) for the **Respondent**

Hearing date: 27 November 2018

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Approved Judgment

Mrs Justice Carr:

Introduction

1. This is the privately-funded appeal of the Appellant, Alexis Maitland-Hudson, who is now aged 70 years, brought as of right pursuant to s. 49 of the Solicitors Act 1974. He was admitted as a solicitor in England and Wales in 1975 and to the Paris Bar in 1988. He latterly practised as a senior partner at Maitland Hudson and Co LLP and as a sole practitioner avocat at Cabinet Maitland Hudson.

2. The Appellant appeals against findings of misconduct and dishonesty made against him by a constitution ("the Tribunal") of the Solicitors Disciplinary Tribunal ("the SDT") on 20 April 2018 (with reasons set out in a written judgment dated 20 June 2018). Pursuant to those findings, on 2 May 2018 the Appellant was struck off the Roll of Solicitors and ordered to pay the SRA's costs, including £300,000 by way of interim payment. The Tribunal found the Appellant to have been guilty of misconduct "at the highest level", characterised as "deliberate, calculated and repeated… over a number of years". It was aggravated by the Appellant's dishonesty and attempts to defend his conduct.

3. The appeal is based on grounds of alleged procedural unfairness, specifically that the Appellant, a litigant in person, was substantially impaired in his ability to defend himself, to the extent that he admitted himself to hospital. Despite the fact that consultant psychiatrist experts on both sides found that the Appellant was unable to represent himself, the Tribunal refused to dismiss the proceedings on the basis of "incurable unfairness" or even to stay or adjourn their remainder.

4. Procedural issues of some general importance are raised, in particular the extent to which, if at all, a court's personal assessment of a litigant's ability to participate effectively based on his/her performance in the proceedings may be relevant.

5. The court has had the benefit of thorough written and oral submissions from Mr Cohen QC for the Appellant and Mr Cunningham QC and Mr Levey for the Respondent.

Background facts

6. The factual allegations are not directly in issue on this appeal. The Appellant submits that conviction was not surprising, given the procedural unfairness that is alleged to have preceded it. However, an understanding of the nature of the allegations is relevant to considerations of fairness and in particular the question of whether or not the Appellant was able to participate effectively in them. The Appellant points to the fact that they were detailed, complex and related to historic events in 2010, 2011 and 2012.

7. The allegations were set out in a statement pursuant to Rule 5(2) of the Solicitors (Disciplinary Proceedings) Rules 2007 ("the Rules") ("the Rule 5 statement) and a statement of additional allegations pursuant to Rule 7 of the Rules ("the Rule 7 statement"). The Rule 5 statement concerned the dealings between the Appellant and his former client, Mr Stephen Cosser ("the Cosser allegations"). The Appellant acted for Mr Cosser in relation to a series of loans made by Elite Partners Limited ("EPL") to Mr Cosser and/or two companies owned by Mr Cosser (known as Sungate and Tranfeld) between 12 April 2010 and 26 January 2011. The Tribunal found the

Appellant to have a "fundamental conflict [of interest]" in relation to those loans because, contrary to the Appellant's case, the Appellant had a beneficial interest in EPL and was actively involved in its management.

8. In May 2011, when the loans were not repaid as Mr Cosser had promised they would be, a dispute arose between Mr Cosser and the Appellant. The Appellant instructed a different firm of solicitors, Grosvenor Law, on behalf of EPL to take aggressive action against Mr Cosser even though, at least initially, Mr Cosser was still his client. Specifically, the Appellant instructed Grosvenor Law to enforce a judgment of the Tribunal de Grande Instance de Nanterre dated 8 October 2009, a judgment for in excess of €2.7 million ("the Nanterre Judgment"). The judgment debtor in respect of the Nanterre Judgment was the Appellant and the judgment creditor was Sungate (one of Mr Cosser's companies).

9. Sungate was the legal owner of one of Mr Cosser's properties in London situated at 115 Eaton Square, Belgravia. The Nanterre Judgment had been obtained in the context of Mr Cosser's divorce proceedings. Its purpose was to demonstrate that Mr Cosser had significant debts and was not as wealthy as had been suggested in the divorce proceedings.

10. As part of the loans made by EPL to Mr Cosser and his companies: (a) EPL had taken an assignment of the Nanterre Judgment and (b) Mr Cosser had transferred his beneficial interest in Sungate to EPL, with the result that - when Mr Cosser defaulted on his repayment obligations under the EPL loans - EPL was able to enforce the Nanterre Judgment against him.

11. Accordingly, the Appellant instructed Grosvenor Law to issue a writ of *fieri facias* against Mr Cosser and to instruct bailiffs to attend Mr Cosser's property at 115 Eaton Square to take walking possession of his goods. In the event, the bailiffs were stood down upon part payment of the loan by Mr Cosser.

12. Ultimately a settlement was reached between (amongst others) Mr Cosser, EPL and the Appellant. That settlement was described by the Tribunal as "totally unacceptable" and the circumstances in which it was entered into were "outrageous". It included a "particularly egregious" term whereby Mr Cosser agreed to pay the sum of £500,000 to the Appellant, purportedly as damages for an allegedly defamatory comment made by one of Mr Cosser's "associates" about the Appellant. The allegedly defamatory remark was made orally during the course of a single conversation in Sierra Leone.

13. The Tribunal found (to the criminal standard) that the Appellant had acted when he had a conflict of interest, had used confidential information about Mr Cosser after Mr Cosser had ceased to be his client, had taken unfair advantage of Mr Cosser, and that his conduct was dishonest.

14. The allegations in the Rule 7 statement ("the Kagalovsky allegations") arose out of the Appellant's involvement in an unlawful scheme carried out by his former client, Mr Kagalovsky, a Russian businessman. Mr Kagalovsky had been in business with another Russian businessman, Mr Gusinski. Through their respective companies, Mr Kagalovsky and Mr Gusinski had held equal interests in a partnership which owned a Ukrainian television network ("TVi") worth tens of millions of dollars. By his unlawful conduct, Mr Kagalovsky deprived Mr Gusinski of his capital investment in the

partnership. This was achieved by a scheme whereby 99% of the ownership interests in TVi were transferred from the partnership to Mr Kagalovsky's own trusts. The scheme also involved the transfer of trademarks owned by TVi to entities owned and controlled by Mr Kagalovsky.

15. Mr Gusinski sued Mr Kagalovsky in the Supreme Court of New York. A 24-day trial took place between December 2011 and April 2012 before the Honourable Justice Ramos. 13 witnesses testified, including Mr Kagalovsky and Mr Gusinski, and the Court received depositions from ten additional witnesses, including one from the Appellant. In a judgment dated 10 August 2012 ("the Ramos Judgment"), Judge Ramos found that Mr Kagalovsky had with the assistance from (amongst others) the Appellant, carried out the unlawful scheme. Mr Kagalovsky was ordered to pay damages in the sum of US$50 million, plus interest. Judge Ramos made an express finding that the Appellant had been "acting in multiple capacities" and that the Appellant "had helped plan and cause the dilution and the trademarks transfer".

16. The allegations against the Appellant before the Tribunal were that the Appellant had provided advice and/or assistance to Mr Kagalovsky in relation to the unlawful scheme and that the Appellant had assisted Mr Kagalovsky in his efforts to conceal what he had done from Mr Gusinski and that this conduct was dishonest. The allegations (with one exception) were found proved by the Tribunal to the criminal standard of proof.

The course of the proceedings before the Tribunal

17. On 27 August 2014 a duly authorised officer of the Respondent, the Solicitors Regulation Authority ("the SRA"), commenced an investigation into the Appellant's conduct, leading to the production of a Forensic Investigation Report dated 21 December 2015. The SRA then commenced disciplinary proceedings on 30 November 2016. The Rule 5 Statement was made on the same day, with the Rule 7 Statement following on 20 March 2017.

18. In June 2017 the Appellant, represented by Mr Cohen and junior counsel, applied to strike out the Kagalovsky allegations on the basis that the Ramos Judgment was inadmissible and in any event that its admission would be "deeply unfair". They were also said to be an abuse of process. Prosecutorial bad faith was alleged. The application was dismissed following a hearing on 26 and 27 July for reasons set out by the Tribunal in writing on 6 September 2017. The Appellant's statement of costs for the application hearing amounted to just over £68,000 with some £44,000 going towards leading counsel's fees. The Appellant appealed that decision, and sought leave to judicially review it. Leave to bring judicial review proceedings was refused and the appeal dismissed by Ouseley J on 19 December 2017.

19. The full hearing fixed to commence on 15 January 2018 therefore remained effective. Prior to the hearing the Appellant had informed the Tribunal that he suffered from anxiety and panic attacks and introduced letters from his GP, Dr MacGreevy dated 13 December 2017 and 2 January 2018. These recorded that the Appellant was on medication for depression. Dr MacGreevy suggested that the Appellant be allowed to address the Tribunal sitting down, with frequent breaks, and that sitting hours should be restricted to 10am to 4pm with a lunch break. The Tribunal complied with these suggestions, save for day 10 when the evidence did not finish until 5.30pm (in order to accommodate the witness being called whose evidence had to complete that day). The

afternoon session that day started late and the Appellant was offered as many breaks as he needed.

20. On 14 January 2018, the day before the hearing, the Appellant dispensed with the services of his legal team for reasons unexplained and as to which I do not speculate.

21. At the outset of the hearing, the Appellant, now in person, made a number of different preliminary procedural applications including: to exclude the majority of documents relating to the Cosser allegations on the basis that they were privileged under French law; to exclude 2 witness statements served by the SRA; for disclosure of the SRA's instructions to junior counsel; for permission to rely on additional documents and evidence; to exclude a member of the public known as "PD" from the hearing room.

22. The Tribunal having ruled on these applications, the SRA opened its case and called 3 witnesses, each of whom was cross-examined by the Appellant.

23. On 19 January 2018 the Appellant provided the Tribunal with another letter from Dr MacGreevy in which Dr MacGreevy stated that he had seen the Appellant the previous day; his mental state was poor and "negatively affecting his ability to perform in court". He was due to see Dr Capstick the next week. On 24 January 2018 the Appellant provided the Tribunal with an email of 23 January 2018 from Dr Capstick in which she stated that the Appellant was suffering from depression and anxiety which "impact his performance". She had suggested that he might wish to consider inpatient treatment but he had declined.

The application of 24 January 2018

24. At the conclusion of the SRA's case, on 24 January 2018 and day 8 of the hearing, the Appellant made an application to dismiss the proceedings on the ground of ill-health which is said to have encompassed the possibility of an adjournment as an alternative. He also applied to strike out the Cosser allegations on the basis that his rights under Article 6 of the European Convention of Human Rights ("Article 6") had been infringed because he was unable to rely on relevant French documents because of client confidentiality. The Tribunal received both written and oral submissions from the Appellant. It rejected the applications. It also dismissed the Appellant's further submission of "no case to answer".

25. The hearing proceeded accordingly. The Appellant opened his defence with a speech lasting over 3 hours. He then gave evidence. He was cross-examined at length. Mr Cosser's evidence on behalf of the Appellant was interposed on Friday 26 January 2018 to meet his availability. The SRA submits that Mr Cosser's oral evidence contradicted his own witness statement and a central plank of the Appellant's case, namely that Mr Cosser had consented to enforcement of the Nanterre judgment. Mr Cosser's evidence demonstrated that the Appellant had not been telling the truth on this important issue.

26. On Monday 28 January 2018 the appellant sought (unsuccessfully) to adduce email correspondence relating to the preparation of Mr Cosser's witness statement. He then continued his oral evidence which completed on 30 January 2018.

27. On 31 January 2018 the Appellant did not attend, having admitted himself to a private psychiatric hospital the previous evening for depression. The Tribunal adjourned the

hearing to 26 February 2018, directing that if either party wished to serve medical evidence, he/it should do so 7 days before the resumption of proceedings.

The application of 26 February 2018

28. On 26 February 2018 the Appellant did not attend but Mr Cadman of Russell-Cooke LLP ("Russell-Cooke") represented him pro bono. Mr Cadman applied for an adjournment, relying on 2 letters from Dr Bourke, the Appellant's treating consultant psychiatrist, dated 6 and 14 February 2018. The SRA relied on a report from Dr Oyebode, also a consultant psychiatrist, dated 26 February 2018. It indicated in advance of the hearing that it wished to cross-examine Dr Bourke. Russell-Cooke indicated that the Appellant could not afford to pay for Dr Bourke's attendance (and the SRA declined to offer to pay), and then that Dr Bourke was not available on 26 February 2018.

29. The thrust of the medical evidence at that stage was that the Appellant was unfit to represent himself through depression, but was able to instruct counsel. Mr Cadman submitted that the Appellant did not have the funds to do so. Without prejudice to its position that the Appellant had the ability to fund lawyers if he wished to, the SRA offered to pay up to £7,500 plus VAT in order to fund preparation of the Appellant's closing submissions. This was, so the SRA informed the court, an unprecedented step on its part.

30. The Tribunal adjourned proceedings for 4 weeks to 3 April 2018 in order to give the Appellant the opportunity to secure representation. The Appellant was also directed that he could make his closing submissions in writing if he wished.

31. On 3 April 2018 the Appellant again did not attend and was represented by Mr Cadman pro bono. Mr Cadman applied for an adjournment or for a stay to enable the Appellant's health to improve and/or to allow him to obtain funding to instruct counsel for the remainder of the proceedings. The Appellant had provided 2 witness statements for this hearing, dated 27 and 29 March 2018. In his statement of 27 March he stated that, despite his depression, he was still continuing to work as a French avocat in Paris. He did not have any money of his own and was unable to borrow from friends or family. In his statement he referred to being unable to pay £12,500 plus VAT (i.e. the sum, together with the £7,500 offered by the SRA necessary to meet junior counsel's apparently quoted fee of £20,000).

32. The SRA opposed the application for an indefinite adjournment or stay. It submitted that the Appellant's evidence about his financial means should be treated with great caution. The evidence before the Tribunal demonstrated that the Appellant had substantial assets and/or ready access to large sums of money.

33. The Tribunal granted another adjournment to 16 April 2018, albeit with hesitation, indicating that this was the Appellant's final opportunity to instruct counsel to assist with closing submissions.

The applications of 16 April 2018

34. On 16 April 2018 the Appellant was represented by leading counsel but only for the purpose of making an application to dismiss the proceedings as an abuse of process

because the Appellant had not been able to effectively participate at trial or to adjourn/stay the proceedings. Leading counsel had prepared a detailed skeleton argument in support. The Appellant had provided a witness statement dated 13 April 2018 stating that his wife had provided him with the funds to instruct leading counsel for the limited purpose of that hearing but was not willing or able to fund the additional and more expensive work need to complete the trial.

35. The Tribunal rejected the Appellant's applications. The proceedings continued and closed on 17 April 2018. Thereafter the Tribunal deliberated, announcing its findings in open court on 20 April 2018. A sanctions hearing took place on 2 May 2018.

The written judgment of 20 May 2018

36. The written judgment is a lengthy, comprehensive and impressive document. It runs to 123 pages with a full 37 pages devoted to preliminary matters including all of the applications made during the course of the hearing and the subject of this appeal. I identify below each of the Appellant's applications in particular so as to demonstrate the level of his engagement throughout.

37. Having set out the individual allegations, the Tribunal stated that it had considered all the documents including the evidence, transcripts and written submissions, save where ruled inadmissible.

38. The material section for present purposes then followed under the heading: "Preliminary Matters". The Tribunal first addressed "Reasonable adjustments/the [Appellant's health]". It recorded 2 letters from Dr MacGreevy, the Respondent's GP, dated 13 December 2017 and 2 January 2018, together with a French (translated) medical certificate dated 5 January 2018. The Tribunal recorded that the Appellant was under treatment and that both his mental and physical well-being needed to be taken into account in periods of difficulty and stress such as legal proceedings. It set out Dr MacGreevy's suggestion that the Appellant be not asked to speak for longer than 90 minutes without a break and allowed to speak sitting down rather than standing. He hoped that sitting hours would not exceed 10am to 4pm with a break for lunch. These measures "should ensure that [his] patient is able to comfortabl[y] manage himself during the process". The Tribunal recorded that it had accommodated these suggestions, adding that it was made clear to the Appellant that he should indicate that he needed any additional breaks and that the Tribunal itself had of its own volition instigated breaks when the Appellant appeared tired or distressed. It explained in detail why on one occasion the Tribunal had had to sit late, due to the very poor health of the witness who was unable to attend on any other day. The Appellant had been offered as many breaks as he required and proceedings stopped when he felt unable to continue.

39. The judgment went on to deal with the numerous interlocutory applications made during the course of the final hearing, in broadly chronological order: the Appellant's applications in relation to "Disputed French Documents" and the SRA's application for the Tribunal to consider these documents in order to determine admissibility; the Appellant's application for disclosure of legal advice to the SRA on French law; the Appellant's application to exclude certain replies from Grosvenor Law and the SRA's application to adduce further witness statements; the Appellant's application for disclosure of the SRA's instruction to counsel in relation to the Kagalovsky allegations; the Appellant's application to adduce documents relating to High Court proceedings

between the Appellant and the SRA; the Appellant's application to adduce additional documents; the Appellant's application to adduce the evidence of Andriy Porayko; the Appellant's application to have a member of the public excluded from the hearing; the Appellant's application to sit in private.

40. The Tribunal then recorded that on the morning of the fifth day, 19 January 2018, the Appellant became distressed. The Tribunal rose. The Appellant indicated that he was awaiting a letter from Dr MacGreevy and the Tribunal did not resume until that letter was received. It was dated 19 January 2018 and stated that Dr MacGreevy had seen the Appellant on the previous day. His mental state was poor and negatively affecting his ability to perform in court. The presence of "PD" in the public gallery was upsetting and disturbing to the Appellant. As a doctor he supported the request for the proceedings to be carried out in private. The Tribunal noted that the letter did not say that Respondent was unfit to participate in proceedings, in private or otherwise. The Tribunal resumed sitting. PD did not return to the public gallery and the Appellant told the Tribunal that he did not want the case hanging over him and would "have to soldier on". He could continue, though would renew his application for a private hearing if PD returned.

41. The Tribunal next addressed the SRA's application to adduce late evidence before turning to the Appellant's submissions under Article 6 at the close of the SRA's case on day 8, 24 January 2018. The Appellant submitted that the hearing should be discontinued on 2 grounds: ill health and inability to rely on privileged documents. On the first ground, the Appellant relied on Dr MacGreevy's letter of 19 January 2018 and an email from Dr Capstick, a psychiatrist, dated 23 January 2018. Dr Capstick had seen the Appellant the previous day. She set out her observations and made recommendations as to medication. She also stated: "I suggested he might wish to consider inpatient treatment – which he has declined". The Tribunal recorded the Appellant's submission that Dr Capstick had concluded that his ability to function was materially impaired, aggravated by the fact that he was acting in person. Any continuation of the trial would in and of itself be unfair on him.

42. The Tribunal rejected both grounds, having first set out in full the terms of Article 6. In relation to ill-health, the Tribunal recorded that it was not a new issue. It reminded itself of the material before the start of the hearing and the material from Dr MacGreevy and Dr Capstick. Dr Capstick's email concluded that his symptoms impacted his performance but did not state that he was unable to attend the hearing or unable to present his own case or participate in the proceedings. She had not said that in-patient treatment was required or even strongly encouraged. It would have been open to her to admit him to hospital if she had felt it necessary, irrespective of his wishes. Equally, Dr MacGreevy had not stated that he was unfit to participate in proceedings. His earlier letter of 2 January 2018 had suggested ways of adapting the proceedings to ensure that he could manage the process. The Tribunal had implemented those suggestions. It went on as follows:

> "The Tribunal noted that the Respondent had made coherent and detailed submissions on complex areas of law both in writing and orally, including this one. He had made a number of applications to adduce/exclude evidence. He had cross-examined Mr Baker at some length and had also cross-examined Mr Morrison and Mr Tracey. There was nothing in the medical evidence to suggest

> that he was unable to follow proceedings, represent himself or put his case forward in cross-examination providing the appropriate measures remained in place."

43. Although the Appellant had not sought an adjournment, the Tribunal said that it had nevertheless considered whether one was justified, concluding that there was no basis for this on the medical evidence presented at that stage. The Tribunal would keep the matter under review and would revisit the issues were fresh medical evidence to be submitted. The Tribunal recognised that the proceedings were stressful for the Appellant, particularly as he was a litigant in person:

> "…However, this was not uncommon and there was a public interest in matters such as these being heard and the Tribunal had put measures in place based on the recommendations of the [Appellant's] GP. The Tribunal was not satisfied that there were any grounds for adjourning or discontinuing the proceedings on the grounds of the [Appellant's] health."

44. The Tribunal then addressed at length the Appellant's submission of no case to answer made following his unsuccessful application under Article 6, followed by various applications by the Appellant to adduce certain correspondence and his applications to call a Mr Archer, Alice Mahon and Mr Jeremy Davidson.

45. By this stage the Tribunal had reached day 13, <u>31 January 2018</u>, which was the first occasion when the Appellant did not attend. A number of emails had been received indicating that he had been admitted to hospital. The Tribunal considered the Solicitors Disciplinary Tribunal Policy/Practice Note on Adjournments (4 October 2002) and the criteria for exercising the discretion to proceed in the absence of a respondent as set out in *R v Hayward, Jones and Purvis* [2001] QB 862 at [22(5)]:

> "In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular:
>
> (i) the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear;…
>
> (iii) the likely length of such an adjournment;
>
> (iv) whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation;…
>
> (vi) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him;

…

(ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates;

(x) the effect of delay on the memories of the witnesses;…"

It also noted the need for fairness to the regulator as well as the respondent: see *GMC v Adeogba* [2016] EWCA Civ 162 at [19] and [23].

46. The Tribunal noted that the Appellant had attended every previous day of the hearing and had participated fully. He had expressly told the Tribunal that he did not wish an adjournment. Although there was no medical evidence on this occasion, there was a clear indication that his absence was not voluntary. The criteria for proceeding in his absence were not met, but momentum should not be lost. The case was of some age. There was also a public interest in the matter being resolved in a timely manner. The matter would be adjourned part-heard and re-listed on 26 February 2018. If either party intended to rely on medical evidence, that should be served 7 days before the resumption of the hearing.

47. Moving on to <u>26 February 2018</u>, the Tribunal recorded the Appellant's non-attendance and that of Mr Cadman, who first applied for his application for an adjournment to be heard in private. The Tribunal set out its reasons for rejecting that and then set out the submissions on both sides on the application to adjourn.

48. Mr Cadman referred to 2 letters from Dr Bourke dated 14 and 23 February 2018. The letters concluded that the Appellant was fit to instruct counsel but did not have the ability to represent himself as a litigant in person. Dr Bourke had concluded that the Tribunal should not proceed at this stage but could not give a timeframe as to when it might be possible to do so. The Appellant was not fit to attend on 26 February 2018. Mr Cadman submitted that the Tribunal could not fairly proceed. The Appellant had a right to participate. Dr Oyebode, the expert instructed by the SRA, had also concluded that the Appellant was not fit to represent himself and that he was fit to instruct counsel. He, however, thought that the Appellant was fit to attend and could make written submissions with assistance. Mr Cadman's further submission was recorded thus:

> "The [Appellant] did not have the ability to pay for representation. He owed money to lawyers already and although he had made reference during the course of the hearing to instructing Counsel, this was not an option."

Mr Cadman submitted that in the light of the Appellant's health and inability to participate as a litigant in person it would be a breach of his Article 6 rights to proceed.

49. The Tribunal gave full reasons for its decision to adjourn for a limited period. It noted 2 factual errors of concern in Dr Bourke's letter of 23 February 2018: first that the Tribunal had sent the Appellant emails since 14 February which were responsible for a deterioration in his health. No emails had been sent. Secondly, Dr Bourke had said that the Tribunal had insisted upon the Appellant's attendance which, again, "was simply not the case".

50. The Tribunal was not critical of the Appellant for not attending in the light of Dr Bourke's conclusion but was, however, not satisfied that he was not fit to attend (in line with Dr Oyebode's view). The Tribunal noted that Dr Bourke had not been furnished with the transcripts of the hearing and it was unclear if he had been aware of the stage reached in the proceedings. Unlike Dr Oyebode, he had not held himself out as an independent expert. Dr Oyebode had seen the Appellant more recently and appeared to be more familiar with the proceedings, have seen the transcripts and been told of the stage reached.

51. The Tribunal noted that the Appellant was not fit to represent himself at that stage but was fit to instruct counsel. There was one potential witness left and then closing submissions were to be made. The Tribunal decided that it would not be in the interest of justice to proceed with the hearing immediately. It was appropriate to give the Appellant a reasonable opportunity to secure representation if he wished to do so. The case could not be allowed to drift indefinitely, in everyone's interests. 4 weeks was an ample period of time to enable the Appellant to instruct lawyers. The matter was to be adjourned part-heard to 3 April 2018. If the Appellant wished his closing submissions to be made in writing, this would be permitted, with the same weight being accorded to them as to oral submissions.

52. The Tribunal moved on to the hearing on <u>3 April 2018</u>, again attended by Mr Cadman for the Appellant. Mr Cadman applied for an adjournment or stay of the proceedings. There was a further letter from Dr Bourke of 28 March 2018 and a report from Dr Symeon, consultant psychiatrist, of 31 March 2018. Mr Cadman applied for an adjournment or stay to enable the Appellant's health to improve and/or to allow him to obtain funding to instruct counsel for the remainder of the proceedings. He invited the SRA to increase its offer of funding. The instruction of junior counsel alone would cost £20,000 for a brief fee plus refreshers at £2,500. The Appellant remained unfit to act as a litigant in person and this included preparing his own written submissions, a matter on which all 3 psychiatrists who had examined him agreed. He was fit to instruct lawyers. In this regard, the Appellant had no money to pay for counsel and already owed £62,000 to lawyers. An adjournment would enable the Appellant to earn the money required to instruct counsel to complete the case.

53. The Tribunal concluded that it was in the interests of justice to proceed with the matter and the application for a stay was refused. It seriously considered proceeding immediately but "out of an abundance of fairness" to the Appellant agreed to adjourn the matter to 16 April 2018 on which day it would proceed, with or without closing submissions. The position remained largely unaltered from 26 February 2018. The Appellant remained fit to instruct counsel but unfit to represent himself.

54. The Tribunal considered the Appellant's witness statement of 27 March 2018 in which he stated that he tried to continue working in Paris as a French avocat. It was not apparent, commented the Tribunal, that either Dr Bourke or Dr Symeon had been aware that the Appellant was still working and practising as an avocat in Paris at the time of their reports. Neither of these psychiatrists had been made available for cross-examination, despite counsel for the SRA having made it clear on 26 February that the SRA would have wanted to cross-examine Dr Bourke. It was clear from the material before the Tribunal that the Appellant was well enough to instruct counsel for the purpose of making oral and/or written closing submissions. Indeed, it was submitted

that one basis for adjournment was to allow the Appellant time to earn the money that he argued he would need to fund representation. The Tribunal went on:

> "31.2.19 The Tribunal did not deem it appropriate to carry out an assessment of the [Appellant's] means or investigate how he may choose to fund Counsel. It further deemed it to be completely inappropriate to make a finding on the question of honesty at this stage. The [Appellant] was fully entitled to the presumption of innocence and the time for considering the evidence had not yet been reached.
>
> 31.2.20 The Tribunal was satisfied that, in terms of his health, the [Appellant] had the capacity to instruct Counsel and it noted that he was currently represented in separate civil proceedings. The Tribunal had given the [Appellant] five weeks in order to instruct Counsel if he wished to do so. He had not taken this opportunity and the Tribunal concluded that he had chosen not to make closing submissions. The Tribunal noted that the [Appellant] had made a detailed opening speech and had given extensive evidence. The Tribunal did not feel that the Respondent was unduly prejudiced by the absence of closing submissions in circumstances where he had chosen not to make any. The Tribunal would consider all of his evidence given both orally and in writing.
>
> 31.2.21 There was a public interest in the matters concluding and indeed it appeared to be in the [Appellant's] best interest for this to be achieved. Dr Symeon had stated "I envisage that true significant improvement in his mental state will only occur after his case concludes."

The Tribunal stated that adjourning to a case management hearing would not achieve any clear purpose since the Tribunal would most likely find itself in a similar position on the next occasion.

55. The Tribunal then set out the events of <u>16 April 2018</u> and the reasons for its decision to proceed with the hearing on that occasion. The Appellant was by now once again represented by Mr Cohen, who had prepared a detailed and full 26-page skeleton argument in support of 3 applications: to dismiss the case against the Appellant on the basis that the proceedings to date had breached his Article 6 and common law rights; in the alternative, for a general adjournment; in the further alternative, for an adjournment to allow the Appellant the opportunity to seek a judicial review of the Tribunal's decisions. Counsel was expressly instructed for the limited purpose of those applications and not for any wider purpose.

56. The Tribunal recorded the submissions on behalf of the Appellant, many of which have been repeated on this appeal, including references to the Equal Treatment Bench Book (February 2018)[1]; *Varma v General Medical Council* [2008] BMLR 84 ("*Varma*"); the

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[1] Chapter 4 paras. 80 to 82 under the heading "What if the individual does not raise the subject of disability?":

meaning of "effective participation in proceedings" by reference to *R v Marcantonio* [2016] EWCA Crim 14 at [7]; the dangers of forming a view based on the Appellant's apparent ability to perform well by reference to *Solanki v Intercity Telecom Ltd* [2018] EWCA Civ 101; [2018] 1 Costs LR 103 ("*Solanki*"), citing *Teinaz v London Borough of Wandsworth* [2002] IRLR 72 ("*Teinaz*").

57. The Tribunal noted that the Appellant had become emotional on occasions during the hearing. However, he had been fully engaged, had spoken eloquently, behaved entirely appropriately at all times and was appropriately dressed. He had attended on time every day and had been ready to proceed. Nor was this a case where the Appellant had not raised the issue of mental health. It had been raised in general terms before the start of the hearing and kept under review throughout, with adjustments being made. The issue had been raised directly in the skeleton argument for the Appellant, with no suggestion that the Appellant was not fit to participate or that it would not be fair to proceed.

58. The Tribunal stated that, whilst Mr Cohen had relied primarily on the evidence of Dr Bourke, it was right to carry out its assessment of fairness of the proceedings to date by reference to the totality of the medical evidence before it. It then set out in chronological order the medical evidence received. In relation to Dr Capstick's email of 23 January 2018, the Tribunal considered it important to be very precise as to what Dr Capstick had, and had not, said. She had not advised that the Appellant should be admitted as an in-patient, as Dr Bourke appears to have believed. Rather she had stated that it was something that the Appellant might wish to consider. It followed that some of Dr Bourke's conclusions might have been based on an incorrect understanding.

59. The Tribunal noted that the Appellant's presentation to Dr Bourke was "significantly different" to his presentation in Court. The [Appellant] had been eloquent, coherent and engaged throughout. He had been cross-examined for more than three days by experienced Counsel and had robustly maintained his position, often pushing back forcefully but appropriately, to the allegations put to him:

> "…The Tribunal in no way sought to substitute Dr Bourke's assessment with its own views. However, it was relevant that Dr Bourke did not appear to have been in possession of all the material facts when reaching his conclusions."

60. The Tribunal pointed to the fact that Dr Bourke had not been provided with transcripts of the Appellant's submissions and evidence or of the audio discs of the hearing as a whole. There was no evidence that Dr Bourke had been made aware of the adjustments made to assist the Appellant, or that the Appellant had been continuing to work as an Avocat in Paris. This was of particular relevance to Dr Bourke's conclusion as to the

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"In some cases, people might not tell the court or tribunal that they have a mental health issue or that they are having any difficulties. This might because of the stigma attached to mental health, not knowing the court is willing to make adjustments or fear they will be taken less seriously. They may not themselves recognise that they have a difficulty…. Judges are not expected to make diagnoses of mental health conditions. It can be difficult to tell whether a person has a mental health difficulty or whether he or she is simply stressed and uncomfortable as a result of being court. Nevertheless, judges should be alert to any indicators that adjustments might be required. A person might appear disrespectful, difficult, inconsistent or untruthful, but those impressions might be erroneous if they have a mental health condition…. The Prison Reform Trust says the following behaviour might indicate a person has a mental health condition: the person lacks energy… is fidgety… is very emotional, often incongruously.. appears uninterested and avoids eye contact…unclear speech, inappropriate interruptions; inappropriate dress."

Appellant's capacity. Whilst no criticism was made of Dr Bourke, it was clear that he was not in possession of the full picture when he wrote his letters. This had an effect on the weight to be attached to them. Dr Bourke was not advanced as an independent expert, nor was he made available for cross-examination. The Tribunal therefore found Dr Bourke's letter of 14 February 2018 as to the Appellant's fitness to participate in the proceedings in January 2018 to be unpersuasive. The Tribunal noted that Dr Bourke's letter of 28 March 2018 suffered from similar weaknesses.

61. The Tribunal went on to make its central findings on the application to dismiss:

> "32.8.30 The Tribunal concluded, having reviewed the medical evidence provided before, during and after the January proceedings, that there was no persuasive evidence that the [Appellant] had not been fit to participate in the proceedings.
>
> 32.8.31 The Tribunal considered whether the fact that he was unrepresented, allied with the health difficulties that had been established, meant that the proceedings had been unfair. Mr Cohen had conceded that equality of arms alone was not sufficient in this case to meet that test.
>
> 32.8.32 The [Appellant] had representation in these proceedings until the working day before the hearing commenced. His case preparation had therefore been undertaken with the assistance of solicitors. At previous hearings in the case he had been represented by Counsel.
>
> 32.8.33 The Tribunal noted that once the hearing began the [Appellant] had made a number of applications and submissions, in some cases on complex legal points. He had done so effectively. This Tribunal was experienced in dealing with unrepresented Respondents. It had therefore given the [Appellant] time and had generally made allowances throughout for his lack of representation. It had assisted him by explaining procedures to him. The Tribunal did not find that the [Appellant] had been prejudiced by his lack of representation, even when allied with his health difficulties.
>
> 32.8.34 The Tribunal found that the [Appellant] had not demonstrated, on the balance of probabilities, that he had been unfit to participate in the proceedings or that there had been procedural unfairness to the [Appellant]. The Tribunal was satisfied that the [Appellant] had had a fair hearing to date. There had been no abuse of process and the application to dismiss the case against the [Appellant] was refused."

62. As for the alternative application to adjourn generally, that had been made late and without notice, which the Tribunal did not consider to be acceptable. Furthermore, it was a repeat of 2 previous applications to adjourn generally, both of which had been considered and determined. Parties were not free to make the same applications repeatedly; one aspect of the overriding objective was that cases should be dealt with

efficiently and expeditiously. There was no significant or material change of circumstance since the last application on 3 April 2018. As for the submission that where a serious error had occurred, the Tribunal could reconsider its decision, that would in effect involve the Tribunal sitting as an appellate tribunal reviewing its own decisions. In any event, the Tribunal had properly applied the relevant authorities when making its earlier decisions. The Tribunal always considered whether it was appropriate to proceed in absence when a respondent did not attend and it had that in mind on this occasion. In the absence of any significant change in circumstance since 3 April, there was no basis for a further application.

63. The Tribunal further dismissed the application to adjourn for judicial review. It then proceeded in the remainder of the judgment to address the substantive allegations, with reasons for its findings including as to sanction and costs.

Grounds of appeal

64. The Appellant raises the following three broad grounds, all of which concern his health and its consequent effects on his ability to defend himself as a litigant in person, namely that the Tribunal was wrong:

i) To refuse to adjourn generally or stay the prosecution once it became aware that there was a real prospect that the Appellant was or had become unable to participate effectively in it ("ground 1");

ii) Not to dismiss the prosecution when presented with consistent medical evidence establishing that for a significant part of it the Appellant had been unable to participate effectively in it ("ground 2");

iii) Not to direct the production of further expert evidence or cross-examination of experts in so far as it was not satisfied by the state of the evidence as it stood ("ground 3").

65. In more detail, the Appellant submits that the application on 24 January 2018 was made in circumstances which suggested that "there was very good reason to think that the Appellant was unable to effectively participate in the proceedings". For example, the Appellant was under the care of a consultant psychiatrist. His mental and physical wellbeing were affected and needed to be taken into account. On 19 January 2018 the Appellant became too distressed to continue. A letter from his GP was later produced, stating that the Appellant's mental state was poor and this was negatively affecting his ability to perform in court. On 22 January 2018 the Appellant indicated that he was unable to complete the day. The Tribunal rose early to allow the Appellant to see Dr Capstick, a consultant psychiatrist. In an email of 23 January 2018 Dr Capstick indicated that there was "fragility of mood with tearfulness and irritability. There is anergia, fatigue and decreased motivation. His concentration and short-term memory are impaired with distractibility… His symptoms of depression and anxiety impact his performance". She said that she had suggested to the Appellant that he might wish to consider inpatient treatment, but the Appellant had declined.

66. The Appellant does not suggest that the Tribunal should have acceded to the application on 24 January 2018 without more. However, it is said to have been a plain error of law to reject the application without making directions for the provision of evidence that

would permit the Tribunal to determine whether there was more, in accordance with the comments of Peter Gibson LJ in *Teinaz* at [22].

67. As for the applications of 26 February and 16 April 2018, the experts for both sides were consistent in their conclusions that the Appellant was unable by reason of his health to represent himself, as the Tribunal expressly found. The only way in which a fair trial could have been conducted was if legal representation was a cure, which it was not. By 26 February 2018 the prosecution was on its 14th day. There were no complete transcripts and more than 15 lever arch files of papers. It is doubtful that counsel could have effectively picked up the prosecution in these circumstances. But even more importantly, the Appellant was unable to pay for such representation. He filed evidence to show that he could not afford to pay. The SRA offered £7,500 for representation, but there was not the "slightest prospect at all that counsel could have been found for anything like that sum". The only fair solution was to delay the prosecution unless and until the Appellant "became unstuck". The Tribunal did not grapple with either of these issues.

68. The second ground relates to the Appellant's application to dismiss the proceedings on 16 April 2018 on the basis that he had not been able to participate effectively to date, based on the reports of Dr Bourke, the Appellant's treating physician following his admission as an inpatient, whose views were corroborated by evidence from Dr Symeon, another psychiatrist. In summary, Dr Bourke opined:

   i) The fact that the Appellant chose to proceed regardless of medical advice was a reflection of the fact that he was not well placed to ascertain what was and was not in his best interests at the time. The medical assessment as at 23 January 2018 that he required inpatient treatment provides adequate insight as to his likely level of functioning at the start of trial;

   ii) The Appellant would have been more inclined to discover the more negative or pessimistic aspects of any points of the case. His concentration and attention were routinely affected, as were short term memory and word finding. A general sense of absentmindedness often ensues. He was unlikely to have provided evidence that was sufficiently detailed and accurate, no matter how hard he might have tried. Dr Bourke said he would have great difficulty in suggesting that the Appellant had capacity to conduct litigation;

   iii) Dr Bourke stated that he suspected that the Appellant was not able to give either competent or indeed reliable evidence and this in turn may have led to the court being unintentionally misled, or prevented the court from being appraised of all the facts. In short, his opinion would be that his ill-health would certainly have impacted upon the way that he presented to the Tribunal.

69. The Appellant submits that his inability to effectively participate in what was a prosecution of the highest level of complexity was incontrovertible.

70. The Appellant also submits that the Tribunal applied the wrong test, namely whether or not the Appellant was "unfit to participate in the proceedings as opposed to whether he "might be unable effectively to participate in the proceedings" (see *Varma* at [28]). It also fell into the "appearance trap" identified in *Solanki* per Gloster LJ at [41]:

> "…But the judge's own view, apparently based on his observation of the appellant in court, was no substitute for the professional medical evidence provided by the general practitioner which clearly demonstrated that the appellant had a genuine history of depression and mental problems…The judge did not explain why he felt able to reject the doctor's view that the appellant had reported suicidal thoughts (six days before the hearing) and that examination of his mental state was consistent with a diagnoses of "severe depression". The appellant was plainly ill and there was no evidence to suggest that the illness was contrived."

71. Thirdly, the Appellant submits that it was an error of law and a breach of fair trial rights for the Tribunal to criticise Dr Bourke's report without inviting the Appellant to call Dr Bourke "in short order with a dismissal of the application in default".

72. In his oral submissions Mr Cohen grouped the Appellant's challenges together as relevant by reference to the individual hearings in chronological order. I will adopt the same approach in due course below, analysing the criticisms of each hearing in turn.

The right to a fair trial and the approach on appeal

Right to a fair trial

73. The right to a fair trial is enshrined under the common law and Article 6. The content of procedural fairness is infinitely flexible; it is not possible to lay down rigid rules to be applied identically in every situation. Whilst there is a core minimum of process required, involving notice and some form of hearing, what is necessary to meet the requirements for a fair trial in any given case will depend on the specific facts, including for example the nature of the proceedings, the stage reached by the proceedings and the overall procedural history. So, for example, a "fair" hearing does not necessarily mean that there must be an opportunity to be heard orally.

74. The ability of a respondent to participate effectively in regulatory proceedings is a fundamental element of the right to a fair trial. It is to be assessed in the context of the particular proceedings (see for example *R v Marcantonio and Chitolie* [2016] EWCA Crim 14 at [7] ("*Marcantonio"*)). The courts will interfere to protect it when necessary: see for example *Anastasi v Police Appeal Tribunal* [2015] EWHC 4156 at [38] and *Brabazon-Drenning v UKCC* [2001] HRLR 6 where Elias LJ stated at [18] and [19]:

> "Save in very exceptional cases where the public interest points strongly to the contrary, it must be wrong for a committee which has the livelihood and reputation of a professional individual in the palm of its hands, to go on with a hearing when there is unchallenged medical evidence that the individual is simply not fit to withstand the rigours of the disciplinary process….She clearly was unable to attend this hearing because she was too ill to do so. In those circumstances, I do not think there were any overriding public interest considerations which should have deprived her of her basic rights to be present when the case was put against her, and to be in a position where she could either

> cross-course examine herself, or have a representative with whom she could communicate cross examine on her behalf. It was a breach both of the principles of natural justice and Article 6."

75. Equally, in *R (on the application of Gatawa) v Nursing and Midwifery Council* [2013] EWHC 3435 (Admin) a decision not to adjourn a disciplinary hearing to allow more time for a lay representative to prepare on behalf of a nurse, who was suffering from mental illness and was absent, was held not to have been procedurally unfair when her representative had been given many opportunities to ask for more time.

76. Thus, refusal of an adjournment to a party unable to attend the hearing, if wrongful, may be tantamount to a denial of justice. Context is everything.

The approach on appeal

77. Most of the decisions of the Tribunal under challenge involve a mixture of fact-finding and case management. The approach of this court to appeals against findings of fact are uncontroversial (and set out in the recent case of *Solicitors Regulation Authority v Day and others* [2018] EWHC 2726 (Admin) at [61] to [79]). The Administrative Court's task is to assess whether the Tribunal's decision was wrong within the meaning of CPR 52.21. In relation to findings of fact what matters is whether the decision is one that no reasonable judge could have reached. It will not come to a different conclusion unless satisfied that any advantage enjoyed by the trial judge could not be sufficient to explain or justify the trial judge's conclusions. Particular care will be needed before departing from a trial judge's findings of fact where they depend to a significant extent on the judge's view of witnesses. The need for caution applies with particular force in the case of appeals from a specialist adjudicative body such as the SDT.

78. In general terms, case management decisions will only be reversed or interfered with if they are plainly wrong, or outside the generous ambit where reasonable decision makers may disagree (see by way of example *Global Torch Ltd v Apex Global Management Ltd* [2014] 1 WLR 4495 at [13]; *Simou v Sallis* [2017] EWCA Civ 312 at [59]). The question of whether or not to grant an adjournment on health grounds is a discretionary matter for the trial judge and the court would have to be satisfied that a high hurdle had been surmounted before it intervenes.

79. The emphasis may, in context, be on fairness, particularly in circumstances where the right to a fair trial under Article 6 is at stake: see *Solanki* at [32] where Gloster LJ cited Sedley LJ in *Terluk v Berezovsky* [2010] EWCA Civ 1345 when dealing with a judge's refusal to adjourn a civil trial in order to give a party further opportunity to obtain legal representation:

> "18. Our approach to this question is that **the test to be applied to a decision on the adjournment of proceedings is not whether it lay within the broad band of judicial discretion but whether, in the judgment of the appellate court, it was unfair…. [T]he question of whether a tribunal… was acting in breach of the principles of natural justice is essentially a question of law**… anything less would be a departure from the appellate court's constitutional responsibility. This "non-

> Wednesbury" approach… has a pedigree at least as longstanding as the decision of the divisional court in *R v SW London SBAT ex parte Bullen* [1976] 120 Sol Jo 437**…. It also conforms with the jurisprudence of the European Court of Human Rights under Article 6 of the Convention**….
>
> 19. But…the appellate judgments "requires a correct application of the legal test to the decided facts". Thus the judgment at first instance is not eclipsed or marginalised on appeal. What the appellate court is concerned with is what was fair in the circumstances identified and evaluated by the judge. In the present case, this is an important element.
>
> 20. **We would add that the question whether a procedural decision was fair does not involve a premise that in any given forensic situation only one outcome is ever fair. Without reverting to the notion of a broad discretionary highway one can recognise that there may be more than one genuinely fair solution to a difficulty**… Put another way, the question is whether the decision was a fair one, not whether it was the fair one."

At [34] Gloster LJ commented that subsequent cases in the Court of Appeal have followed the approach of Sedley LJ in *Terluk*. A recent example of appellate interference with a tribunal decision not to adjourn proceedings on the basis that it was "unjust" can be found in *Rodriguez-Purcet v SRA* [2018] EWHC 2879 (Admin) (at [42]).

80. In the very recent decision in *GMC v Hayat* [2018] EWCA Civ 2796 ("*Hayat"*) (handed down following the hearing in this matter) at [69], the Court of Appeal held that there was no significant incompatibility between the approaches by reference to fairness and discretion, endorsing the approach of Baron J in *Dhillon v Asiedu* [2012] EWCA Civ 1020 at [33] where he said that both approaches (discretion and fairness) were "consistent and analogous":

> "…a) the overriding objective requires cases to be dealt with justly. CPR 1.1(2)(d) demands that the Court deals with cases "expeditiously and fairly". Fairness requires the position of both sides to be considered and this is in accordance with Article 6 ECHR.
>
> b) fairness can only be determined by taking all relevant matters into account (and excluding irrelevant matters).
>
> c) it may be, in any one scenario, that a number of fair outcomes are possible. Therefore a balancing exercise has to be conducted in each case. It is only when the decision of the first instance judge is plainly wrong that the Court of Appeal will interfere with that decision.

> d) unless the Appeal Court can identify that the judge has taken into account immaterial factors, omitted to take into account material factors, erred in principle or come to a decision that was impermissible…the decision at first instance must prevail."

81. Mr Cohen submits that these comments should be treated with caution, given that they may have been influenced by a concession that "there is no conflict between fairness and discretion" and given that *Solanki* does not appear to have been cited to the court. In practical terms it will be a rare case where the approaches to be applied by reference to a test of fairness or *Wednesbury* reasonableness result in competing outcomes. On the facts here, any distinction between the two is one without a difference in terms of result.

The alleged "appearance trap"

82. An important point in this appeal arises out of the Appellant's submission that in this case the Tribunal fell into what has been described as the "appearance trap". Mr Cohen submitted that the perception of a judicial audience as to the extent of a health impairment on the ability of a litigant to engage with litigation is no substitute for the opinion of a medical expert. Any view based upon appearance is positively dangerous, it is submitted, given its capacity to mislead. Mr Cohen relied heavily on the comments of Gloster LJ in *Solanki:*

> "40. First, the judge gave no satisfactory reasons either on the papers or [orally]…as to why he regarded the medical evidence supporting the adjournment as inadequate or for rejecting such evidence. From the tone of his language ("a further purported application on the grounds of ill-health") the judge clearly thought that the appellant was putting on an act; the judge said:
>
> "I have seen him on a number of occasions in court and I have read through the emails that he has been sending to the court. I am perfectly satisfied that he is capable of acting for himself in this case and there is no valid reason for an adjournment."
>
> …
>
> 41. But the judge's own view, apparently based on his observation of the appellant in court, was no substitute for the professional medical evidence provided by the general practitioner which clearly demonstrated that the appellant had a genuine history of depression and mental problems, for which he had been prescribed medication over a period of time. The judge did not explain why he felt able to reject the doctor's view that the appellant had reported suicidal thoughts (six days before the hearing), and that examination of his mental state was consistent with a diagnosis of "severe depression". The appellant was plainly ill and there was no evidence to suggest that the illness was contrived".

Mr Cohen conceded that there might be cases, for example where there was alleged physical disability, where a court's own assessment could come into play although even then, he submitted, the court's assessment would first have to be put in terms to the expert(s) before it could be acted on. But that could not be the case where mental health concerns were at issue, he submitted, referring in particular to the Equal Treatment Bench Book at chapter 4 (see footnote 1 above).

83. I am unable to accept this proposition as a matter of general principle. There is no blanket rule that a court (or tribunal) must ignore what it sees and hears in court. *Solanki* was a very extreme case on its facts. The first instance judge there essentially completely disregarded the medical evidence without giving any reasons and substituted it with his own opinion that the claimant in that case was not genuine.

84. It is quite legitimate for a court to take account of its own assessment of a litigant's capacity to participate effectively in its overall assessment of the evidence before it, including the expert medical evidence, if it considers it appropriate to do so. No court is ever bound to accept the expert evidence before it, even if that evidence is agreed; see for example *Levy v Ellis-Carr and others* [2012] EWHC 63 (Ch) at [36] (endorsed in *Hayat* at [38]). A court or tribunal is entitled to weigh up the medical evidence against all of the other material available to it. If it intends to depart from the conclusion of an expert or experts, it needs, of course, to exercise caution. It also needs to bear in mind that litigants with, for example, mental health illness may mask their problems or not understand that it may not be in their best interests to continue. It must also give reasons for its conclusion. The Judge's failure to do so in *Solanki* was central to the Court of Appeal's criticism of the Judge's approach.

85. This approach is wholly consistent with the comments of the Court of Appeal in *Hayat*: see in particular at [56] where Coulson LJ said:

> "Finally, I consider that the Tribunal was entitled to weigh up the (inadequate) sick note against all of the other material available to them. This included not only the existing medical evidence…but also the fact that Dr Hayat had already made three unsuccessful applications to adjourn this hearing on entirely different grounds, each without success."

Mr Cohen again points to the fact that the court in *Hayat* does not appear to have been taken to the decision in *Solanki*, which is authority for the proposition that a tribunal is not entitled to substitute its own view on a medical matter for that of an expert. He accepts that a tribunal is not bound to accept medical evidence but submits that it may only depart from it where there is a basis found in other medical expert evidence to different effect. I do not accept that the ability of a tribunal not to accept the evidence of a medical expert is so limited. The task of a court is to weigh up the expert medical evidence under scrutiny alongside all the other material available to it. *Solanki* does not say otherwise.

86. Thus, the central submission for the Appellant that the Tribunal's own experience and view of the Appellant's performance during the hearing was irrelevant and should have been wholly disregarded as a matter of principle is misconceived.

An overview

87. It is convenient to set out some general observations which set the context for the Appellant's complaints.

88. The Appellant was facing the most serious of allegations, namely dishonesty, which threatened his ability to practise in this country (and at least potentially in France as well).

89. The allegations were complex and related to events that occurred some time ago. However, whilst the Appellant's oral evidence and recollection were no doubt important, there was extensive contemporaneous documentation available. The Appellant was a sophisticated and intelligent lawyer.

90. This does not appear to have been a case where the Tribunal's findings on the substantive allegations of professional misconduct depended on, or were materially influenced by, the Appellant's demeanour or any negative aspects of his performance in the witness box. Rather he was described as eloquent, coherent and engaged throughout.

91. The Appellant had been legally represented throughout the disciplinary proceedings right up to the day before the final hearing commenced. Thus his case was fully pleaded by counsel. A full skeleton argument for the hearing prepared by junior counsel on his behalf was submitted; separate written submissions in support of a number of the Appellant's preliminary applications had also been prepared by junior counsel. Additionally, the Appellant had the benefit of multiple witness statements prepared with his lawyers and lodged on his behalf in full response to the allegations against him. He was able to adopt as part of his evidence his written responses to the allegations in 2016, his very extensive pleadings in 2017, four witness statements, a deposition from 2011 and 2 affidavits from 2010 lodged in the Supreme Court of the State of New York. He also adopted in evidence his opening speech at the final hearing before the Tribunal. No-one could suggest that the Tribunal did not have before it the Appellant's essential case on the merits (as the Tribunal indicated in its judgment at paragraph 31.12.20).

92. The Tribunal was alive to the Appellant's health difficulties from the very outset (as carefully recorded in section 7 of its judgment). It made adjustments to accommodate the Appellant throughout the hearing – for example by way of providing additional breaks and shortened sitting hours.

93. The Tribunal was undoubtedly faced with a difficult situation from 24 January 2018 onwards, at which stage the evidence had concluded and only closing submissions remained. Again, there can be no doubt but that the Tribunal genuinely sought to assist the Appellant so far as it felt properly able to, including by granting repeated adjournments. Equally, the SRA took the unprecedented step of offering significant financial support towards the Appellant's legal costs in order to assist him.

94. There is a clear public interest in the efficient despatch of proceedings but also in ensuring that solicitors who are dishonest are not allowed to practise. Reference was made to a voluntary undertaking offered by the Appellant not to practise in England and Wales. The worth of such an undertaking might be questionable in the event of a finding of dishonesty. But in any event the Appellant was still practising in France.

Whilst that was activity beyond the strict control of the Tribunal's jurisdiction, findings of dishonesty here could be material to the Appellant's ability to continue working as an Avocat abroad. There is the additional well-recognised public interest in the marking of past misconduct and the deterrence of future misconduct within the solicitors' profession.

The application of 24 January 2018: grounds 1 and 3

95. For the Appellant, it is said that the Tribunal made 3 fundamental errors on 24 January 2018:

    i) It was unjust and unfair for the Tribunal to reject the existing medical evidence on sufficiency grounds and to continue. The Tribunal had a duty to assist the Appellant in identifying what evidence needed to be produced. Reliance is placed on *Teinaz* in particular, together with examples of directions made in cases such as *Governor and Company of the Bank of Ireland and another v Jaffery and another* [2012] EWHC 734 (Ch) and recorded in *Lindsay v SRA* [2018] EWHC 1275 (Admin) at [22]. No detailed reasons or assistance on the medical evidence was provided to the Appellant at the time;

    ii) The Tribunal applied the wrong test as identified in *Varma*, asking itself simply whether the Appellant was able to attend as opposed to whether he was able to participate effectively;

    iii) The Tribunal fell into the appearance trap, substituting its own opinion for that of the medical experts based on its own assessment of the Appellant's ability to engage.

96. It is not said that the Tribunal should have acceded to the Appellant's application without more on 24 January 2018. However, it is said to have been a plain error of law on the part of the Tribunal to reject the application to adjourn without making directions for the provision of evidence that would permit the SDT to determine "whether there was more".

97. Putting to one side the not irrelevant objection that on 24 January 2018 the Appellant was in fact seeking discontinuance and not adjournment of the proceedings, the Tribunal's decision to continue the proceedings on the terms that it did cannot be said to be wrong in law. It was not unfair, nor one with which this appellate court should interfere.

98. In *Teinaz* Peter Gibson LJ said this:

> "21. A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties…But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment.

> 22. If there is some evidence that a litigant is unfit to attend, in particular if there is evidence that on medical grounds the litigant has been advised by a qualified person not to attend, but the tribunal or court has doubts as to whether the evidence is genuine or sufficient, the tribunal or court has a discretion whether or not to give a direction such as would enable the doubts to be resolved. Thus, one possibility is to direct that further evidence be provided promptly. Another is that the party seeking the adjournment should be invited to authorise the legal representatives for the other side to have access to the doctor giving the advice in question. The advocates on both sides can do their part in assisting the tribunal faced with such a problem to achieve a just result. I do not say that a tribunal or court necessarily makes any error of law in not taking such steps. All must depend on the particular circumstances. I make these comments in recognition of the fact that applications for an adjournment on the basis of a medical certificate may present difficult problems requiring practical solutions if justice is to be achieved."

99. *Teinaz* is not authority for the proposition that directions for further evidence are always a necessity. Rather it is to the effect that if there is evidence of unfitness but the tribunal has doubts as to the adequacy or reliability of that evidence, the tribunal may seek further evidence or make directions. This is a matter of discretion – as stated explicitly above and confirmed again in *Hayat* at [42]. Mr Cohen pointed to the fact that *Teinaz* was not "an Article 6 case", or one engaging Article 1 of the First Protocol, such as the present proceedings. However, at [44] of *Teinaz* Arden LJ commented that no reference had been made to Article 6 and went on to say that it would not have added anything to the argument in the case, although it underscored the need to approach applications to adjourn on the grounds of an applicant's health with great care.

100. As stated expressly in *Teinaz,* everything depends on the circumstances. (In *Teinaz* the applicant was applying on the first day of an employment tribunal hearing for an adjournment based on a medical certificate signed by a doctor containing 2 sentences to the effect that the applicant had been advised to keep away from work for a fortnight due to severe stress and for the same reason had been advised not to attend court.) Here the medical evidence at this stage was not to the effect that the Appellant was unfit to continue. Further, the situation was not that the Tribunal had a material doubt about the genuineness or adequacy of the evidence before it in the sense contemplated in *Teinaz* such as to warrant the seeking of further information or the making of specific directions. The Tribunal clearly took the view that it had sufficient material and evidence in the round to make the necessary decision on discontinuance (or adjournment). There was no doubting that the medical evidence was genuine. Nor was it inadequate: both Dr MacGreevy and Dr Capstick were aware that the Appellant was representing himself in legal proceedings. Neither said that he was unable to participate effectively.

101. Even if there were such a doubt, the Tribunal had a discretion. It is important to remember that the Tribunal was expressly keeping the situation under review with an eye to fairness (see paragraph 20.11.4 of the judgment), the issue of the Appellant's

health having been raised at the very outset of the hearing. It was open to the Tribunal to halt the proceedings at any time were that to be necessary, for medical reasons or otherwise. There was no need as a matter of fairness or otherwise to do more at this stage.

102. Nor am I able to accept the submission that the Tribunal applied the wrong test by considering only whether the Appellant was able to attend the hearing, as opposed to whether or not he was able to participate effectively in representing himself. The whole context of the Tribunal's consideration of the appropriate way forward was the Appellant's ability effectively to appear and represent himself in the light of his mental health difficulties (not merely physically attend). The question of fairness was uppermost in the Tribunal's mind. Moreover, it is clear on the face of the judgment that the Tribunal considered not only whether or not the medical evidence suggested that the Appellant could attend but whether he was able "to present his own case or participate in the proceedings" (see paragraphs 20.11.1, 20.11.2 and 20.11.3 of the judgment).

103. Finally, the Tribunal did not fall into some impermissible appearance trap. Having concluded that the medical evidence did not suggest that the Appellant was unable effectively to participate, it carried out the perfectly legitimate – indeed it could be said necessary - exercise of cross-checking by reference to the Appellant's actual performance in the proceedings to date. It could have been criticised for not doing so. That exercise confirmed that there were no grounds for discontinuing or adjourning on the grounds of the Appellant's health. The Tribunal was not substituting its own views for those of the medical experts but rather considering their evidence in the round.

104. For these reasons, there was no error of law on the Tribunal's part on 24 January 2018, let alone a plain one.

105. On 31 January 2018, as set out above, the Tribunal adjourned the proceedings to 26 February 2018 in the light of the Appellant's non-attendance following his voluntary self-admission to a private hospital. The Tribunal made a direction that "[i]f any party intended to rely on medical evidence", such evidence should be filed by no later than 4pm on 19 February. In so far as any criticism of the adequacy of that direction is made, I reject it. There was no confusion or uncertainty as to the target of any medical evidence. The nature of the issue for consideration, namely whether or not the proceedings should continue in the light of the Appellant's health and his ability to attend and participate in the proceedings, would have been obvious to all concerned, including the Appellant (or at the very least the Tribunal was reasonably entitled to take that view). The Tribunal adopted a fair way forward and this was pre-eminently the sort of case management decision in which an appellate court should not interfere.

<u>Applications of 26 February and 3 April 2018: grounds 1, 2 and 3</u>

106. As set out above, on 26 February 2018 and 3 April 2018 Mr Cadman applied for the proceedings to be adjourned. Adjournments, albeit not open-ended, were in fact granted on both occasions. Nevertheless, the Appellant criticises the Tribunal for not adjourning the proceedings generally (or halting them outright):

i) The Tribunal should have looked backwards over the past proceedings, and concluded that the proceedings had not been fair;

ii) The Tribunal adjourned the proceedings in order for the Appellant to obtain legal representation, it being common ground by this stage that that the Appellant could no longer represent himself (although he could instruct counsel). However, it failed to grapple with the fact that the Appellant could not afford to pay for such legal representation. The Appellant was thus left in a "Kafkaesque" situation.

107. At one stage it was further submitted that the instruction of counsel could never have been an adequate cure, given the stage that the proceedings had reached. There were no complete transcripts of evidence and more than 15 lever arch files. However, not least in the light of Mr Cadman's express request on 3 April 2018 for time to allow the Appellant to obtain funding to instruct counsel for the remainder of the proceedings, that argument was rightly not pursued.

108. I do not accept the proposition that the Tribunal was under any obligation at this stage to stand back and conclude (effectively of its own motion) that the proceedings to date had been unfair and should be halted on that basis. Had the Tribunal had any such concerns, it no doubt would have raised them. But it clearly did not have such concerns. So, for example, the second letter of Dr Bourke of 14 February 2018 (which was the first to address the position retrospectively) did not impress the Tribunal (for the reasons given later by the Tribunal in its judgment). The Tribunal had been alive to the Appellant's health issues throughout and made the adjustments suggested by the doctors. It had adjourned the proceedings on 31 January 2018. There is no sound basis for the suggestion that there was an obligation on the part of the Tribunal as a matter of pro-active case management or otherwise to make directions, for example, for Dr Bourke to be cross-examined.

109. Mr Cadman did not adopt a retrospective approach either. His submission was that the proceedings could not proceed fairly "at this point" and that it would be a breach of his Article 6 rights to proceed.

110. The Tribunal properly considered the (final) stage reached in the proceedings. It was entitled to conclude that there was no proper basis for an open-ended adjournment but that it was appropriate to give the Appellant a reasonable opportunity to secure representation if he wished.

111. In this regard there was no unlawful failure to grapple with the Appellant's financial position. The Tribunal clearly concluded on 26 February 2018 that the Appellant could (or at the very least might be able to) fund or obtain funding for legal representation. Mr Cadman had submitted that the Appellant did not have the ability to pay for representation. He owed money to lawyers. Although he had referred to instructing counsel during the course of the proceedings, "this was not an option". However, this submission was not accepted by the SRA. The Appellant was still practising, or hoping to practise in France. The case had been "heavily-lawyered" by the Appellant. The Appellant had told the Tribunal that he hoped to instruct counsel. His wife had significant assets and his son was working at a law firm. Further, without prejudice to that, the SRA was prepared to pay £7,500 + VAT to any counsel instructed by the Appellant to finish the hearing.

112. Come 3 April 2018 Mr Cadman was positively inviting the Tribunal to adjourn in order for the Appellant to obtain funding to instruct counsel. An adjournment "would enable

him to earn the money required to instruct Counsel to complete the case". A witness statement from the Appellant dated 27 March 2018 said in terms that he had been working, including since his hospitalisation:

> "Since Christmas, I have been unable to do anything like the number of chargeable hours and since my hospitalisation, I am working less than half the hours that I was previously able to manage."

113. The Tribunal, noting also that the Appellant was currently represented in separate civil proceedings, was entitled to conclude (without carrying out an assessment of the Appellant's means or investigating precisely how he might choose to fund counsel) that, as a matter of fact, the Appellant had chosen not to instruct counsel, as he could have done, and chosen not to make closing submissions. That finding cannot be said to be perverse. Indeed the SRA is entitled to say that the Tribunal's conclusion was entirely borne out by subsequent events, given the Appellant's instruction of Mr Cohen for the hearing on 16 April (and indeed on this appeal).

114. The Tribunal nevertheless, out of an abundance of fairness to the Appellant, granted him a final opportunity to do so, either orally or in writing.

115. The Tribunal's decisions not to adjourn the proceedings more generally either on 26 February or 3 April 2018 cannot be impugned as unjust or wrong. They were taken carefully in the context of the history of the proceedings to date and the fact that finality was as much in the Appellant's interest as that of the SRA. The Appellant was not fit to represent himself but had the capacity to instruct counsel and to find funding as necessary. Closing submissions could be made in writing and there was no time pressure.

<u>Application of 16 April 2018: grounds 1, 2 and 3</u>

116. Rather than instructing junior counsel to prepare closing submissions, the Appellant chose to instruct Mr Cohen to appear on 16 April 2018 to apply to dismiss the proceedings, alternatively for a general adjournment, alternatively for an adjournment to seek judicial review. As already indicated, this was said to have been funded by the Appellant's wife. No statement of costs was provided by the Appellant for the hearing (nor has one been lodged by him on this appeal). Notice of the application to dismiss was given for the first time on 10 April 2018.

117. The Appellant raises the following challenges to the Tribunal's decisions to reject the first 2 of those applications:

    i) The Tribunal again failed to apply the correct test as set out in *Varma*;

    ii) The Tribunal was wrong to conclude that the Appellant had been able to participate effectively in the proceedings;

    iii) The Tribunal fell into the appearance trap, wrongly taking into account its own observations of the Appellant's performance;

iv) The Tribunal failed to make an order for further expert evidence or cross-examination of the experts. To the extent that the Tribunal was dissatisfied with the shape of the medical evidence, it was bound to make such an order, something that was suggested as being "the right approach" by Mr Cohen in his oral reply submissions to the Tribunal;

v) The Tribunal failed to entertain the renewed application for a general adjournment.

118. As already indicated above, I do not consider that the Tribunal failed to apply the correct test by considering only whether the Appellant was fit to attend. A fair reading of the judgment makes it plain that this is not how the Tribunal proceeded. It had been taken in terms to *Marcantonio* in the context of the meaning of "effective participation." It referred expressly (in paragraph 32.8.33 of the judgment) to the fact that the Appellant had made applications and submissions "effectively".

119. The Tribunal's finding was that the Appellant had been fit to participate effectively and that there had been no procedural unfairness to him. That was a finding fairly open to it based on its consideration of all the submissions, authorities and the totality of the evidence presented and available to it, which it analysed in significant detail.

120. The Appellant's application focussed on the evidence of Dr Bourke, albeit that he was not advanced as an independent expert witness. Dr Bourke had not been tendered for cross-examination despite the SRA's indication that it would wish to cross-examine him. The Tribunal was fully entitled to attach limited weight to that evidence for the reasons that it gave: Dr Bourke's opinion set out in his letter of 14 February 2018 may have been based on an incorrect understanding of Dr Capstick's advice to the Appellant on 22 January 2018; it was relevant that Dr Bourke did not appear to have been in possession of all the material facts when reaching his conclusions, including that the Appellant had been continuing to work as an Avocat; Dr Bourke did not appear to have seen the Appellant's submissions or heard recordings of the proceedings; there was no evidence that Dr Bourke had been made aware of the adjustments made for the Appellant. By 28 March 2018 Dr Bourke was (at least partially) aware of the provision of breaks for the Appellant but still not the full picture. As for the evidence of Dr Symeon relied on by the Appellant, he too did not appear to be aware of relevant material, including the fact that the Appellant was still working as an Avocat.

121. There was no obligation on the Tribunal to grant yet another adjournment in order for Dr Bourke to be called. As already indicated, he was not tendered for cross-examination even though it was known that the SRA did not accept his evidence and had wanted to cross-examine him. No supplementary report from Dr Bourke had been produced addressing the deficiencies in his evidence as identified on 26 February and 3 April 2018. It cannot be said that the Tribunal's decision to proceed on the basis of the information then available to it was unfair to the Appellant or outside the ambit of reasonable decision-making. The fact that there were deficiencies in Dr Bourke's evidence did not mean that that evidence was "inadequate" in the sense envisaged in *Teinaz*, and in any event it was a matter for the Tribunal's discretion when and where to draw the line procedurally.

122. As for the criticism that the Tribunal took into account its own assessment of the Appellant's performance in reaching its conclusions, I have already indicated that there

is no blanket rule objection to such an exercise. The Tribunal proceeded in this instance in an entirely appropriate manner. It did not ignore the medical evidence available without reasons and simply proceed on the basis of its own assessment of the Appellant's capacity. Rather, it considered all of the medical evidence carefully, giving full reasons for its reservations as to the reliability of the central medical evidence (from Dr Bourke and Dr Symeon) relied upon by the Appellant. It was fully entitled to include in its consideration of the application to dismiss what it had heard and seen of the Appellant first-hand during the hearing. In doing so, as it expressly said, it "in no way sought to substitute Dr Bourke's assessment with its own views". Rather it was seeking to come to a correct and fair conclusion on the question of whether or not the Appellant had been able to participate in the proceedings to date effectively.

123. The Tribunal gave careful reasons for its conclusion that the Appellant had been so able: explaining why only limited weight could be placed on evidence of Dr Bourke and Dr Symeon; setting out the procedural history, including the Appellant's previous legal representation; referring to the numerous applications and lengthy submissions made effectively by the Appellant, including on complex and legal points; identifying the adjustments made for the Appellant; stating that he had been "eloquent, coherent and engaged throughout" and acted appropriately under cross-examination.

124. Finally, the Tribunal's decision not to entertain another application for a general adjournment was another case-management decision fairly open to it for the reasons that it gave: the application was made late, without notice and was a repetition of the 2 previous applications to adjourn generally, both of which had been considered and determined. In the absence of a significant or material change of circumstance or new information, there was no reason for the Tribunal to hear or re-consider the application.

<u>Conclusion</u>

125. For these reasons, and in agreement with the further comments of Lord Justice Green below, I would dismiss the appeal. The Tribunal's findings do not fall to be set aside for procedural unfairness on the grounds alleged.

Lord Justice Green:

126. I agree entirely with the judgment of Mrs Justice Carr and add only a limited number of observations of my own.

127. First, the judgment of the Tribunal under appeal was of high calibre. The issue of the Appellant's mental health and his ability to conduct his own appeal in person was meticulously addressed by the Tribunal. It cannot be said that the Tribunal failed to address the issue or took into account irrelevant considerations. As such the appeal is *par excellence* a challenge to the exercise of judgment by the Tribunal on, essentially, a case management matter, albeit one that engages the fundamental right to a fair hearing and also the right of a person to engage in their chosen profession.

128. Second, as Mrs Justice Carr points out (paragraph 77 above), on an appeal of this sort the Court will exercise circumspection when being invited to second-guess the judgment call of a specialist tribunal that has had the benefit of being able, at close quarters and over an extended period, to form a considered view of an appellant's mental and physical abilities and hence that person's ability to represent himself. Of

course, the intensity of the review upon an appeal will take account of the seriousness of the allegations being advanced against an appellant and the consequences of an adverse finding against him. But, as is reflected in the present case, an appellate court is in a materially inferior position to that of the first instance Tribunal to determine what was the appropriate case management decision to take in the circumstances prevailing. This is an important consideration in a case such as the present when the appeal court is asked, in effect, to substitute its own view of a case management step for that of the Tribunal below.

129. Third, in relation to the so called "*appearance trap*" said to emerge as a principle from *Solanki*, I also agree with the analysis of Mrs Justice Carr at paragraphs 82 to 86 above. Nothing in that judgment creates a principle which precludes a court rejecting expert evidence before it, and preferring its own evaluation. The criticism in *Solanki* of the Judge below flowed from the fact that in the face of *prima facie* credible medical evidence, the judge gave no reasons to explain why he rejected that evidence and preferred his own inconsistent view. In the absence of a reasoned and logical explanation the judge's conclusions appeared irrational. At base expert evidence is like any other evidence and when a judge must take a decision based upon an expert opinion the judge must assess its probative value by weighing it against all of the other evidence in the case that bears upon the issue in question. I would view this as trite. Indeed, it is routine when a judge directs a jury in a criminal case to instruct the jurors that expert evidence is like any other evidence and that the jury is entitled to reject it if such a course is in their view appropriate. The judge will (or should) guide the jury on the probative value of the expert evidence but the jurors as the triers of fact are ultimately entitled to reach their own conclusions on the facts.

130. Fourth, an issue arose during the hearing which in the final analysis we have not had to grapple with to determine this appeal. The Appellant has argued by reference to the evidence that (i) he would not recover from his mental disability *until* the ordeal presented by the Tribunal proceedings was at an end but also (ii) that his mental state was such that an adjournment of the proceedings was the only lawful course that the Tribunal could take. These two positions raise the spectre of a classic Catch 22: the proceedings should, in all fairness, have been adjourned pending the appellant's recovery but (once adjourned) those proceedings could not be resumed for the very reason that being in abeyance he would remain prone to the disability. It seemed to me that this Catch 22 was part of the Appellant's forensic end game. As observed, we have not needed to grapple with this as a discrete issue of law. I would however add that *even if* the Catch 22 had been a justifiable position *on the evidence* this would not necessarily have meant that the Tribunal became powerless. Once again, the analogy with criminal proceedings is instructive. There, if a defendant is unfit to plead, the charges are not dismissed, or the trial adjourned into an uncertain future without limit. On the contrary, if the court considers that the defendant is unfit to plead then the hearing continues with the jury being instructed not to find guilt or innocence, but only to decide whether the defendant did the acts charged. The court then disposes of the case by making appropriate non-punitive orders, for instance under mental health legislation. The relevance of this is that even when a defendant faces very serious charges an inability to defend himself, because of unfitness, does not automatically mean that the important public interest in the pursuit of the proceedings is set aside. In such a case the court adopts a modified approach which balances that public interest in pursuing proceedings with the right of the defendant to a fair trial. We have not in the

present case had to address how such a balance might have been struck. The only point I would make is that I would have been loath to accept the argument that the unfitness of a solicitor to face disciplinary proceedings inevitably meant that such proceedings had to be abandoned, or placed in more or less permanent stasis.