Citation Number: [2021] EWHC 2918 (Admin)

Case No: CO/595/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
ON APPEAL FROM THE SOLICITORS DISCIPLINARY TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/11/2021

Before :

THE HONOURABLE MR JUSTICE SAINI

- -

Between :

RAMACHANDREN NARAYANASAMY	**Appellant**
- and -	
SOLICITORS REGULATION AUTHORITY LIMITED	**Respondent**

- -
- -

Ijeoma Omambala QC and **Nicola Newbegin** (instructed by **Leigh Day**) for the **Appellant**
James McClelland QC (instructed by **Solicitors Regulation Authority Limited**) for the **Respondent**

Hearing dates: 26 October 2021

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Approved Judgment

MR JUSTICE SAINI :

This judgment is 5 main parts as follows:

I. Overview

1. Ramachandren Narayanasamy ("the Appellant"), a former Solicitor of the Senior Courts, was found guilty of dishonesty and other serious misconduct following a 7 day trial before the Solicitors Disciplinary Tribunal ("SDT"). The SDT ordered that he be struck from the Roll and provided detailed reasons in a judgment dated 28 January 2021 ("the SDT Judgment"). The Appellant has appealed to the Administrative Court, as of right, against the SDT's decision (including the sanction) by an Appellant's Notice dated 18 February 2021. That appeal is due to be heard in 2022.

2. In broad terms, the basis of the proceedings before the SDT was alleged false and evasive evidence the Appellant had given in a financial partnership dispute with a former partner. That dispute was the subject of a claim heard in the Chancery Division ("the ChD Trial") before Mr Stephen Morris QC, sitting as a Deputy High Court Judge ("the Judge"). The Appellant was unsuccessful in his defence of that claim: see [2015] EWHC 3117 (Ch).

3. By an Application Notice dated 3 August 2021 ("the Application") the Appellant seeks the permission of the court to adduce new expert medical evidence concerning his psychiatric and mental state which was not before the SDT. He has instructed a wholly new legal team for his appeal and they presented the Application before me.

4. The Appellant had been represented by experienced Leading Counsel, Mr Michael McLaren QC, before the SDT. I emphasise at the outset that there has rightly been no criticism made of Mr McLaren QC's conduct of the Appellant's defence. Having considered the record it is clear to me that the Appellant had legal representation of the very highest quality.

5. The essential basis of the Application is that new medical evidence obtained from an expert, Dr Christine Tizzard ("Dr Tizzard"), a Chartered Consultant Psychologist, would have had an important impact upon the outcome of the SDT proceedings. I will summarise that evidence in Section II below, but in outline it is said to show that the Appellant was at various material times suffering from a number of recognised mental

health and cognitive disorders which compromised his psychological function in all areas including his ability to give evidence. I will avoid referring in any detail in this judgment to the Appellant's personal circumstances which give rise to the conclusions of Dr Tizzard. These are private matters which I do not need to set out to determine the Application.

6. It is argued for the Appellant that had the medical evidence been before the SDT, that tribunal would not have found the Appellant dishonest and it would have reflected differently upon the answers he had given in evidence before Mr Morris QC and before the SDT. The Appellant also pursues a number of Grounds of Appeal which do not relate to the medical evidence but allege errors by the SDT on the basis of the evidence which was before it.

7. The SRA opposes the Application. I was greatly assisted by the focussed and well-structured oral submissions of Leading Counsel for the Appellant and Leading Counsel for the SRA.

II. Factual Background

8. As outlined above, the misconduct at issue before the SDT related to alleged false and evasive evidence which it was said the Appellant gave under oath when he was a witness in the ChD Trial. The broad nature of the issues in the trial and the Judge's conclusions can be understood from the opening and concluding paragraphs of his judgment [1]-[2] and [271]:

> "1. In this action, the Claimant, Edwin Lewis claims sums from the Defendants, Mr Ramachandren Narayanasamy and his wife, Yamunah Suppiah, allegedly due following the termination of his professional relationship with the Defendants. For clarity I refer to the First Defendant as Mr Narayanasamy.
>
> 2. Mr Narayanasamy was and remains the principal partner in the firm of Dotcom Solicitors ("the Firm"). The Second Defendant was also a partner in the Firm. In 2007, the Claimant, who had been practising as a solicitor in Malaysia, came to the United Kingdom in order to work as a solicitor with the Firm. With the assistance of Mr Narayanasamy, the Claimant obtained a work permit to work at the Firm, and consequent upon that, entry clearance into the UK. The Claimant worked with the Firm from May 2007 until January 2010 when the relationship broke down and he left the Firm. He now seeks to recover remuneration and repayment of a lump sum contribution he made to the Firm, allegedly due under the terms of the contractual arrangement made between himself and the Firm. The Defendants dispute the terms of the arrangement made between the Claimant and the Firm and secondly contend that the arrangement, whatever its precise terms, is

> unenforceable as being illegal. They further contend that the arrangement is voidable for non-disclosure of material facts and should be rescinded."

> "271. My conclusions on the Issues are as follows: On Issue (1), the terms of the arrangement were that the Claimant would be paid £24,000 and 10% of the Firm's annual gross turnover, he would make a contribution to the Firm of £30,000 and that contribution would be refunded on termination. There was no agreement to offset nor any pre-condition to generate £300,000 in fees. On Issue (2), the arrangement between the Claimant and the Firm was a contract of employment at all times".

9. Arising out of the Appellant's evidence in the ChD Trial, the SRA advanced seven allegations against the Appellant, which are reproduced at [1] of the SDT Judgment. Of these, the SDT upheld four allegations, *viz.* Allegations 1.1(ii), 1.1(iii), 1.1(v), and 1.1(vi), and made findings of dishonesty in relation to two of them, namely Allegations 1.1(ii) and 1.1(v).

10. The proven allegations were (in summary) as follows:

    i) Allegation 1.1(ii). In giving evidence concerning a letter written by the firm's accountant to the UK Government, the Appellant dishonestly gave evidence that was (a) knowingly untrue and (b) evasive, obfuscating, and lacking in candour, in breach of Principles 1, 2 and 6 of the SRA Principles 2011 (the "Principles"). The relevant Principles provided as follows: "You must […] 1. uphold the rule of law and the proper administration of justice; 2. act with integrity […] 6. behave in a way that maintains the trust the public places in you and in the provision of legal services";

    ii) Allegation 1.1(iii). In giving evidence concerning an email dated 6 November 2007, the Appellant denied its plain meaning and his evidence was evasive, obfuscating, and lacking in candour, in breach of Principles 1, 2 and 6;

    iii) Allegation 1.1(v). The Appellant knowingly, dishonestly, and in breach of Principles 1, 2 and 6, gave false evidence to the effect that his former partner, Mr Lewis had agreed that he would have to generate £300,000.00 as a condition precedent to obtaining any interest in the earnings of the Appellant's firm (the "£300,000 Condition"); and

    iv) Allegation 1.1(vi). When giving evidence concerning the earnings of the firm, the Appellant gave evidence which was evasive, obfuscating and/or lacking in candour in breach of Principles 1, 2 and 6.

11. Before turning to what took place before the SDT, it is appropriate to record what passed between Mr McLaren QC and the Appellant on the issue of evidence concerning the Appellant's mental health. That material is before me by waiver of privilege. It is clear that the Appellant and his Leading Counsel actively considered obtaining medical

evidence and a decision was made not to do so. This is reflected in Mr McLaren QC's email of 21 April 2021, which the Appellant acknowledges to be accurate.

12. Turning to that email, it shows that Mr McLaren QC expressly addressed the possibility of obtaining a medical report on at least one, and quite possibly two, separate occasions, *viz.* when advising on the Appellant's draft witness statement and, again, when preparing for trial. I note that Tab K of the SDT's electronic bundle had been set aside for Medical Reports, and Mr McLaren QC specifically raised the question of whether a report should be obtained in that context. He recalls the Appellant firmly stating that he did not want to get a medical report. However, one knows from what then occurred that some form of cognitive shortcoming was raised by Mr McLaren QC before the SDT, albeit not backed with medical evidence.

13. Both Counsel helpfully took me through the SDT Judgment and it is clear that in defending the allegations, the Appellant relied, amongst other things, on a number of medical or quasi-medical issues which he claimed had affected his evidence during the ChD Trial. In particular, he adduced a medical certificate detailing a number of serious non-psychiatric medical conditions; he contended that he suffered from hearing loss and had found it difficult to hear questions in the ChD Trial.

14. Of most importance in the present context is the fact that the Appellant relied on alleged cognitive shortcomings or what his Leading Counsel described as serious deficiencies in his ability to process information and to give evidence. These were portrayed as severe problems with memory, difficulties processing facts, absorbing questions, and articulating coherent answers. These were all said to be highly relevant to the evidence the Appellant gave in 2015 and before the SDT. I will return below to the way this was put by Mr McLaren QC in his submissions.

15. Despite this being the case pursued at the trial, the Appellant did not adduce medical evidence concerning the existence, nature or degree of such cognitive shortcomings. In fact, the contrary position was taken by the Appellant. So, in both his own evidence, and through Mr McLaren QC, the Appellant repeatedly confirmed that he was *not* contending that he had a recognisable psychiatric or cognitive disorder, nor was he seeking to adduce medical evidence on those matters.

16. My attention has been drawn to the Appellant's evidence on 8 October 2019 (Transcript, pp. 63-64) confirming that he did not claim to have "*any psychiatric or cognitive disorder*", had not been diagnosed with depression and was not taking antidepressant medication; and confirming that he did claim to have been "*mentally impaired*" when giving evidence.

17. Given the importance of the precise submissions made in the SDT to the issues before me, I should set the relevant parts of Mr McLaren QC's closing in full (my underlining):

> "Now, Ma'am, as you'll be aware, this is the point at which counsel, habitually, try to persuade the court or tribunal that their own client is an impeccable witness, and to be believed in everything he says, whereas the converse is true for the opposition witnesses. That's the usual course. This, however, is a most unusual case, because in nearly 40 years of <u>practice, for the first time, I shall say something quite different about my own</u>

> client, including, in particular, his shortcomings in his ability to process information and to give evidence. And, Madam, I stress, I am saying this with my client's approval, which is what I've needed to take in the last half hour or so, because he recognises the truth of the comments I'm about to make, and he also recognises the gravity of the situation he now faces. So my submission is, in a nutshell, this, that it's abundantly clear from the manner in which the respondent has given evidence to the tribunal, and indeed to the Chancery trial in 2015, that he suffers from a number of severe deficiencies or shortcomings in his ability to process information and to give evidence. In a bit more detail, his ability to deal with and to answer questions, is I regret to say, significantly less than one would expect of a typical or reasonably competent solicitor. On occasions, you may feel that he doesn't listen properly to questions. On occasions he fails to comprehend even relatively easy questions. On occasions he, perhaps, spends time trying to work out what the questioner is getting at, rather than focussing on the question. On occasion he fails to analyse the question and the relevant answer. And, above all, he fails to marshal, properly, his thoughts, and generally, I think we can all agree, he is far from articulate at expressing himself. His sentences are ill-structured and often difficult to follow, and one can see that by looking at either the transcripts of the Chancery trial or the transcripts of this hearing. Frequently, the gist of one sentence tails off or one point morphs into another unrelated point and, as a result, often he heads off at a tangent to what was the original question. Madam, tellingly, he doesn't only do that when under the cross-examination, facing difficult questions for him, you will recall seeing it even in re-examination. When I was asking him open but relatively benign questions, and yesterday, I had to repeat questions to bring him back on point and, indeed, I think I did so today as well. He sometimes says what he does not mean, an example, if I can put it to you, is transcript, day 3, at page 125, when he made…"

Mr McLaren QC continued:

> "…Now, of course, I'm not saying that the respondent's is a clinically diagnosed problem, I'm not instructed to say that and, of course, there's no expert medical report, but I would say that it's a fact, plain to see, in the manner in which the respondent has given his evidence, and in his emotional reaction to my question about the passage of the last 13 months, that he is having real mental issues in remembering things and in dealing with stressful situations like giving evidence. Again, just to be clear, I'm not saying, obviously, that you can afford the respondent carte blanche to give any answers he wishes to any questions he is asked. Of course, clearly, you, the tribunal, must look at each instance of evidence which is alleged to have been given falsely or obfuscatingly [sic] and so on, and you need to

> ask yourself whether this particular respondent was aware, was conscious that he was not answering the question directly or aware that he was being untruthful in the evidence he gave, as the case may be. In other words, in this rather extraordinary case, indeed, in my experience, unique case, and that's an overused word but apt here, I'd urge you to look at the respondent's evidence not through the prism of a typical, competent solicitor in full mastery of his faculties, with a reasonable memory, and a reasonable capacity to absorb and process facts and questions, and a reasonable ability to articulate coherent answers. Rather, you, the tribunal, must look at any shortcomings in the respondent's evidence to the Chancery trial, through the particular and very different prism of this particular person, whom, you may well think, has all the shortcomings I've outlined, and I'm sure you will make all the necessary but unusual allowances which may be required for the mental elements of the misconduct that's being alleged. In summary, whilst, ultimately, it depends on your impression of the respondent, at the risk of being blunt, I suggest that here is a solicitor who in his evidence to the Chancery Division and to the tribunal, was very confused in his thought processes, who has real difficulty in comprehension of questions, struggles to articulate his responses and stick on point, but, and this is the key point, one who is not, basically, dishonest. He is not lacking integrity, and he wasn't deliberately seeking to obfuscate or be evasive. I would urge you to think he was doing his best to assist the tribunal, as I would suggest was his approach at trial, and that perhaps his innate shortcomings were even more apparent and pronounced at trial because of his difficulties in the run up to trial...".

18. The Tribunal relied upon these concessions or acknowledgements and recorded them in its Judgment at [43.26] as follows:

> "The information before the Tribunal in this regard was set out in the Respondent's evidence and in submissions. In particular the Respondent had set out a number of personal difficulties he had faced and that evidence had not been challenged by the Applicant. However there was no medical evidence before the Tribunal and indeed Mr McLaren acknowledged that he was not suggesting that there was a clinically diagnosed problem with the Respondent's mental health".

19. Returning to the chronology, having been unsuccessful before the SDT the Appellant instructed new representatives (Saunders Law) to prepare an appeal. Saunders Law (now replaced by Leigh Day) obtained expert evidence from Dr Tizzard which (as summarised below) finds that the Appellant has two cognitive/psychiatric disorders.

20. The Expert Reports set out Dr Tizzard's findings as follows. Mr Narayanasamy is suffering from severe Post-traumatic Stress Disorder; he also has concomitant severe clinical depression and this is at times causing suicidal ideation and giving rise to paranoid thoughts; at the level of distress he is suffering from, "*it would be common place for him to experience very serious difficulties in all areas of psychological, emotional and behavioural function*"; "*An individual who experiences PTSD, frequently has very significant problems with short term memory. They find it difficult to string sentences or articulate them and often misplace or are unable to locate usual words that they want to say*"; "*It is without doubt that Mr Narayanasamy is suffering from these conditions and these will each have placed a significant negative impact on his every day performance in all areas of his life*"; "*In my opinion given the severity of his condition, he would not have been in any adequate state to provide evidence at Tribunal and remains unfit. Essentially, he would need an intermediary for him to do this as his short-term memory, recall and general level of distress is extremely high*"; *"… individuals with a diagnosis of PTSD frequently experience absences or psychological disassociation. Which means in times of stress, even minimal stress, they become overwhelmed as the adrenaline and cortisol in the system floods the body and individuals appear unreceptive, uncooperative and generally act in a very bizarre manner. It would be appropriate to assert that this would have been the likely cause of Mr Narayanasamy's presentation when giving an account of himself*"; "*It is my opinion that Mr Narayanasamy is very seriously compromised in all areas of psychological function. It needs to be explained to him that his function will improve once he has had the benefit of correct psychological therapy and the stress in his life has reduced. Nevertheless, at this time he is extremely compromised*". I have set these matters out at some length because, without doing so, it is difficult to understand the basis of the Application. I have however excluded references to the challenges faced by the Appellant in his private and personal life and which the evidence suggests contributed to his medical predicament.

21. Although the Reports did not originally have any CPR compliant expert declaration, the SRA accepts that they are credible evidence from a duly qualified expert. The Reports are however concerned with the difficulties faced by the Appellant at the time of the SDT proceedings and not the 2015 ChD Trial.

III. Legal Framework

22. The jurisdictional gateway is CPR r.52.21(2) and the governing principles are those stated in Ladd v Marshall [1954] 1 WLR 1489 (CA) at 1491:

> "To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

23. Ladd v Marshall pre-dates the CPR, but it is common ground that it still sets out the relevant test and promotes the overriding objective. The Court of Appeal has explained that: "*[i]t [Ladd v Marshall] has survived the introduction of the CPR, and its approach is binding on us* […];": W (Children) [2009] EWCA Civ 59. As has been explained by Lord Phillips MR, "*These [Ladd v Marshall] principles have been followed by the Court of Appeal for nearly half a century and are in no way in conflict with the overriding objective*": Hamilton v Al-Fayed [2001] EMLR 15 (cited with approval in General Medical Council v Adeogba [2016] 1 WLR 3867 at [28]).

24. Accordingly, whilst the CPR sets the gateway, as a matter of substance: "*the old criteria effectively occupy the whole field of relevant considerations to which the court must have regard in deciding whether in any given case the discretion should be exercised to admit the proffered evidence*": Terluk v Berezovsky [2011] EWCA Civ 1534, at [32]. Further, the Courts will be still more reluctant to permit the admission of new evidence if it would necessitate a re-trial. Where that is the case, new evidence should only be admitted if the Ladd v Marshall criteria are satisfied and it is "*imperative in the interests of justice*": Transview Properties Ltd v City Site Properties Ltd [2009] EWCA Civ 1255 at [23].

25. The Ladd v Marshall principles are fundamental to legal certainty and the proper administration of justice. Far from subverting the overriding objective, they crystallise its requirements, embodying the appellate courts' settled attempt "*to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result*": Hamilton v Al-Fayed [2001] EMLR 15 at [11].

26. There is an issue between the parties as to whether a court can permit new evidence when one or more of the Ladd v Marshall requirements is not met. I was referred in this regard to Jasinarachchi v General Medical Council [2014] EWHC 3570 (QB). I will address this issue further below.

IV. CPR 52.21(2) and *Ladd v Marshall*: application

The submissions

27. In her powerful and eloquent submissions, Leading Counsel for the Appellant argued that the Expert Reports satisfy all three elements of the Ladd v Marshall test. In addition, she submitted that it is overwhelmingly in the interests of justice, and in the public interest, that they be admitted. I will summarise the submissions below, but without identifying every point made.

28. The submissions for the Appellant first addressed the second limb of the test: whether the Expert Reports are likely to have an important influence on the result of this appeal. It was argued that the Reports show that the Appellant's cognitive abilities, including his ability to give evidence, have been impacted by his mental health, namely severe PTSD and depression. In particular, it was said that they show that he would have suffered from serious difficulties in all areas of psychological and behavioural function, he would have struggled with short term memory, he would have found it difficult to articulate himself and he would have been unfit to give evidence.

29. Leading Counsel for the Appellant underlined that her client was very severely compromised in all areas of psychological function. She submitted that her client's lack of appreciation meant that neither he (nor his legal advisers) had the requisite skill and knowledge to make an informed decision to obtain medical evidence. She also rightly stressed the embarrassment which her client would have felt and the cultural sensitivity at play when accepting and acknowledging mental health issues.

30. She argued that medical evidence, if admitted, would put in doubt the fairness and outcome of any proceedings against an individual in the Appellant's position. It was submitted that its effect would be particularly stark in this case where all of the allegations that were upheld were based upon the way in which the Appellant gave evidence at the ChD Trial and his evidence about the same before the SDT. It was submitted that the SDT found that the reason for the way he gave his evidence was misconduct, including a lack of integrity and, in two instances, dishonesty. This was despite a lack of medical evidence about his cognitive abilities at the time and their own recognition that at times he appeared to be in difficulty before them. By contrast the Expert Reports show that the reason was likely to have been his severe PTSD and depression and that he was unfit to give evidence.

31. Leading Counsel said that whilst the appellate court is not being asked to make findings about the state of her client's mental health at the relevant time, had the Expert Reports been available to the SDT, it clearly would have provided what she termed "exculpatory evidence" to the SDT in relation to the dishonesty allegations, in that if the evidence in the 2015 ChD Trial was the product of cognitive impairment rather than deliberate obfuscation, the tests in respect of lack of integrity and/or for dishonesty would not have been met. She accordingly argued that the SDT's decision must, at a minimum, be retaken with the benefit of proper medical evidence about her client's mental health and cognitive abilities (or lack of) at the time of the first trial and before the SDT.

32. As to whether the evidence could not have been obtained with reasonable diligence for use at the trial, reliance was placed on the Appellant's witness statement where he explained that he did not realise that he was suffering from PTSD at the time of the SDT proceedings and explained that it was that lack of realisation that meant that he did not obtain treatment for it and of course therefore why he did not obtain an appropriate medical report at the time.

33. Finally, as to the interests of justice, it was said to be "overwhelmingly in the interests of justice" that the Appellant be permitted to rely upon the Expert Reports. It was submitted that both the SRA and the SDT were on notice of the potential mental health or "cognitive" difficulties that he was suffering from both at the time of the 2015 ChD Trial and before the SDT. Yet neither the SRA (with whom the burden of proof lay) nor the SDT (who had duties to obtain medical evidence) took appropriate steps. Reliance was placed on the case of Brookman v GMC [2017] EWHC 2400.

34. It was said that it is important from what Leading Counsel for the Appellant called a "public policy perspective", that the correct decision is reached. She argued that it is not in the public interest that a qualified solicitor, capable of giving good service to clients, should be struck off in a situation where, had medical evidence been obtained, that evidence might well have shown him to have been innocent of the allegations against

him. It was submitted to me that is an important factor to be taken into account when the Court exercises its discretion in this case.

35. Leading Counsel for the SRA persuasively submitted in his concise and attractively structured submissions that none of the limbs of the test (save the third) was satisfied and took issue with the invocation of general public interest considerations.

36. Leading Counsel for the SRA relied upon four main points. First, the new evidence plainly could have been obtained at first instance with "*reasonable diligence*". Indeed, the Appellant was well aware that he could obtain medical evidence, discussed doing so with his Leading Counsel, elected not to obtain it, and expressly informed the SDT of that decision. I refer above to the history. Second, it was submitted that the Appellant cannot show that the new evidence "*would probably have an important influence on the result of the case*". It was said that the position was in fact quite the reverse: the evidence relates to the Appellant's present state of mind, not his condition when the relevant misconduct occurred some 6 years ago. It is, therefore, at the most of only marginal relevance. Furthermore, Leading Counsel for the SRA argued that psychiatric evidence of this sort is incapable of disturbing certain findings that were made by the SDT based on "*overwhelming*" contemporaneous documentary evidence, which made the Appellant's dishonesty "*incontrovertible*". Those findings made the result of the prosecution (*viz.* strike off) inevitable. Third, it was submitted that it manifestly is not in the "*interests of justice*" to permit the admission of this new evidence in circumstances in which the Ladd v Marshall criteria are not satisfied. Leading Counsel disputed the suggestion that the SRA and SDT were in some way both responsible for the fact that the Appellant did not obtain and adduce this evidence at first instance. Fourth, and finally, he argued that "*public policy*" does not require the admission of this new evidence and challenged the adoption of such a criterion.

Analysis and conclusions

37. I will consider the issues under each of the Ladd v Marshall heads.

The "reasonable diligence" issue

38. In my judgment, the new evidence could have been obtained "with reasonable diligence" for the proceedings before the SDT. My five reasons are as follows.

39. First, the Appellant benefited from expert representation at every stage in the proceedings. Within a month of the Rule 5 Statement being issued, the Appellant had already engaged a City firm pre-eminent in the field of solicitors' discipline (Kingsley Napley LLP). That firm prepared and signed his Answer. Then, at a two-day interim hearing on 4-5 April 2019, the Appellant was represented by both Kingsley Napley and Michael McLaren QC who attempted to strike out part of the SRA's case. At some point following that hearing, the Appellant parted company with Kingsley Napley. However, he continued to instruct Mr McLaren QC. Mr McLaren QC then advised the Appellant concerning his draft witness statement (filed on 1 August 2019) and in the preparation for trial, before then representing him vigorously and ably throughout each of the 7 days of the final hearing itself. Equipped with this high-powered representation, the Appellant had, and took, the opportunity to consider and seek advice upon what

evidence might be adduced to advance his defence to best effect. In the event, he filed copious submissions and evidence. I note that his pleading alone ran to 37 pages (including 9 pages of schedules) and was accompanied by extensive documentary exhibits. It is not alleged (and could not sensibly be alleged) that the Appellant was practically or financially obstructed from obtaining a medical report.

40. Second, this was not a case in which the Appellant's cognitive shortcomings were hidden or their significance for the dispute was overlooked. Quite the reverse: the Appellant and his Leading Counsel, placed extensive reliance upon those putative shortcomings. Indeed, the difficulties now addressed in the Expert Reports are the very same cognitive shortcomings upon which the Appellant actively relied at trial. If the Appellant had wished to buttress his case with medical evidence, he could readily have done so. This is not a case of a wholly new evidential matter emerging post-trial. It is a case of evidence which might forensically have further supported a submission already being made.

41. Third, it is clear on the evidence that the Appellant and his Leading Counsel actively considered obtaining medical evidence and a decision was made not to do so. This is reflected in Mr McLaren QC's email to which I have made reference above. The Appellant firmly stated that he did not want to get a medical report. This was a choice and it was one made in the knowledge that cognitive shortcomings would be a feature of the Appellant's Defence. Mr McLaren QC made forceful submissions relying on these very shortcomings on the Appellant's instructions.

42. As to the submission that the Appellant cannot realistically or fairly be criticised for not recognising or diagnosing his own mental health difficulties, in my judgment this misstates the issue. The Appellant did not need to diagnose himself. It was sufficient that he, and his expert representation, knew that they were positively relying on the fact that he suffered from alleged cognitive shortcomings which it was said pulled him below the standards of a reasonably competent solicitor and prevented him giving evidence in a straightforward and conventional manner.

43. Against this background, it is in my judgment somewhat unrealistic to suggest that medical evidence could not have been obtained with reasonable diligence. The first limb of Ladd v Marshall typically bites in cases where an appellant had constructive notice of relevant evidence or could have identified it if reasonable steps had been taken. I agree with the SRA that this is a much starker case. The Appellant, and his expert representation, *knew* that he had (or claimed to have) cognitive shortcomings, *knew* that a medical report could be obtained, and *knew* that, once obtained, the SDT would be predisposed to admit it. They cannot now contend that these were matters that were hidden, unknown, or inaccessible.

44. Fourth, in my judgment the position is still clearer when it is brought to mind that the Appellant and his Leading Counsel informed the Tribunal that the Appellant (a) did not maintain that he had a cognitive or psychiatric disorder; and (b) was not seeking to adduce a medical report. I agree with the SRA that the Appellant is now seeking to resile from concessions made both in evidence and through Leading Counsel. This is a feature of the application which the Appellant's submissions simply overlook. For present purposes, however, the point is that this is not a case in which an appellant simply omitted to obtain evidence at first instance. It is one in which he actually referred to the potential for obtaining such evidence but stated that he was not seeking to adduce

it. To submit, in these circumstances, that such evidence could not have been obtained with reasonable diligence is, again, at odds with reality.

45. Fifth, the fact that the new evidence could have been obtained is illustrated by considering how such evidence has now found its way before this Court. This was not the result of discovering a cache of documents, locating a missing witness, or even the Appellant seeking medical attention and thereby obtaining a therapeutic diagnosis. To the contrary, the reports were sought out specifically for the purposes of this appeal. The Appellant obtained new representation and instructed them to prepare an appeal. It was these new solicitors who, in the Appellant's words, "*identified my weakness*" and then engaged a psychologist who specialises in preparing reports for Court proceedings.

46. In fact, on the material before me, the Appellant's new lawyers did not "*identify*" cognitive shortcomings of which the Appellant, or his Leading Counsel, had previously been unaware. They simply made (or persuaded the Appellant to make) a different choice as to how to address those shortcomings for the purposes of this dispute. It appears that nothing of relevance had changed between the trial and the Appellant's application, save for the instruction of new lawyers and disappointment at having lost the case.

47. This is, therefore, a textbook example of new representatives bringing with them different ideas and second-guessing the judgments of those who came before them. As I said in oral argument, it can be fairly said that this is precisely the sort of "second bite of the cherry" situation which, for almost 70 years, Ladd v Marshall has sought to prevent.

48. The first Ladd v Marshall condition has not been satisfied.

Influence on the result of the case

49. Turning to this matter, I note that both of the reports which the Appellant seeks to introduce address the Appellant's current state of mind, rather than his mental health at the time of the relevant misconduct, *viz.* when he gave evidence in the ChD Trial more than 6 years ago in June 2015. This is an obvious limitation in the evidence, which renders it, at most, of marginal relevance. The Appellant indicates that Dr Tizzard could provide a further report addressing the historic position, but "*she has a fully booked diary until the end of January 2022*".

50. This is inadequate. The Appellant has had ample time to prepare for this application. Judgment was handed down on 29 January 2021. It is not acceptable that the Court should wait until 2022 for a report which would then be used to appeal the SDT Judgment handed down some 12 months prior. In any event, the present application concerns the reports actually before the Court and a party cannot secure the introduction of new evidence which does *not* satisfy the Ladd v Marshall criteria on the basis that he intends, in the future, to obtain different evidence which would do so. I have not overlooked the witness statement of the Appellant's solicitor about his conversations with Dr Tizzard and what her further report might say. That is not the same as the actual evidence.

51. Aside from this objection, I was persuaded by the SRA that on any view, Dr Tizzard's evidence is incapable of unseating the SDT's central findings which were made conclusively on the contemporaneous documents. The SDT's findings related to the Appellant's evidence in the ChD Trial. However, they were rooted in contemporaneous documents, and not all hinged on examining the content or quality of particular passages of the Appellant's oral evidence. Both parties focussed their submissions before me on the £300,000 Condition.

52. It is clear to me that in the case of Allegation 1.1(v), the Appellant's alleged false evidence concerning the £300,000 Condition, was not an off the cuff statement volunteered under the pressure of cross-examination. It was the fundamental plank in the Appellant's defence in the ChD proceedings. That defence was advanced in pleadings, written evidence, Counsel's submissions, and then onwards before the Court of Appeal, which characterised it as the Appellant's "*unswerving case throughout*". The Appellant pursued an appeal from the Deputy Judge's decision to the Court of Appeal. That appeal was dismissed on 6 April 2017: [2017] EWCA Civ 229. I note that at [87] Sir Colin Rimer said, *"I have difficulty in understanding how Mr Narayanasamy, whose unswerving case throughout was that (the £300,000 condition not having been met) he never intended to become a partner, can criticise the judge for declining to find that he did so intend."*.

53. The SDT concluded that this case had been dishonestly concocted, and it did so based on "*[t]he overwhelming weight of the contemporaneous evidence*", concluding that "*the facts were so incontrovertible as to make it plain that the [Appellant] knew that the evidence he was giving was untrue*". In my judgment, it is fanciful to suggest that this conclusion can be resisted on the basis of inadvertence, confusion or the other disadvantages canvassed in the Expert Reports which the Appellant now seeks to introduce. There is no escape from the fact that the existence of the £300,000 Condition was the cardinal tenet of the Appellant's case over a period of years and related to events that long pre-dated the life events which the Appellant now maintains have caused him psychiatric illness. That tenet was patently false and the finding of falsity turned on overwhelming documentary evidence, rather than the assessment of the Appellant's performance as a witness.

54. I agree with the SRA that this is decisive because the finding on the £300,000 Condition was, of itself, sufficient to ensure that the Respondent was struck off. It was realistically not argued to the contrary by Leading Counsel for the Appellant. I consider it inconceivable that the SDT would not apply that sanction for deliberate and sustained dishonesty, by a solicitor in furtherance of his private financial interests in a civil dispute with another practitioner relating to the earnings of his legal practice: see Bolton v Law Society [1994] 1 WLR 512 at p. 518.

55. That being so, I conclude that it is not "*probable*" that the reports would have an important influence on the result of the case. To the contrary, it is difficult to see how it is even *possible* that they could do so. The Appellant either can or cannot demonstrate that the SDT's findings on the contemporaneous documents were clearly wrong. In short Dr Tizzard's reports will not influence that result. They miss the relevant target.

56. The second limb of Ladd v Marshall is not satisfied. The SRA conceded the third limb.

The interests of justice and departure from the Ladd v Marshall criteria

57. As a fallback (if the criteria were not satisfied), it was argued for the Appellant that on a free-standing basis the interests of justice demanded the Reports be admitted as evidence. The premise of the Appellant's argument was that the SRA and SDT were both under a duty to obtain the evidence which the Appellant now seeks to introduce. That premise is wrong in law.

58. Although in her oral submissions, Leading Counsel did not ultimately go so far, her written arguments did appear to suggest that the SRA and SDT are subject to the procedural requirements imposed on criminal prosecutors and courts respectively. This is incorrect. It is well-established domestically and in Strasbourg that SDT proceedings are not criminal in character: Macpherson v Law Society [2005] EWHC 2837 (Admin) at [6-7[; Pine v Law Society [2001] EWCA Civ 1574 at [7-8], and [13-14]; and Wickramsinghe v United Kingdom CE:ECHR:1997:1209DEC003150396;

59. Putting that point to one side, on the facts this is not a tenable submission. In evidence and through his Leading Counsel, the Appellant specifically and repeatedly confirmed that he did not claim to be suffering from a psychiatric condition and was not seeking to adduce medical evidence. The SDT duly recorded that fact. The Appellant was not a litigant in person – he benefited from expert legal advice and representation. The SDT was perfectly entitled to accept the Appellant's evidence and Leading Counsel's submissions. Indeed, had it sought to challenge the decision not to call medical evidence, it would immediately have trespassed into the territory of legal privilege. Equally, had it directed an adjournment (as the Appellant now says it should), so that the Appellant could obtain medical evidence (which he did not want and for which he would have been required to pay), the SDT would likely have been criticised for procedural irregularity. It would be a strange thing indeed in proceedings of this nature for the SDT to tell experienced Leading Counsel for the Appellant that he should be calling evidence which it had been decided should not be called.

60. As to reliance on Brookman v General Medical Council [2017] EWHC 2400, in my judgment that case is of no relevance. In Brookman, it was found that the GMC should have adjourned for medical evidence. However, this was in circumstances in which (amongst other things): (a) the respondent was a litigant in person; (b) the respondent gave evidence under oath that his judgment and conduct had been affected by psychiatric medication and also claimed to have autistic spectrum tendencies; (c) the GMC specifically recognised that, in light of this evidence, additional medical evidence was required; (d) the GMC re-called a medical witness who had already given evidence but remained available on a telephone-link; (e) that doctor had not read the allegations or transcripts, said he could not give an opinion over the phone, stated (twice) that a mental health reassessment was required, and explained that a battery of tests would be required to diagnose autistic spectrum disorder; and (f) in the face of this evidence, the GMC nevertheless did not adjourn to obtain medical evidence. The facts are remote from those before me.

61. As stated above, the Appellant relied on Jasinarachchi v General Medical Council [2014] EWHC 3570 in support of the proposition that evidence may be admitted even if the Ladd v Marshall criteria were not satisfied. That is a case on very specific facts where both parties were operating under a common misapprehension relating to automatic loss of a specialty training contract if a trainee doctor was suspended. It has no parallels to the case before me.

62. Finally, I reject the submission that the Application should succeed since it is important that a qualified solicitor capable of doing public service should not be struck off. Considerations of "*public policy*" cannot justify a departure from Ladd v Marshall: GMC v Adeogba [2016] 1 WLR 3867 at [31]. This is hardly surprising given that Ladd v Marshall is, itself, rooted in public policy, and represents the careful balance struck between competing objectives in civil litigation which I have outlined above.

V. Conclusion

63. The Application is dismissed.

64. For completeness, I should record that the Appellant had an alternative submission (which was not pressed in oral submissions) that the Application should be adjourned to the appeal itself on a "rolled-up" basis. I would have rejected that alternative on case management grounds (it should be clear well before the hearing of the appeal which issues and evidence will be in play). But in any event, the alternative does not arise because I am satisfied the Application fails on its merits at this stage.