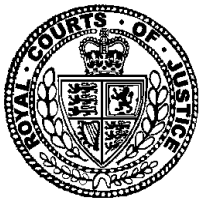

Neutral Citation Number: [2021] EWHC 3325 (Admin)

Case No. CO/1653/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 26 August 2021

Before:

MR JUSTICE COTTER

Between :

- -

	THE QUEEN (on the Application of DAVID MOND)	**Claimants**
	- and -	
	INSOLVENCY PRACTITIONERS' ASSOCIATION	**Defendant**

- -
- -

Mr S. Davies QC and **Mr J. Gunaratna** (through **Direct Access**) appeared on behalf of the **Claimant**.
Mr N. Peacock QC (instructed by **Gateley Legal**) on behalf of the **Defendant**.

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J U D G M E N T

Mr Justice Cotter:

1. This is an ex tempore judgment at the conclusion of a hearing of the claimant's challenge an order of the defendant, one of the bodies recognised for the purposes of the licensing insolvency practitioners under the Insolvency Act 1986 . The claimant is an accountant and an insolvency practitioner and the defendant is his relevant professional regulatory body. The claimant seeks to overturn the decision of the defendant, acting by its Appeal Committee made on 25 March 2020 to uphold the order of its Disciplinary Committee that the claimant pay the costs of proceedings against him before the Disciplinary Committee. Permission was initially refused on the papers by Sir Ross Cranston on 23 September 2020. Permission was granted by Mr Anthony Metzer QC, sitting as a deputy High Court judge, following an oral renewal hearing on 4 November 2020.
2. In short, the claimant argues that the decision of the Appeal Committee that a costs order made by the Disciplinary Committee should stand, notwithstanding that it remitted to the Disciplinary Committee the substantive complaints, i.e. it effectively set aside the finding of the Disciplinary Committee on the merits, was one which was an error of law and, secondly, that there was procedural impropriety and/or a breach of natural justice and fairness.
3. The case against the claimant was remitted to a differently constituted Disciplinary Committee by the Appeal Committee and that hearing is yet to take place.
4. Although I had comprehensive written submissions by both leading counsel, and reference to an array of authorities, in my view this matter turns on rather straightforward issues. As such it is necessary only to give a relatively brief factual background.
5. The claimant is, as I have stated, a chartered accountant and licensed insolvency practitioner, being the owner of Hodgsons Chartered Accountants. In 2004 he set up a company known as ClearDebt Limited ("CDL") with a view to offering to administer individual voluntary arrangements under the 1986 Act with multiple creditors, the aim being to do so for profit. The claimant acted as an insolvency practitioner on each of these IVAs with CDL administering the business. The claimant was the ultimate beneficial owner of CDL through its parent company. After significant growth of CDL's business, the claimant investigated the possibility of outsourcing aspects of the administration of IVAs to a suitable third party. Eventually such a company was formed. CDL entered into an agreement with this company which I shall refer to as DRSP Limited. Payments were made to this company from the IVA's estates pursuant to contractual arrangements made between the companies.
6. I need say no more for the purposes of this judgment, other than to repeat what was said in relation to this in general terms by the Disciplinary Committee. The intent was "To try and set up a scheme – we use the term neutrally and note the respondent used this term in his evidence – to circumvent a problem. Putting it less diplomatically Mr Mond intended to create a situation whereby the third party disbursements were paid to an entity in circumstances where most of the profit from those disbursements would be channelled back into his pocket or the pocket of CDL. The object was, in short, that the third party should be independent in appearance but not in commercial reality. The allegation that eventually came to be raised on the complaints before the Disciplinary Committee was that the company structure put in place did not result in an independent company administering the IVAs and as such payments to that company required to have approval, and such approval was not gained.
7. It is important to note that the claimant took advice from Counsel (now Leading Counsel) about aspects of the company set up and the issue of corporate independence.
8. In 2016 the bulk of this business was sold by the claimant but in 2017 the defendant decided to commence disciplinary proceedings against the claimant by referring a formal complaint to its Disciplinary Committee in respect of the corporate arrangements to which I have referred (and which operated between 2012 and 2016).

9. Matters came before the Disciplinary Committee in May 2018. The claimant faced three complaints. Firstly, that between October 2012 and September 2016 in his role as supervisor of one or more IVAs he had (a) failed to disclose to debtors and creditors his financial interest in ClearDebt Group PLC; (b) that he had earned unauthorised and secret profit as a shareholder in ClearDebt Group PLC, through the referrals. Secondly, that between October 2012 and 2015 in his role as supervisor of one or more of the IVAs he failed to obtain approval for the payments made out of the IVAs estates in connection with the service agreements made to DRSP Limited, which was not an independent third party. Thirdly, between July 2013 and September 2016 in his role as supervisor of one or more of the IVAs he failed to obtain approval for payments out of certain IVA estates, it not being an independent third party, that being in breach of fundamental principles of integrity and/or professional competence and due care as set out in the Insolvency Code of Ethics.

10. The claimant was represented in those disciplinary proceedings in February and March 2018 by the same Counsel who had previously provided advice in relation to the company structures. It was the claimant's case before the Disciplinary Committee that the company DRSP Limited was, both in fact and in law, an independent third party and therefore the payments that he had made as supervisor of various IVA complaints were made in compliance with the rules because no creditor consent was required. There was no defence raised in reliance of the advice provided by Counsel.

11. The Disciplinary Committee circulated its judgment on 4 May 2018 and found the claimant liable on the complaints made. At a further hearing it decided to impose sanctions consisting of a severe reprimand and a fine of £500,000. An appeal was then lodged. Counsel settled the grounds of appeal which were issued on 7 May 2019. However, in August 2018, the claimant dis-instructed his counsel, and his current counsel came into the picture and the grounds of the appeal were recast. It was argued on behalf of the claimant that his previous counsel was too close to the case to act properly, and that he had, in simple terms, failed to put the correctness of his own advice on the line by not putting it before the Disciplinary Committee, something, it is submitted, that independent counsel would have recommended. This would have, lead amongst other things to a reliance defence.

12. Faced with this change of tack, the Appeal Committee directed that there be a preliminary hearing; that the ground in relation to Counsel's independent be determined before the substantive issues which challenged the correctness of the Disciplinary Committee's reasoning. It was argued on behalf of the defendant that this further ground was fanciful and that the claimant was fully aware of the fact that he could have employed counsel's advice if he considered it within his interests to do so within the arguments advanced to the Disciplinary Committee. It was argued that a reliance defence would never in practice have been run given the claimant's intransigent stance on the merits, i.e. his unshakeable belief that the company was in fact independent.

13. Within its judgment on the issue I note that the Appeal Committee stated, at para.24:

> "It is no part of this Panel's function to decide whether if Mr Mond's defence had been conducted along the lines Mr Davies QC suggested, it would have had any greater success than his original defence. The question is whether, had Mr Mond been differently advised, this would have been a possible defence. As will be seen the Panel cannot, on the material before it, decide definitively that it would not."

14. The Panel's decision was that the substantive complaint should be remitted to a fresh tribunal. The key passage is para.77:

> "77. By a majority, and with some reluctance, the Panel has concluded that, in the circumstances of this case, counsel had got indeed too close. He had been persuaded to give, and in the case of the composite advice concocted by Mr Mond, Doyle 3 to sign, advice the correctness of which might well be called into question.

78. The relationship both to the affairs of CDL and DRSP and to Mr Mond personally was such that the necessary objectivity and independence that any Tribunal is entitled to demand were compromised. The Panel accepts that had independent Counsel been constructed to conduct Mr Mond's defence, such Counsel might have advised Mr Mond to run a reliance defence and that such defence might conceivably have led to a different result, even if only as to sanction. It is unnecessary to decide whether Mr Mond would have accepted such advice or whether a different outcome would have resulted from him taking it. It is the loss of the possibility which make the findings below sufficiently unsafe for this appeal to succeed.

79. The appeal will therefore be allowed on this preliminary point and the case remitted to the Disciplinary Committee for hearing before a differently constituted panel. The panel considers it appropriate to remit on the second complaint because it impinges on the first complaint and, in any event, were there to be an adverse finding by the Disciplinary Committee at a rehearing, it would be appropriate for the Panel below to reconsider sanction in light of the new material. Thus the entire case will be remitted."

15. The judgment was circulated on 7 October 2019. All of the complaints were remitted for consideration by a fresh panel, and the claimant had been entirely successful on this preliminary point.

16. Turning to costs, the Panel stated:

> "As to costs, the Panel is of the view that this can be dealt with on paper. Counsel on both sides are invited to determine between themselves what if any applications for costs are to be made, and thereafter to agree the sequential submissions to be filed. This will enable the Panel to have the benefit of submissions in reply which respond to the original submissions made. In so far as the order of submissions cannot be agreed, then the matter should be referred to the Chair for determination. Schedules of costs should be provided."

17. No objection was taken by either party to this course of action. Written arguments were then produced by the parties. In its judgment on costs, the Appeal Committee stated that it received detailed and helpful submissions on costs from both parties and that there were four issues to be determined: (a) the quantification of costs order to be paid by Mr Mond under the directions order of 16 August 2019; (b) the order for costs made against Mr Mond by the Disciplinary Committee on 25 March 2019; (c) the costs of the appeal before the panel and (d) the costs of the current application for costs.

18. The decision of the Panel was that in respect of (a) the claimant was to pay the defendant's costs in the sum of £32,000 in respect of the costs of and occasioned by the amendment. I should add that this is not challenged by the claimant. In relation to (c) and (d), the decision was that there should be no order for costs. Again, this is not challenged. In relation to (b) it was the order of the Appeal Committee that the order of the Disciplinary Committee should stand, and this is the subject of challenge.

19. The submissions on behalf of the claimant to the Appeal Committee were relatively straightforward; that the power of the Committee on an appeal to affirm a decision of the Disciplinary Committee on costs pre-supposed that an appeal against a relevant decision had been unsuccessful. There was simply no power to uphold costs in circumstances where the Appellant had been successful and was entitled to an order that the decision below was unlawful. So, it was submitted that there was no jurisdiction either to uphold a costs order below or exercise a discretion afresh. In any event, it was argued it would be wrong to do so in advance of any re-trial and the findings made on the substantive complaint against Mr Mond. It was only at that stage that any such costs jurisdiction could properly be exercised, taking into account all of the relevant factors.

20. On 13 February 2020 the Appeal Committee circulated its judgment which included the following findings in relation to the costs decision.

"10 While the appeal has succeeded to the extent that the matter is to be remitted to the DC for reconsideration, this is not determinative of the costs ordered by the DC. The Panel is of the view that this order for costs should stand. Mr Mond took the policy decision to contest the complaint against him on the merits, and there was a lengthy hearing during with Mr Mond tried, and failed, to convince the D.C that the avoidance scheme which on his own case was of his own devising (whether or not it subsequently obtained the imprimatur of Mr Doyle) was effected to circumvent the Statements of Insolvency Practice.

11. The effect of the Panel's judgment is the potential conflict of interest on the part of Mr Doyle may have deprived Mr Mond of the opportunity of contending before the DC that he had acted on appropriate and competent legal advice. Whether Mr Mond would actually have advanced such an argument had he been independently advised is, to put it neutrally, questionable. But the deprivations of theoretical opportunity to advance it is sufficient to cross the very low threshold for ordering a re-hearing. Were such an argument to have been advanced before the DC, the DC might have been persuaded that as Mr Mond had acted on legal advice his culpability under the rules of the IPA would be considerably diminished. The fact remains, however, that reliance on legal advice would not turn an ineffective avoidance scheme into an affective one. That was the issue on which Mr Mond chose to contest the complaints below in the hope that were the DC to conclude that this was an effective avoidance scheme, he could continue with it (or one similar). That was why it was fought on the merits and the original appeal sought to question the DC's judgment on those merits.

12. It is thus not the case that if the argument of reliance on legal advice had been advanced before the D.C it could be said that the decision on the merits of the scheme would have been any different. Mr Mond fought on those merits and he lost.

13. There is no good reason why the costs order made below should be set aside and this Panel does not do so. The order stands"

21. On 21 February 2020 the Appeal Committee sent its formal order to the parties requiring Mr Mond to pay the sum of £208,369.51, inclusive of VAT.

22. The grounds of challenge to the decision in relation to the costs are two-fold. Ground One is that the Appeal Committee fell into an error of law in failing to set aside the Disciplinary Committee's cost decision as it should have treated the costs decision as void and set it aside. It is argued that this is a necessary consequence of upholding the preliminary ground of appeal and setting aside the liability and sanctions decisions upon which the costs decision was based. More specifically, it is argued by Mr Davies Q.C. that as the Disciplinary Committee's decision had been set aside, the Appeal Committee had to recognise that affected the lawfulness of all of the three decisions equally such that the costs decision should also have been set aside. The Appeal Committee also wrongly failed to treat the Disciplinary Committee's costs decision as parasitic upon a valid liability decision. Finally, it is submitted that the Appeal Committee wrongly assessed the validity of the Disciplinary Committee's costs decision as subject to a general or unfettered discretion, whether under rule 38 to 40 of the applicable rules or otherwise.

23. The second ground alleges procedural impropriety and/or a breach of natural justice. Put simply, it is said that in the costs decision, the Appeal Committee acted in a manner which breached natural justice and fairness in that it determined the costs issue having taken into account the substantive merits of the appeal against the disciplinary proceedings which were not before it; what was before it was solely the preliminary issue. The issue of whether the Disciplinary Committee fell into an error of law remained to be concluded at the substantial appeal had the preliminary hearing not been successful. It raised mixed issues of fact and law, and what the Tribunal Appeal Committee could not do, but which did do, was descend into those merits. In fact, the whole reason why there was a preliminary hearing was to avoid consideration of the merits. In actin as it did, in adopting the approach that it could undertake

consideration of the merits, the Appeal Committee deprived the claimant of the opportunity to make appropriate submissions. Indeed, even the detailed grounds of appeal were not before the Appeal Committee at the time it made its order as to costs.

24. I turn to my analysis. It is necessary to start with the relevant rules. Paragraph 38 of the defendant's disciplinary rules state as follows.

> "38. If the Tribunal finds the Formal Complaint has been proved in whole or in part, it may order the Respondent to pay to the Association by way of costs such sum as the Tribunal may determine.
>
> 39. Where a Tribunal makes a finding that the whole Complaint was not proved it shall be open to the Respondent to request the Tribunal to make an Order directing the Association to pay all or part of the Respondent's costs reasonably incurred since referral of the Formal Complaint but any such costs awarded shall be proportionate to the nature of the Complaint and shall only be ordered if the Tribunal considers that the referral of the Complaint by the Committee was in any way improper or unreasonable in the circumstances."

25. Mr Davies Q.C. argues that it is clear that the power to order costs is entirely parasitic on a finding against a respondent, and there is no wider discretion as to costs afforded to the Tribunal.

26. The relevant rules in relation to the Appeal Committee state, at rule 39, that:

> "39. On an appeal from a Disciplinary Tribunal on a Formal Complaint, the Panel may by order: -
>
> (a) affirm, vary or rescind any decision and order made by the Tribunal;
> (b) substitute for any such order any other order it thinks appropriate which the Tribunal could have made on the Formal Complaint;
> (c) include in any such substituted order such terms and conditions, if any, as the Panel think appropriate;
> (d) direct that the Tribunal's Record of Decision to be published under Disciplinary Rule 44…"

27. As set out at para.39(a), the power that the Appeal Committee has is "to affirm, vary or rescind any decision [or] order made by the Tribunal…". It seems to me obvious that it is implicit within the sub-section that that it must be an order or decision that the Tribunal had the power to make. In relation to costs, that throws consideration back to paragraphs.38 and 39 of the Disciplinary Rules which provide a power to order costs to be paid only if a formal complaint has been found proved.

28. In my judgment, Ground One is unanswerable. In upholding Mr Mond's preliminary ground of appeal on the issue of process, the Appeal Committee determined that the entire case against him required to be remitted to the Disciplinary Committee because that Committee's findings were unsafe. It is clear on the Rules that an adverse finding on a complaint by the Disciplinary Committee is a condition precedent for a costs order against the Respondent, regardless of how egregious his or her conduct may have been before or during the appeal process. The Appeal Committee could not remove all of those findings against the respondent yet leave the Disciplinary Committee's adverse costs order in place as the result would be an order that the Disciplinary Committee simply had no power to make. Ordinarily an appeal process will uphold in whole or part or dismiss an appeal against an order of a subordinate body; and may substitute its own order. However, on the express rules binding the Committee what was not permissible was for there to be any substituted order which the Tribunal could not itself have made. Paragraph 39(b) makes this expressly clear.

29. Contrary to Mr Peacock QC's submission, it cannot possibly be a proper interpretation of rule 39(a) that it gives a wider power to the Appeal Committee, by way of affirming or varying an order, to make an order that the Tribunal itself could not have arrived at. In effect, Mr Peacock

QC was submitting that the Appeal Committee has wide and broad powers unconstrained by the Disciplinary Committee's own powers to make an order by variation. If that was so, to take an example, it would be possible for the Appeal Committee to simply insert a sanction which was not a sanction available to the Disciplinary Committee. That cannot be right. If only part of the finding had been set aside, something the Appeal Committee clearly considered, then an adverse finding would have remained and the costs order could have been properly left. However, the Appeal Committee did not do this. It remitted the whole of the complaint for a re-hearing and as soon as it did so, the fundamental basis for any costs order fell away. As a result there was only one legally correct option as regards the costs order of the Disciplinary Committee, which was to rescind it.

30. The Appeal Committee's own powers in relation to the costs of the appeal are a wholly separate matter covered by rules 42 to 45. It is clear that as rule 42 states the appellate panel may order the appellant to pay all or a proportion of the costs of the respondent in connection with any appeal. But this rule does not cover the costs before the Disciplinary Committee. So, in my judgment, the position is quite clear. The Appeal Committee fell into error, when, having remitted the whole of the case, it allowed the costs order to stand.

31. However, even if ground 1 had not succeeded, ground 2 would have resulted in the order being set aside. In my judgment, the approach of the Appeal Committee was clearly procedurally unfair. The Appeal Committee decided to have a preliminary hearing, the rationale being that if it was successful it would avoid the need for a hearing on the substantive merits. As I have indicated, the Appeal Committee did not even have the detailed grounds of appeal against the decision of the Disciplinary Committee on the merits, which Mr Davies QC referred to as "a root and branch attack" upon the approach of the Disciplinary Committee including as to its analysis of the law as to the independence issue.

32. As I have set out, the Appeal Committee had pointed out in its main judgment that it was no part of its function at the preliminary stage to descend into a consideration of those merits. In my judgment, what it then did was exactly that. It went on to arrive at a decision as set out at paragraphs.10 and 11 of its judgment on costs which trespassed clearly into issues as to the merits of the Disciplinary Committee's decision. The reasoning was, in my judgment, quite clear in that it reached conclusions on merits and treated the judgment at first instance as if it were correct on fundamental legal issues which were the subject of challenge. The Appeal Committee assumed that the arrangement or scheme was indeed ineffective which was a matter which remained to be considered. It found that Mr Mond was wrong to have contested that issue on the merits before the Disciplinary Committee, that being a matter very much live on the substantive appeal, had it proceeded further. This approach was without notice to Mr Mond and effectively denied him the opportunity to make full submissions on the merits. In effect, the second judgment short-circuited the whole appeal procedure by reaching conclusions without such a hearing. That was, in my view, clearly and obviously procedurally unfair.

33. Mr Peacock QC submitted that it was not the case that the Appeal Committee had descended into the merits. I cannot accept that submission. In my judgment it is quite clear that it did, taking the view that it clearly set out in relation to the effectiveness of the scheme.

34. For the reasons I have set out, both grounds 1 and 2 succeed and the decision will be set aside.