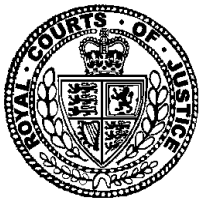

Neutral Citation Number: [2020] EWHC 1255 (Admin)

Case No: CO/3240/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/06/2020

Before :

MR JUSTICE FORDHAM

- -

Between :

HENRY HENDRON	**Appellant**
- and -	
BAR STANDARDS BOARD	**Respondent**

- -
- -

The Appellant in person
Zoe Gannon (instructed by **BSB In-House**) for the respondent

Hearing date: 20 March 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10am 02/06/2020. A copy of the judgment in final form as handed down can be made available after that time, on request by email to the administrativecourtoffice.listoffice@hmcts.x.gsi.gov.uk

MR JUSTICE FORDHAM:

Introduction

1. This is a case about a barrister who was directed by the Legal Ombudsman to make a payment to a former client and was then disciplined by the Bar Standards Board for not complying with the direction. The case has brought to light a "lacuna" in the statutory and regulatory scheme. The BSB accepts that, because Mr Hendron was at the material times already suspended in relation to an earlier matter, the Ombudsman had no power to make the direction and the BSB no power to discipline Mr Hendron for non-compliance with it. Everyone agrees that the appeal must therefore succeed. The central question for me is whether that should be the end of the matter.

2. The hearing before me took place on 20 March 2020 and was one of the last conventional oral hearings before remote hearings began under the Covid-19 pandemic arrangements. At the hearing, Mr Hendron introduced a new point of law based on Article 7 of the ECHR (as scheduled to the Human Rights Act 1998). I granted him permission to advance the new point, unopposed by Miss Gannon for the BSB, giving her until 6 April 2020 to file written submissions in response, and giving Mr Hendron until 28 April 2020 to file written submissions in reply. I also allowed time for the BSB informally to approach the Ombudsman if it wished to do so. On 30 April 2020 the BSB provided me with the Ombudsman's response (dated 22 April 2020), confirming that the Ombudsman did not wish to apply for permission to make any submissions about the "lacuna".

3. The Ombudsman had directed Mr Hendron to make a payment of £850 to "H", a former direct-access client. The Ombudsman found that Mr Hendron had been under a duty to make a £650 fees reimbursement to H, to which the Ombudsman added £200 compensation, making it £850 payable to H. The Ombudsman subsequently complained to the BSB that Mr Hendron had failed to pay H the £850, as directed. The BSB pursued professional misconduct proceedings before a Disciplinary Tribunal (DT) for non-compliance by Mr Hendron with the Ombudsman's £850 direction. The DT found Mr Hendron to have breached two BSB Handbook rules, which breaches were sufficiently serious to amount to professional misconduct. Each breach, as charged, was constituted by the act of non-compliance with the Ombudsman's direction for the £850 payment to H. The DT imposed two sanctions: a 3-month suspension from practice and a concurrent 9-month prohibition on accepting direct-access instructions. Mr Hendron has since paid the £850 to H. He brought an appeal to this Court seeking to overturn the DT's findings of breach and the sanctions it imposed.

4. As I have indicated, by the time of the hearing of the appeal before me, the BSB recognised that it had a legal problem in this case. The problem meant that the DT's findings of breach, and sanctions for those breaches, could not stand. It meant that the appeal must succeed. The reason for this was that Mr Hendron's practising certificate had been suspended, by reason of an earlier matter. It remained suspended, at both: (a) the time when any duty to comply with the Ombudsman's direction and pay H £850 would have arisen; and (b) the time when any underlying duty to reimburse the £650 to H had arisen. That meant, as to (a), that the DT could not make any lawful adverse finding or impose any sanction for Mr Hendron's failure to comply with the Ombudsman's direction and pay the £850. It also meant, as to (b), that the Ombudsman had lacked jurisdiction over the underlying failure to reimburse H £650. All of this

meant that the case could not be remitted to the DT for reconsidering the question of breach of BSB rules, constituted by failure to comply with the Ombudsman's £850 payment direction, since that could not have been a breach. The appeal must be allowed.

5. In those circumstances, what could and should happen now, says the BSB, is this. The matter to be remitted for the BSB. That remittal would be to allow the BSB to consider starting all over again and, if so, reformulating a fresh charge: not that Mr Hendron breached BSB rules by failing to comply with the Ombudsman's direction and pay H £850; but instead that Mr Hendron breached BSB rules by the underlying failure to reimburse the £650 to H. That would mean the underlying failure, previously the subject of a complaint which the BSB says the Ombudsman had no jurisdiction to consider, would now become the subject of fresh BSB disciplinary proceedings. The non-compliance with the Ombudsman's direction would be stripped out of the case. Ultimately, what I have to decide is this. Should I allow this appeal and leave it there? Or should I accede to the BSB's request and make a remittal order for this further consideration to take place?

The Background

6. Mr Hendron had been called to the Bar in November 2006. In July 2015 he was instructed on a direct access basis by H. She was described as "H" by the DT and I am doing the same in this judgment. Direct access instructions involve no intermediary instructing solicitor and mean the barrister deals directly with the client's money. H paid Mr Hendron £1,500 on account, in relation to the services for which she had instructed him. On 17 May 2016 H was notified that Mr Hendron was now going to be unavailable to represent her at a hearing on 20 May 2016. What had happened was that Mr Hendron had received a suspension of his practising certificate which began with immediate effect on 17 May 2016. Another barrister represented H at the hearing. H requested reimbursement and on 28 June 2016 Mr Hendron wrote H a cheque in the sum of £650, representing the relevant reimbursement. Unfortunately, the cheque bounced, there being insufficient funds in the account to pay it. The failure of that reimbursement of £650, on and after May 2016, constitutes what I have been describing as the underlying failure of reimbursement.

7. H complained to the Ombudsman, who investigated Mr Hendron's underlying failure to reimburse the £650, and upheld H's complaint. By a preliminary decision dated 6 March 2017, and a final decision dated 13 April 2017, the Ombudsman directed Mr Hendron to pay H £650 plus compensation, assessed in the final decision at £200, making £850. The preliminary decision gave a payment deadline of 3 April 2017; the final decision gave a payment deadline of 16 May 2017; and an enforcement letter dated 13 May 2017 gave a new payment deadline of 6 June 2017. The payment of £850 not having been made, the Ombudsman made a complaint to the BSB on 26 June 2017. The BSB had conduct of the matter thereafter. The non-compliance, on and after May 2017, to make the payment of £850 to H as directed by the Ombudsman, is what became the subject of the BSB's charges against Mr Hendron.

8. I have referred to the cheque for £650 dated 28 June 2016 which had bounced. A number of further cheques feature in the story after May 2017. A cheque for £850 dated 2 March 2018, which Mr Hendron said he posted on 5 March 2018, was followed up with a communication on 8 March 2018 by which Mr Hendron informed H that there were now insufficient funds in the account. A cheque for £850 dated 1 June 2018 was

provided by Mr Hendron to the Ombudsman, who sent it to H on 13 June 2018. Mr Hendron wrote to the Ombudsman on 27 June 2018 stating that H should bank the cheque *"this week"*, failing which he would "*take the reasonable view"* that payment had been "*waived"*. When H eventually paid in the 1 June 2018 cheque on 20 September 2018 there were insufficient funds to cover it and it bounced.

9. Mr Hendron's suspension (in place initially as an 'interim suspension' from 17 May 2016) lasted three years and was lifted on 17 May 2019. By then, the BSB's disciplinary proceedings against Mr Hendron were far advanced. The BSB had initially communicated a summary of complaint in September 2017. A first referral to a DT was made on 19 March 2018. Mr Hendron challenged its legal validity and was vindicated: on 12 April 2018 the first referral was accepted by the BSB to have been invalid and was withdrawn. The BSB amended its Handbook to remove the impediment to referral, and a new and second referral to the DT was made on 20 July 2018. Mr Hendron objected to the validity of this second referral, and that objection became the subject of a preliminary issue before the DT. The BSB sent Mr Hendron a formal Charge Sheet on 11 September 2018. The Charge Sheet contained two charges, constituting the formal case against Mr Hendron. It read as follows:

> Charge 1. Statement of Offence: Professional misconduct contrary to Core Duty 5 (CD5) of the Code of Conduct of the Bar of England and Wales (9th Edition). Particulars of Offence: On 13 April 2017, the Legal Ombudsman directed that Henry Hendron, an unregistered barrister, should reimburse fees of £650 and pay compensation of £200 to his former client, H by 16 May 2017 which was subsequently extended to 6 June 2017 by the Legal Ombudsman. Henry Hendron failed to reimburse any, or all of those fees, and failed to pay compensation to H by 16 May 2017 up to at least 12 September 2017. By doing so, Henry Hendron behaved in a way which was likely to diminish the trust and confidence which the public places in him or in the profession.
>
> Charge 2. Statement of Offence: Professional misconduct contrary to rC71 of the Code of Conduct of the Bar of England and Wales (9th Edition). Particulars of Offence: Henry Hendron, an unregistered barrister, failed to give the Legal Ombudsman all reasonable assistance requested of him in connection with the determination of a complaint made under the Ombudsman scheme in that he failed to comply with the decision dated 13 April 2017 that he reimburse fees of £650 and pay £200 compensation to his former client, H, by 16 May 2017 which was subsequently extended to 6 June 2017 by the Legal Ombudsman.

10. Several things are to be noted about the Charge Sheet. The alleged breaches, as charged, squarely related to Mr Hendron's non-compliance with the Ombudsman's direction that he make the £850 payment. That non-compliance with the Ombudsman's direction was characterised as constituting professional misconduct, as being a breach of two provisions: CD5 and rC71. Because each charge related to non-compliance with a direction dated 13 April 2017, and an original payment deadline of 16 May 2017, the conduct being alleged to be misconduct was conduct on and after May 2017. No charge was being advanced against Mr Hendron in relation to his underlying conduct of failing to have reimbursed the £650 to H, on and after May 2016. The Charge Sheet recorded on its face that Mr Hendron had been *"an unregistered barrister"* at the time of the alleged breaches of the BSB rules: this reflected the fact that he (his practising certificate) had been suspended at the time of the alleged breaches.

11. In due course, the DT conducted oral hearings. H provided a witness statement and gave oral evidence. At an initial oral hearing on 17 July 2019, the chairman considered a preliminary issue of law raised by Mr Hendron, ruling against Mr Hendron on that issue in a written determination dated 19 July 2019. The preliminary issue was a 'retrospectivity' argument about the Handbook change, purportedly curing the defect leading to the withdrawal of the first referral, and purportedly validating the second referral. The preliminary issue concerned whether the second referral of 20 July 2018 had been validly made and whether the DT had jurisdiction to hear and determine the charges. I shall need to return to this issue, which was raised and expanded by Mr Hendron on this appeal. After finding against Mr Hendron on the preliminary issue on 19 July 2019 there was then a 1½-day oral hearing on 25 and 26 July 2019, at which the full 3-person DT considered the charges, finding each to be proved. The hearing in relation to breach concluded at 3:50pm on the first day, and the DT retired to consider its decision overnight, announcing its findings and reasons at 11:10am on the 2nd day. The DT then heard representations in relation to sanction, retiring at 11:35am and returning at 12:30 to announce its decision and reasons on sanction. In its decision making on sanction, the DT annotated headed 'Mitigating and Aggravating circumstances', to record those factors considered by the DT to be relevant. A written Report of Finding and Sanction was issued dated 15 August 2019. Within it, was a record of the finding and reasons (announced orally at 11:10am on 26 July 2019) as to breach; and a record of the decision and reasons on sanction (announced orally at 12:30pm). As I have said, the sanction had two limbs: first, that Mr Hendron was suspended for 3 months; second, that he was prohibited from accepting or carrying out any public access instructions for 9 months; these periods to be concurrent.

Nature of This Appeal

12. Mr Hendron's appeal to this Court is governed by section 24 of the Crime and Courts Act 2013 and Part 52 of the Civil Procedure Rules (CPR). The hearing is by way of review unless the interests of justice call for a rehearing (CPR 52.21(1)(b)), which in this case I am satisfied that they do not. The court will allow the appeal where satisfied that the decision is wrong, or unjust because of serious irregularity in the proceedings (CPR 52.21(3)). The High Court is empowered to "make such order as it thinks fit on an appeal" (section 24(6)). Its decision is final (section 24(4)).

The Suspended-Barrister Problem

13. As I have said, the BSB has come to recognise that it has a legal problem on this appeal. The appeal before this Court was originally to be heard on 5 February 2020. On that occasion, an adjournment was necessitated, but Miss Gannon raised with me that a point of law had come to light in the preparation of the case, which was adverse to the BSB and favourable to Mr Hendron. He had not identified it or relied on it in his grounds of appeal. But Miss Gannon and the BSB wanted to bring it to the attention of the Court and Mr Hendron, who was for the purposes of the appeal a litigant in person. I made directions for written submissions on the new point of law. Its implications are, as I said at the outset of this judgment, that the BSB concedes that this appeal must succeed. It is to the great credit of Miss Gannon and of those who instruct her that the point of law favourable to Mr Hendron was identified and raised. Such ethical standards are a foundational principle on which our system of justice operates, but recognition and appreciation are never out of place.

14. The suspended-barrister problem starts with rule rC71, the subject of Charge 2. But it does not end there. The BSB's rules are found in the BSB Handbook and the principal focus for this appeal was Version 3.3 of the Handbook, as updated in May 2018. In those parts of the analysis where I was shown earlier versions of the Handbook with different provision, I will say so. Section C (the Conduct Rules) includes rC71, breach of which was the allegation in Charge 2 against Mr Hendron. Rule rC71 provides as follows: "You must give the Legal Ombudsman all reasonable assistance requested of you, in connection with the investigation, consideration, and determination, of complaints made under the Ombudsman scheme." That duty has been recognised as applying not just to cooperating with the Ombudsman's process but also to compliance with the Ombudsman's substantive decision which is the result of the process: see R (Obi-Ezakpazu) v BSB [2018] EWHC 2051 (Admin) at para 16.

15. Under rC1.2, the Conduct Rules (Section 2.C) apply to "BSB regulated persons" (rC1.2.a), and some of the Conduct Rules as listed, but not including rC71, also apply to "unregistered barristers" (rC1.2.b). (I interpose this: those rules not otherwise applicable to "unregistered barristers" can become so applicable if they are rules applicable to "practising barristers" and if the "unregistered barrister" in question is one who "practises as a barrister as set out in rS9"; but the BSB accepts in this case that it has no evidence, and can make no case, that Mr Hendron practised as a barrister as set out in rS9 at the relevant time.) Under rC1.1, the Core Duties (Section 2.B) apply to all "BSB regulated persons" and "unregistered barristers", except where stated otherwise.

16. As I have explained, the Charge Sheet stated on its face that Mr Hendron had been an "unregistered barrister" at the time of failing, in and after May 2017, to comply with the Ombudsman's direction to pay £850 to H. Everybody agrees, and has agreed throughout this case, that Mr Hendron was indeed an "unregistered barrister" while he (his practising certificate) was suspended. The term "unregistered barrister" is defined in the Handbook (Part 6 para 217) as a term which "means an individual who does not hold a practising certificate but who has been called to the Bar by one of the Inns and has not ceased to be a member of the Bar". The BSB's position is that a practising certificate is not "held" by a barrister, for the purposes of the Handbook, where the certificate has been suspended. "Suspension" means that the practising certificate is suspended (Part 6 para 211). A "full practising certificate" is one which "entitles a barrister to exercise a right of audience before every court in relation to all proceedings" (Part 6 para 94). The BSB says a certificate is not "held" where it is suspended; any more than it would be "held" in the case of a barrister who, having defaulted on their annual payments due, had not had the practising certificate renewed. The barrister who (or more accurately whose practising certificate) is suspended is still covered by the Handbook, and can still be disciplined by the BSB, but only insofar as rules and powers apply to the barrister as an "unregistered barrister". For the purposes of Part 5 of the Handbook (enforcement), where a person was a "BSB regulated person" or an "unregistered barrister" at "the time when any conduct was complained of", even if they have lost that status (including by suspension) at the time of enforcement action, they are "applicable persons" for enforcement action (rI7.9; Part 6 para 8). The term "barrister" includes (a) practising barristers; (b) pupils; and (c) unregistered barristers (Part 6 para 28); and the term "BSB regulated person" includes "practising barristers" (Part 6 para 37). As rI7 explains: "practising barristers" are "barristers who hold a practising certificate"; whereas "unregistered barristers" are "all other barristers who

do not hold practising certificates but who have been called to the Bar by one of the Inns and have not ceased to be a member of the Bar".

17. The BSB's position is that a barrister whose practising certificate has been suspended is not a "BSB regulated person", because they are not a "practising barrister" (unless practising as a barrister as set out in rS9). Instead, they are an "unregistered barrister". The BSB seem to be correct that this is the position under the Handbook, and I have heard no argument and seen no analysis to the contrary. The fact that one of the definitions ("applicable person": Part 6 para 8) specifically refers to an inclusion (for Part 5 enforcement) of "persons who would have fallen within the definition of BSB regulated persons but for the fact that, at the time of the conduct complained of, they had their authorisation or licence suspended" appears to reinforce this. Mr Hendron was not a "practising barrister" when his practising certificate was suspended.

18. The BSB was understandably concerned to address its mind, and address me, on the following question. Does this conclusion, as to the inapplicability on the face of the Handbook of rC71 to an "unregistered barrister", place the BSB in breach of its statutory duty under section 145(1) of the Legal Services Act 2007? Section 145 is headed "Duties of authorised persons to co-operate with investigations". Section 145(1) imposes a duty on an approved regulator (which term includes the BSB) to make in its rules (in the case of the BSB, the Handbook) "provision requiring each relevant person to give the Ombudsman all such assistance requested by them, in connection with the investigation, consideration or determination of complaints under the Ombudsman scheme, as that person is reasonably able to give, and … provision for the enforcement of that requirement". The BSB's position is that a suspended barrister is not an "authorised person" so the non-applicability to a suspended barrister of rC71 involves no section 145 breach by the BSB. A person is a "authorised person" in relation to an activity, and a regulator a "relevant approved regulator" in relation to that person, only if the person is "a person who is authorised to carry on the relevant activity by the relevant approved regulator" (sections 18(1)(a) and 20(4)). The BSB says a person whose practising certificate has been suspended is not someone who "is authorised" to carry on the relevant activity. Thus, says the BSB, any lacuna in the application of rC71 to a suspended barrister matches a lacuna in the application of section 145(1) to a suspended barrister. No submissions were made as to whether, were it otherwise, Handbook provisions could be interpreted so as to secure conformity with the statute, but there are obvious problems with the idea of a 'conforming' interpretation which expanded penalising provisions beyond their plain wording.

19. It follows, from what I have said so far, that the BSB accepts that it could not and cannot in law maintain a case against Mr Hendron based on rC71, as in Charge 2, and the DT's finding and sanction regarding Charge 2 cannot stand. At the relevant time, in and after April 2017, when the Ombudsman's decision directed him to make the payment to H of £850, Mr Hendron was suspended and was an "unregistered barrister". Given rC1.2, that meant he owed and could breach, no rC71 duty. The rC71 duty was not applicable to him, as an "unregistered barrister". That is the effect of rC1 of the Handbook itself. The appeal in relation to Charge 2 must succeed. Since composite sanctions were imposed for two breaches viewed in the round, one of which could not in law stand, that would have been enough to allow the appeal. In fact, the problem runs deeper. The BSB accepts that Charge 1, as an allegation of non-compliance with an Ombudsman direction, falls away too.

20. As has been seen, Charge 1 alleged breach of CD5. Core duties like CD5 are applicable to an "unregistered barrister" (rC1.1). CD5 provides as follows: "You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession". It has been recognised as permissible for the BSB to charge non-compliance with an Ombudsman's decision as being a CD5 breach, in addition to charging it as being an rC71 breach: see Obi-Ezakpazu at paras 5-6, 16, 20. So far so good. But the BSB accepts that the DT's findings and sanctions relating to Charge 1 against Mr Hendron cannot in law stand either. That is because of the Ombudsman's jurisdiction, as I will explain.

21. As Miss Gannon put it in her written submissions, barristers will "fall within the jurisdiction of the Ombudsman by virtue of having been an 'authorised person' at the time of the act/omission complained of". The relevant statutory provisions are as follows. Under section 125(1)(b) of the Legal Services Act 2007, a complaint falls within the jurisdiction of the Ombudsman scheme if the respondent is within section 128. By virtue of section 128(1), the respondent is within section 128 if, at the relevant time, she was "an authorised person" in relation to an activity which was a reserved legal activity. Section 128(7) defines "relevant time" as being "in relation to a complaint, … the time when the act or omission to which the complaint relates took place". As I have explained when discussing section 145, the BSB says "authorised person" in the 2007 Act cannot include a barrister whose practising certificate stands suspended. So, a barrister whose practising certificate is suspended at the time of the act or omission to which the complaint relates would not, says the BSB, fall within the Ombudsman's jurisdiction.

22. I will digress briefly here, to make a point about a mismatch. I have explained that the Ombudsman's jurisdiction is focused on the status of the barrister at the time of the act or default which is the subject of the complaint. Provisions like section 145 and rule rC71, which concern cooperation with Ombudsman as to the investigation or outcome of a complaint, are describing the barrister at the time of the cooperation. That means there could be a mismatch: where a barrister, unsuspended at the time of the act or omission which is the subject of the complaint, but then suspended by the time of investigation or outcome. That, however, is not this case. The BSB's position is that, in such a case, the Ombudsman would have jurisdiction (and the direction would be enforceable by application to the court under section 141(3)(4)), but neither section 145 nor rule rC71 would apply. End of digression.

23. In this case, Mr Hendron was already suspended by the time any question of reimbursement of H arose. On this basis, accepts and submits the BSB, the Ombudsman could have no jurisdiction in respect of H's complaint about non-reimbursement of fees by Mr Hendron. Reimbursement of H by Mr Hendron arose after he became unavailable on 17 May 2016, by which date his practising certificate was suspended. Indeed, the suspension was why he became unavailable and could not represent H at her upcoming hearing. Thus, Mr Hendron was suspended at the times of the acts or omissions to which H's complaint related. The substance of Charge 1, said to constitute the CD5 breach, is non-compliance with the Ombudsman's direction of April 2017. But, recognising that the Ombudsman had no jurisdiction over the complaint about non-reimbursement of fees to H, by acts and omissions after 17 May 2016, the BSB's position is that it could not and cannot sustain a case that non-compliance with the Ombudsman's direction by Mr Hendron was a breach of any duty or rule.

24. It is in these circumstances, and for these reasons, that the BSB accepts two things. First, that the appeal must succeed, and that the findings on both charges – and with them the sanctions based on them – cannot stand and must be overturned. Secondly, that the case cannot be remitted to the DT to reconsider afresh, because that would involve remitting a case on two Charges each incapable of supporting a lawful finding of breach.

25. After the hearing, the BSB brought to the Ombudsman's attention (on 25 March 2020) that the BSB had concluded, and was submitting to this Court in these proceedings, that "were a barrister suspended under an interim suspension, and therefore not authorised to provide legal services, the actions of the said barrister would not fall within the jurisdiction of the … Ombudsman during that time". The BSB invited the Ombudsman to consider whether it wished to intervene in this appeal or put in written submissions of its own on this point. On 22 April 2020 the Ombudsman responded to the BSB, confirming that the Ombudsman had decided not to seek to intervene or put in written submissions, stating: "there does indeed appear to be a lacuna. I am not sure that the … Ombudsman can add anything further to assist the court as the submissions identify and address the relevant issue".

What Should Happen Now?

26. The BSB asked me, pursuant to my power in section 24(6), to make an order remitting this case to the BSB. As I have explained, the BSB accepts that it could not be appropriate to remit the case to the DT. The BSB recognises that the case would need to go back to the beginning, for consideration to be given to the reformulation of a charge based, not on non-compliance in and after May 2017 with an Ombudsman, but rather on the underlying facts in and after May 2016 which had led to the Ombudsman's upholding of H's complaint. In other words, the case would not be professional misconduct in failing to comply with a direction of the Ombudsman as to the payment of £850 in and after May 2017; but rather professional misconduct in not reimbursing H by payment of £650 in and after May 2016.

27. Mr Hendron resists that course. There are two strands to that resistance.

    i) The first strand is Mr Hendron's contention that, if he is right about the grounds on which he was pursuing the current appeal, remittal would for that reason be inappropriate. In light of that strand of resistance, Mr Hendron urged me to address, on their legal merits, the points which he was advancing on this appeal, notwithstanding the acceptance by everybody that the appeal must succeed on the basis of the point of law raised by Miss Gannon. Mr Hendron submitted that analysing the grounds of appeal would strengthen his position in resisting remittal, if and to the extent that his grounds were held by me to be well founded.

    ii) The second strand is Mr Hendron's contention that, even if his grounds of appeal were not well-founded, remittal is in any event not a fair and justified course in all the circumstances.

28. In all the circumstances I propose first to address, on their legal merits, the various grounds of appeal advanced by Mr Hendron, as he invited me by his first strand of resistance to do. I accept that the well-foundedness, or otherwise, of these other grounds could be relevant to my consideration of whether to remit this case. The grounds were

argued out, in writing and orally on both sides. I am satisfied that it is appropriate, in all the circumstances, for me to give a reasoned ruling on them.

Grounds Relating to the Power of Referral

29. Mr Hendron submitted that the second referral to a DT on 20 July 2018 was unlawful, with the consequence that the DT had no jurisdiction to deal with professional misconduct at all, or no jurisdiction to impose sanctions such as suspension and prohibition, which it imposed.

30. In his original grounds of appeal, this argument was the same as had been raised in the preliminary issue with which the DT chairman dealt in the determination of 19 July 2019. The argument addressed as the preliminary issue arose out of a sequence of BSB Handbook provisions. In successive editions of the BSB Handbook, there was to be found a provision which – for the category of persons to whom it applied – allowed a complaint to the BSB to be dealt with in only two ways: either by dismissing the complaint or by applying to a DT for a disqualification order. I will call this provision the DDP: 'disqualification or dismissal provision'.

    i) In the December 2016 version of the Handbook the relevant rule (rE39) applied the DDP to a "non-authorised individual". The definition of "non-authorised individual" in that Handbook was "any individual who is not a BSB authorised individual or an authorised (non-BSB) individual but who is directly or indirectly employed by a Chambers, BSB legal services body, or a BSB authorised person". After his suspension from 17 May 2016, Mr Hendron was "not a BSB authorised individual or an authorised (non-BSB) individual". However, nor was he "directly or indirectly employed by a Chambers [etc]". On that basis, says the BSB, the DDP did not apply to him as at December 2016. Mr Hendron does not dispute that.

    ii) The April 2017 version of the Handbook retained rE39, applying the same DDP to a "non-authorised individual". However, the definition had now been changed and "non-authorised individual" was now defined to mean "any individual who is not a BSB authorised individual or an authorised (non-BSB) individual". That definition now included Mr Hendron, from April 2017. That was the problem with the purported referral of Mr Hendron to a DT on 19 March 2018. Mr Hendron pointed out the problem, and on 12 April 2018 the BSB accepted the invalidity of the March 2018 referral.

    iii) The May 2018 version of the Handbook contained an amended rE39, which maintained the DDP, applicable now to the following category: "a non-authorised individual (other than an unregistered barrister, a manager of a BSB entity or a registered European lawyer who does not have a current practising certificate) who at the time of the alleged conduct was an employee of a BSB authorised person". Now, an unregistered barrister was not the subject of the DDP and could be the subject of "an administrative sanction" imposed by the PCC (Professional Conduct Committee) or of "a referral to a Disciplinary Tribunal on charges of professional misconduct". It was against that backcloth, that the second referral was made on 20 July 2018.

31. As the preliminary issue raised before the DT, Mr Hendron challenged the second referral (July 2018). He accepted that the May 2018 version of the Handbook now permitted a referral to a DT on charges of professional misconduct in the case of a suspended barrister. However, the April 2017 version of the Handbook had not permitted this. The conduct which was the subject of the two charges was the alleged failure, by him as a suspended barrister, to pay the £850 directed by the Ombudsman by 16 May 2017, as directed in a decision dated 13 April 2017. Accordingly, argued Mr Hendron, since referral of a suspended barrister to a DT on charges of professional misconduct was precluded from April 2017, and since the only power available at that time was the DDP, the DT lacked jurisdiction to act on the referral of July 2018 and to make any finding of misconduct. True, the July 2018 referral had been made after the May 2018 Handbook amendment, but it was unlawful, retrospective and unfair to make a referral by reference to conduct, which referral could not have been made at the time of the conduct. So ran the argument.

32. In his argument before me at the hearing of this appeal, Mr Hendron added a further ground of challenge to the lawfulness of the second referral, invoking Article 7 ECHR. This was a new point which, having been raised so late in the day, required permission. Miss Gannon did not object to Mr Hendron having permission to rely on the new Article 7 point, provided that she had an opportunity to file written submissions after the hearing. I granted permission on that basis, and allowed Mr Hendron a right of reply in writing.

33. The Article 7 argument ran as follows. Article 7(1) provides as follows:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

Mr Hendron submitted that the sanctions of suspension and prohibition were legally unavailable to the DT, because at the time of the alleged non-compliance with the Ombudsman's direction (i.e. May 2017 onwards), the DDP had been applicable to him as a suspended barrister. For a DT subsequently to impose a sanction of suspension or prohibition was the imposition of a "penalty" which was "heavier" than had been "applicable" in his class of case "at the time" of the conduct in question, in breach of ECHR Article 7. In support of the application of Article 7 to disciplinary sanctions Mr Hendron cited a passage in paragraph 68 of the judgment of Lang J in McCarthy v BSB [2017] EWHC 969 (Admin), where Article 7 is referred to in the context of the temporal application of sanctions guidance, and which he submitted evidences the BSB's practice. He submitted that suspension falls within "penalty" and professional misconduct falls within "criminal offence", applying those autonomous concepts, addressed by reference to their substance, and having regard to the objectives and impact of the regulatory scheme and regulatory actions. He submitted that suspension of a barrister constitutes the deprivation of a profession, which he characterised as clearly "punitive". Alternatively, Mr Hendron describes there as being in play an "estoppel".

34. Before addressing their legal merits, the first point to make about all of these points relating to the power of referral is that they do not, in my judgment, assist Mr Hendron in the context of the proposed remittal, even if he is right about them or one of them.

The reason is this. Mr Hendron does not dispute that the DDP was applicable to him only from the April 2017 version of the Handbook, and not before that. If I were remitting the case to the BSB with a view to their considering whether to formulate a charge based on the non-reimbursement of H after May 2016, the relevant time would be from May 2016 onwards. So, even if Mr Hendron is right that a referral, for a hearing culminating in suspension, can only take place if such a referral could have taken place at the time of the conduct, that would not prevent a referral in respect of his conduct between May 2016 and April 2017. Leaving that to one side, I will address these grounds on their legal merits.

35. I am not persuaded by Mr Hendron's arguments on these grounds. I would not have allowed the appeal by reference to them. As to the original ground of appeal, in my judgment the DT dealt with the point in a legally correct manner and there is no unlawfulness or unreasonableness in the determination made by the chairman. In circumstances where no question of retrospective application of any substantive code of practice rule or core duty arises, the legally correct analysis was the one given by the chairman in the preliminary issue ruling. The change to rE39 was a change to a procedural rule concerning a power of referral. It interfered with no human right nor any vested right. It involved no substantive unfairness. There was no violation of any principle of non-retrospectivity.

36. Nor, in my judgment, can ECHR Article 7(1) assist Mr Hendron. The human rights protection against a "heavier penalty" than one which was "applicable at the time" of the conduct in question, is clearly concerned with a "criminal offence" and a "penalty". I accept Miss Gannon's three core submissions: that these disciplinary proceedings are not to be characterised as "criminal" (citing the decision of the Strasbourg Court in Brown v UK No. 38644/97); that remedies such as a suspension or restriction or disqualification, imposed to protect the public as the DT made clear its sanctions in this case were, would not constitute a "penalty" (citing R v Field, R v Young [2002] EWCA Crim 2913); and that, addressing "heavier" by reference to the "overall effect" (citing R (Uttley) v SSHD [2004] 1 WLR 2278 at paragraph 27), a suspension order is not to be characterised as "heavier" than a disqualification order, since the latter includes extensive restrictions on an individual's ability to engage in or be associated with the provision of legal services. It is common ground that a penalty of disqualification was applicable in the case of a suspended barrister between April 2017 and May 2018. Even if there were a "criminal offence" and a "penalty", no "heavier" penalty was introduced by the May 2018 Handbook. The McCarthy case, which referred to Article 7 considerations as informing the temporal applicability of sanctions guidance, involved no argument and no adjudication as to the application of Article 7. It is not authority for the proposition that a disciplinary finding of professional misconduct is a "criminal offence", nor that a suspension or prohibition imposed to protect the public is a "penalty", still less that a suspension or public-access prohibition is "heavier" than a disqualification order. Mr Hendron's reference to "estoppel" cannot turn a flawed Article 7 argument into a sound objection in law.

Grounds Relating to the DT's Findings of Breach

37. In writing and orally, Mr Hendron advanced a number of grounds of appeal relating to the DT's findings of breach of CD5 and rC71. In my judgment, the essence and high watermark of his submissions on this topic can be encapsulated in the following points. First, that any default on his part in reimbursing H was attributable to his lacking the

means to do so; that the DT's own finding and reasoning reflected a recognition of this impecuniosity; and that in those circumstances no finding of breach was sustainable: we could not be found to be in breach for failing to do that which was impossible. Secondly, that he had demonstrably made a genuine attempt to pay the amount directed by the Ombudsman, having secured funds for that purpose; that the DT was satisfied that those funds were available in June 2018 and made a finding to that effect; and that it was H who declined to pay in the 1 June 2018 cheque notwithstanding Mr Hendron's 27 June 2018 urging that she do so; and that in these circumstances findings of breach were unsustainable. Thirdly, that the correct position at the beginning of July 2018 was to regard H as having waived her entitlement to payment, having failed to pay the cheque in, in circumstances where Mr Hendron (on 27 June 2018) had clearly stated that he would treat such in action as waiver; and that for this reason as well the findings of breach were unsustainable.

38. Treating these points on their legal merits, I do not accept them, individually or in combination. In my judgment, the findings of the DT, that Mr Hendron had breached CD5 and rC71 in failing to reimburse H as directed by the Ombudsman were findings which were open to the DT on the evidence in this case. The DT, having considered all the evidence and having heard oral evidence and representations from Mr Hendron himself, did not find that his impecuniosity rendered impossible compliance with the Ombudsman's direction; nor that this feature, or any other, justified his actions or meant that he had not been in breach. The DT was not impressed that the 1 June 2018 cheque, albeit accepting that it was not issued without funds to honour it, together with the 27 June 2018 follow-up was sufficient to constitute compliance with the Ombudsman's decision and discharge of the CD5 and rC71 duties. The DT was unimpressed by the contention that H had waived her entitlement to be paid. I am satisfied that it was open to the DT to arrive at the findings it did, for the reasons it did.

39. The DT said this: "We heard evidence (partly in private) of difficulties in Mr Hendron's personal life. We do not consider that those difficulties, though they provide some explanation for his conduct, provide a defence to the charges". They said this: "The tribunal is not satisfied that, at the time when he wrote the cheques, Mr Hendron knew that they would be dishonoured. Mr Hendron knew that there was a risk that the cheques might be dishonoured, particularly if they were not promptly presented. Mr Hendron's observations on waiver were, at least in part, an attempt to force [H] to present the cheque as soon as possible. It was an ill-advised tactic". They said: "The public would expect a barrister to be pro-active and to discharge obligations in a prompt manner. The bare facts are plain. Since 2017 there has at all times been an obligation on Mr Hendron to make payment to [H]. The payment has not been made." It is also relevant that, in identifying relevant mitigating factors, at the state of sanction, they recognised "Evidence of financial hardship" with "direct impact on the commission of the offence"; and "unusual personal circumstances that provide some explanation for the behaviour". As an aggravating factor, the DT recognised as relevant "persistent conduct/conduct over a lengthy period of time".

40. In his written arguments Mr Hendron had included three further points relating to the question of breach. (1) He submitted that the DT could make no sustainable finding of breach as at June 2017 when its own reasoning recognised that Mr Hendron's knowledge of the Ombudsman's direction only arose from September 2017. There is nothing in this point. The tribunal stated that "Mr Hendron had knowledge of the final

decision by no later than September 2017". The DT was clearly concerned about the default after that time, but also prior to that time. It specifically dealt with both. It specifically explained why a lack of knowledge prior to September 2017 was and would have been no answer. The DT said this: "we are not simply concerned with Mr Hendron's actual knowledge. He ought to have had knowledge before September 2017. He could have obtained information from material directly available to him or by accessing his chamber/former Chambers. His relationship with his chamber/former Chambers did not preclude from obtaining information. Mr Hendron was aware of the preliminary decision. It was incumbent on him to take steps to find out what had happened since then." (2) Next, Mr Hendron submitted that the finding of breach was incompatible with the BSB having itself extended his deadline to pay H to spring 2018. I was shown no evidence to support such extension, nor given any reason why it would have undermined a finding of breach, in circumstances where no payment had ever been made at any stage prior to the hearing before the DT, about which it was understandably troubled. (3) Finally, Mr Hendron submitted in writing that it was impermissible to charge the same conduct as a breach of both CD5 and rC71, and that the charges should have been put as alternatives. He was right not to pursue this point orally. These were, in principle, legitimate twin charges, it was appropriate for the DT to be able to consider the conduct in this case under each of the rules, making appropriate findings and identifying appropriate sanctions. That is what happened in Obi-Ezakpazu, to which I have referred.

Grounds Relating to the DT's Sanctions

41. Turning to sanction, in his oral submissions Mr Hendron emphasised two points. First, although conceding that the relevant conduct "arose out of" public access instructions, he submitted that the link was a "tenuous" one, and could not justify a nine-month prohibition from accepting or carrying out public access instructions. Secondly, in circumstances where his practice was "overwhelmingly" public access work, as he had explained to the DT, the nine-month prohibition on public access instructions in substance took effect as a nine-month suspension and was unjustified and disproportionate.

42. I do not accept that these would have been good grounds for allowing the appeal. The DT is an expert and informed tribunal, particularly well-placed in any case to assess what measures are required to deal with defaulting barristers and protect the public interest. Absent an error of law, the High Court should pay considerable respect of the sentencing decisions of the DT. See Obi v Solicitors Regulation Authority [2013] EWHC 3578 (Admin) at paragraphs 4 and 8, citing Law Society v Salsbury [2008] EWCA Civ 1285 [2009] 1 WLR 1286 at paragraph 30. So far as the link to the acceptance of public access instructions is concerned, what matters is that this was a case about client monies, which needed to be reimbursed, in circumstances where the barrister had been unable to undertake the relevant work. Client monies, and the way in which they are handled, are a central concern in the context of public access instructions. There is no intermediary instructing solicitor to protect the client. This is the very point in substance emphasised in the relevant paragraph (Paris 6.11) of the Sanctions Guidance: Breaches of the BSB Handbook (February 2018). The DT did not see the public access instructions prohibition as, in substance, constituting a suspension. They saw a difference between the two and emphasised that the length of suspension had been approached having regard to the fact of the prohibition, having "considered

the sanctions in the round". The DT did not find that all of Mr Hendron's work, whether past or future, was public access work. Indeed, they said in their reasons: "He is back in practice on his own account, accepting instructions both from solicitors and on a direct access basis". There is, in my judgment, no basis for impugning or overturning the sanctions, on the basis of these grounds of appeal.

43. Again, further points were advanced by Mr Hendron in writing, and I have considered them all. In particular, he submitted that the sanctions were not necessary and proportionate; that this was not a case of any identifiable risk to the public; that he had not been undertaking public access work at the time of non-compliance with the Ombudsman's decision; that the sanction was out of line with the relevant Sanctions Guidance; and that the sanctions were ones which the DT was not entitled to impose. I am not persuaded by any of those points, individually or cumulatively. The DT was entitled, in all the circumstances and in their exercise of judgment, to regard the sanctions imposed is justified, necessary and proportionate. They were entitled, as an exercise of judgment and appreciation, to identify a relevant risk. They were entitled to regard as sufficient that the issue of reimbursement arose out of direct access instructions, at a time when Mr Hendron had been undertaking direct public access work, and impose a sanction which restricted his ability to continue to undertake such work in future. The application of the Sanctions Guidance starting points (at section D3 of the Guidance) were a matter of judgment: the DT, who rejected the BSB's characterisation of this case as category (d) (starting point: long suspension), was not obliged to use a starting-point of a "conditional short suspension" (category (b)), and gave legally adequate reasons for the sanctions imposed, in all the circumstances of this case. The DT imposed sanctions at which it was entitled to arrive.

Whether to Remit the Case

44. So, I go back to where I started. I have rejected the various grounds of appeal. That means, leaving aside the suspended-barrister problem, no other ground advanced by Mr Hendron could serve as an impediment to my remitting this case, were it otherwise appropriate to do so. Is it otherwise appropriate? That is the essential question which I now have to decide, dealing therefore with the second strand of Mr Hendron's resistance to remittal.

45. What is sought by the BSB is an order for remittal with the prospect of a fresh charge, focusing on a materially earlier part of the chronology, with a new PCC equivalent stage (involving, I was told, what is now called the Independent Decision-Making Body) and the prospect of a third referral to a DT for a further disciplinary hearing. Miss Gannon submitted that remittal is the appropriate course for essentially, as I see it, the following reasons. This is a case engaging significant public interest concerns. Those public interest concerns can be seen reflected in the findings and sanctions imposed by the DT. Protection of the public, and public confidence in the profession, lie at the heart of what the BSB was doing in advancing this case, and what the DT was doing in upholding it. Those public interest concerns have not evaporated, by reason of the problems related to the point of law that has arisen. At the heart of this case are concerns, which the DT considered serious, relating to professionalism and client monies. Unless the matter was remitted, Mr Hendron will be entitled to return to conduct direct access work, handling client monies directly, without the BSB having considered – on a proper legal basis – whether there is a public interest concerned justifying the pursuit of further action against him. The BSB is the regulatory authority charged with protecting the public and

the public interest. Mr Hendron's conduct vis-à-vis H falls within CD5, notwithstanding that he was an "unregistered barrister", and notwithstanding the problems with the Ombudsman's jurisdiction and with rC71. A PCC DT might well be concerned, looking at Mr Hendron's conduct vis-à-vis H, just as was the Ombudsman, and just as was the DT at the hearing in July 2019, notwithstanding the absence of jurisdiction on the part of the Ombudsman and the inapplicability of rC71. The BSB should be entitled to look at this matter again and start fresh disciplinary proceedings if it considers that to be justified.

46. Mr Hendron submits that I should not remit this case. The essence of his position can, as I see it, be encapsulated as follows. Were this case to go further in the light of a remittal, that would be a third referral to a DT. It would involve a wholly new charge with a new focus in time. It would involve the issue of conduct vis-à-vis H, going back to 2016. All of this is in circumstances where the BSB, having taken two opportunities to refer a case against him, chose never to advance any case relating to the 2016 conduct. The case against him was about non-compliance with the Ombudsman's ruling in non-payment of £850 in and after May 2017; it was never (as it could have been) about non-reimbursement to H of £650 in and after May 2016. The BSB has rightly, now, identified a fatal question of law in this case, which has rendered inevitable the allowing of this appeal, but the BSB failed to identify this at any earlier stage. There would be real unfairness in remitting this case. The £850 has been paid. The matter has already been hanging over Mr Hendron for a very considerable period of time. Although in law the appeal to the High Court has a suspensive effect on the sanctions, the practical effect of the findings and sanctions of the DT has been a negative one, over a considerable period. Had the sanctions run their course, Mr Hendron would now be in a position to start afresh. With a remittal, he will face a serious continuing shadow. The BSB can give no reassuring timeframe for dealing with this case if remitted. No DT hearings are currently being listed, in the light of the coronavirus pandemic, and there is little prospect of an appeal being heard in the foreseeable future, with an inevitable backlog. Worse than that, this is a case that would need to go back to the drawing board and be considered from the start of the process, engaging the PCC, with the formulation of new charges. In all the circumstances, there is an insufficiently cogent public interest to support allowing the BSB a third opportunity to advance what is by now a very stale case against Mr Hendron, outweighing the undoubted prejudice that such a course will mean for him.

47. My starting point is to recognise the BSB's position as a regulatory authority acting in the public interest so far as the regulation of the legal profession is concerned. I must, and do, respect the position adopted regarding remittal by the BSB. In my judgment, it was quite right for the BSB to invite me to remit, reminding me of the public interest considerations, and of the virtues of leaving it to the PCC and – if appropriate – a DT to evaluate whether, in all the circumstances of this case, the public interest and the protection of the public, together with the need to promote public confidence in the profession, any further step. I bear in mind, having been invited by Mr Hendron to do so, that I have addressed all of the other grounds of appeal which he had advanced, and have rejected them. That means, leaving aside the point of law raised by the BSB itself, they can be said to have been legitimate concerns capable of supporting findings and sanctions which a court would otherwise have upheld. There is a lot to be said for leaving it to the BSB to deal with what should happen next. That would mean, if the matter is to be dropped, it would be dropped by them. If they maintain the resolve that

the public interest considerations warrant further action, it would be there regulatory judgment in that respect which would give this case an ongoing momentum.

48. I have reflected on all of these points and all the circumstances of this case. The ultimate judgment as to what order to make in disposing of this appeal is entrusted, by Parliament by way of a discretion and judgment, to me. As I have explained, this Court is empowered to "make such order as it thinks fit on an appeal" (section 24(6)). In the end, I am satisfied that it would not be in the interests of justice, nor justified by reference to the public interest, the protection of the public or confidence in the profession, to remit this case to the BSB so that further action could be taken against Mr Hendron arising out of the non-reimbursement of H.

49. I reach that conclusion having regard in particular to the following. (1) H's complaint was to the Ombudsman. The Ombudsman dealt with it and made a finding in her favour. In the event, albeit only after the BSB's action and the DT's determination, the reimbursement (£650) has been affected and the compensation directed by the Ombudsman (£200) was also paid. The process before the DT has had the consequence that Mr Hendron paid the £850 to H. Mr Hendron never challenged the jurisdiction of the Ombudsman and it would be far too late for him to do so now. I make clear: my conclusions in Mr Hendron's favour in the exercise of my discretion is based on the fact that H has received the £850 and there is no question of Mr Hendron seeking to recover any part of it back from her. H's position is secure. (2) As the BSB accepts, the DT's findings of breach of rules, and sanctions arising from those findings of breach, cannot in law stand. No finding of breach or sanction survives. (3) In pursuing his appeal which has arrived at that position, although the appeal in law suspended the operation of the sanctions, there will I am no doubt have been a period of practical impairment on the reality of Mr Hendron's ability to function as a practising barrister. As he told me, and I accept, he has for 8 months been under the shadow of findings of breach, and the imposition of sanctions (albeit in law suspended). I am satisfied that this has had a real, detrimental impact. The findings and sanction casting the inhibiting shadow have in the event proved to be legally unsustainable. (4) The BSB is right to accept that there would be unfairness to Mr Hendron in this matter being remitted. (5) It is not a question of remittal for a short period of time for a promptly reconvened fresh consideration on existing charges. If the case is to be pursued, that could only be because of a substantial change in the focus of the charge against Mr Hendron. (6) That change is driven by a problem of law recognised by the BSB but only extremely belatedly. It could have been spotted at any time. It would be wrong to attribute the failure to appreciate the point to Mr Hendron, who drew attention to a problem with the first referral, itself necessitating a change in the Handbook. (7) The BSB could, from the very start of this case, have included a charge or charges which focused on Mr Hendron's conduct from May 2016 onwards, in not reimbursing the £650. The decision was taken not to do so, but to rely only on the conduct from May 2017, in not complying with the direction for payment of the £850. The focus on the Ombudsman and the direction was linked, no doubt, to the fact that the BSB's interest in the matter was triggered by the complaint from the Ombudsman as to non-compliance with that decision, a decision which the BSB itself submits the Ombudsman lacked jurisdiction to impose. (8) To strip out the Ombudsman and non-compliance with the Ombudsman's direction is to change the nature and focus of the case. (9) The implications of doing so, were the matter to be pursued for a third time, would stand to involve a very lengthy

period of uncertainty together with a very lengthy period taken up with yet further disciplinary proceedings.

50. Having regard to all the circumstances, and all the considerations relevant to the evaluation, I am satisfied that it is inappropriate in the circumstances – as they now are – to remit this case to go back to the drawing board, for further consideration, with the prospect of further reconsideration, a newly formulated and substantially refocused charge, and a third referral, for yet another hearing in front of yet another DT. I have had well in mind that standards applicable to professional behaviour and in particular to the conduct of direct access instructions are matters of great significance, to the public and in the public interest. Mr Hendron knows he will need to comply with the applicable standards in all of his conduct as a practising barrister. He knows that the BSB will retain the important regulatory role that it has in relation to that conduct, while the Ombudsman will retain the jurisdiction of dealing with any matter brought to its attention falling within that jurisdiction. By declining to remit this case to the BSB there is no dilution of the professional standards owed by Mr Hendron, for the protection of the public, going forward. That is now the appropriate focus for energies, going forward. There is an insufficient justification for the order of remittal which I have been invited to make. I therefore decline to do so. The appeal is allowed. I decline to order remittal.