Neutral Citation Number: [2023] EWCA Civ 278

Case No: CA-2021-000821

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HONOURABLE MR JUSTICE BOURNE
CO/727/2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 March 2023

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE LEWIS
and
LORD JUSTICE EDIS

- -

Between:

SOPHIA CANNON	**Appellant**
(by her litigation friend IONA McDOUGALL)	
- and -	
BAR STANDARDS BOARD	**Respondent**

- -
- -

Hugh Southey KC (instructed by **Murdochs Solicitors**) for the **Appellant**
Helen Evans KC (instructed by the **Bar Standards Board**) for the **Respondent**
Lord Hendy KC (instructed by **Clyde and Co) for the Interested Party**

Hearing date: 7 February 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 16 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

LORD JUSTICE LEWIS:

INTRODUCTION

1. This appeal concerns disciplinary proceedings culminating in a hearing before a Bar Disciplinary Tribunal ("the Tribunal") in January 2020 in which the appellant Sophia Cannon was found guilty of four charges of professional misconduct. The Tribunal imposed sanctions of disbarment in respect of three charges and a 12-month prohibition on applying for a practising certificate in respect of one charge. An appeal to the High Court in October 2020 was successful in relation to one of the charges but was dismissed in relation to the other three charges by Bourne J ("the Judge").

2. The appellant now seeks permission to appeal the decision of the Judge. The application was listed for an oral hearing with the appeal to follow immediately after if permission were granted. The grounds on which the appellant seeks permission to appeal are that:

    (1) she lacked mental capacity to participate in the Tribunal proceedings in January 2020 and lacked capacity to give instructions in relation to her appeal to the High Court in October 2020. The appellant seeks permission to adduce evidence which was not before the court below, namely two reports by Dr Acosta, a consultant psychiatrist, dated 20 September 2020 and 22 February 2021, a witness statement of Iona McDougall who was her personal assistant at the material time, a report of Dr Cumming dated 31 August 2022 and a letter dated 13 September 2021 from Clyde and Co, solicitors acting for the counsel who represented the appellant in the appeal before the Judge;

    (2) the judge erred in holding that it was open to the Tribunal to find that the charges amounted to professional misconduct as it was for the Judge to determine if the conduct alleged amounted to professional misconduct within the relevant rules and, as the conduct involved matters going to private life only, the conduct was not capable of amounting to professional misconduct having regard to the guidance in the Bar Standards Board ("BSB") Handbook;

    (3) the judge erred in finding that the BSB were able to refer charge four to the Tribunal as it was prevented from doing so by the principle of res judicata established in *Henderson v Henderson* (1845) 3 Hare 100; and

    (4) the judged erred when considering whether to impose reporting restrictions as he took into account written representations from a witness at the Tribunal proceedings which were not disclosed to the appellant.

3. The counsel who represented the appellant in the High Court appeal was given permission to make oral and written submissions in view of certain allegations made in relation to his conduct of the appeal.

THE FACTS

4. The appellant was called to the Bar in 2001 and held a practising certificate until 31 March 2015. Thereafter, she became an unregistered barrister. Barristers are required to comply with obligations contained in a Code of Conduct. One such obligation, known as Core Duty 5, is that a barrister "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". There is also provision in the rules governing barristers which provide that a barrister "must not do anything which could reasonably be seen by the public to undermine your honesty and integrity" (rule 8).

5. The appellant was charged with five charges of professional misconduct. For present purposes, it is only necessary to consider three of those allegations. The allegations arose out of conduct that the appellant was said to have engaged in during litigation brought by herself in the family court in proceedings involving the father of her children. I will refer to him in this judgment as the father.

6. The first set of proceedings related to the period August 2014 to June 2015. They included the following two charges. Charge 1 was that the appellant had misled the court by telling the judge that she had served a draft order on the father in connection with her application to release a sum of £50,000 from money held in an account that had been frozen by court in order to pay for school fees for her children when she knew that the draft order had not been served on the father. That was said to be a breach both of Core Duty 5 and of rule 8. Charge 2 was that the appellant had failed to comply with four court orders made by a district judge between September 2014 and January 2015. That was said to be a breach of Core Duty 5. On 14 July 2017, the appellant's then solicitors had written to the BSB stating that the appellant admitted the material facts in charge 2 but disputed that they amounted to misconduct.

7. The second set of allegations involved one charge (referred to in this judgment as charge 4, as it was in the judgment of the Judge). The charge related to findings and orders made by a number of judges between 10 April 2015 and December 2016. These included findings that applications made by the appellant were totally without merit and the imposition of a limited civil restraint order on the appellant preventing her bringing further proceedings without the permission of the court. The allegation was that, by this conduct, the appellant had behaved in a way that was likely to diminish the trust and confidence members of the public would place in the profession. That was said to amount to a breach of Core Duty 5. The BSB initially decided in December 2017 to refer charge 4 to the Tribunal, but for procedural reasons, the charge could not then be referred to a Tribunal. Following amendments to the relevant rules the BSB decided for a second time in November 2018 to refer the charge to the Tribunal.

8. In October 2017 and March 2018, the appellant served evidence of mental capacity assessments that she had commissioned. The second of these indicated that the appellant would be ready to attend proceedings in six months.

9. On 5 September 2019, there was a directions hearing in the Tribunal. The appellant did not attend. The Tribunal ordered that the appellant attend for an examination by Dr Isaacs, a consultant psychiatrist. He was to report on (1) whether the appellant was fit to defend disciplinary hearings and attend a three day hearing (2) whether the appellant would have difficulty defending the disciplinary proceedings and, if so, what adjustments could be made and (3) if the appellant could not defend the proceedings or attend the hearing, when she would be able to do so. The Tribunal also ordered that the

appellant must (a) specify whether she admitted the charges or any of the facts relied on by the BSB and (b) serve a witness statement by 19 November 2019.

10. In September 2019, the appellant was assessed by Dr Isaacs. His report of that assessment recorded the appellant's description of her psychiatric state and symptoms. It noted that the appellant had been seen by a psychiatrist and she had been considered as having suffered from extreme post-traumatic stress disorder as a result of events in her life. He said in his report:

> "35. I have no significant concerns about [the appellant's] current capacity to give instructions to her advocate or to take a meaningful part in the forthcoming hearing. She is clearly an articulate and intelligent person, who is able to understand and retain information, as well as weigh alternative courses of action and make her views know.
>
> 36. Few people can doubt that the added pressure representing oneself can be considerable. While I am pleased to learn that [the appellant] has representation, I think that she would currently be capable of representing herself.
>
> 37. However it is equally clear to me that [the appellant] should be regarded as a vulnerable witness in any proceedings. Courts are already well versed in accommodating vulnerable witness and I consider that [the appellant] should receive special measures for the fairness of the disciplinary process
>
> …
>
> 39 Whatever one's interpretation of the evidence might be, my impression of [the appellant] is that she is afraid of [the father] or, more precisely, is afraid of facing him in these proceedings. I did not gain the impression that [the appellant] needed to give her evidence by video link herself"
>
> 40. However I think it would be prudent to shield her in some way from [the father] if he is required to attend to hearing, especially if [the appellant] elects to give evidence. This could be achieved by a screen that is commonly used in courts or some other arrangement".

11. The appellant did not provide her witness statement to the Tribunal by 19 November 2019 as directed.

12. The Tribunal hearing was scheduled to begin on 22 January 2020. On 16 January 2020 the appellant's solicitors applied for an adjournment on her behalf on the basis that she had suffered an assault on 29 May 2019 and had physical injuries to her hand and also that she was due to attend at the magistrate's court on 24 January 2020 in connection with the criminal trial for the assault. Medical evidence relating to her physical injuries was provided. The appellant's solicitors did not apply to adjourn the hearing on the basis of any mental health issue. On 22 January 2020, Ms McDougall, the appellant's

personal assistant e-mailed the Tribunal secretariat to say that she was concerned at the decline in the appellant's mental state and requested an adjournment to obtain support for the appellant during the hearing as Ms McDougall considered that without the support the appellant would be at a disadvantage as she would not be able to go into as much detail as she would like. No medical evidence was provided regarding the appellant's mental health. The Tribunal also had an e-mail from Dr Isaacs. He said that assuming that there had been no significant deterioration in the appellant's mental health in the past few months, she would be able to cope with two sets of hearings in one week. Dr Isaacs also attended the hearing on the first morning. He read Ms McDougall's e-mail, was asked questions by the Tribunal and confirmed that the matters referred to in the e-mail did not alter his opinion. The Tribunal refused the application to adjourn and decided to proceed in the appellant's absence. It gave detailed reasons for those decisions. There has been no appeal against those decisions.

13. The hearing began on 22 January 2020. The appellant did not attend but Ms McDougall attended part of it. The father gave evidence (we are told that he did so by video link not in person). On 23 January 2020, the Tribunal found four charges proved but dismissed one charge. On 24 January 2020, the Tribunal considered sanctions. Early that morning, the appellant e-mailed the Tribunal secretariat stating that she wished to engage with the Tribunal once the criminal assault had been dealt with and she would come across to the Tribunal on 24 January 2020 once the criminal assault charge had been dealt with. In that e-mail, the appellant said that she had not engaged with the disciplinary proceedings since Dr Isaacs's report due to lack of funds and also to secure her own mental health. She asked for an adjournment of 42 days as she could not deal with the Tribunal hearing and the magistrates' court hearing in the assault case in the same week. She stated that she was seeking psychiatric intervention that day. Also on the morning of 24 January 2020, Ms McDougall sent the Tribunal secretariat a five-page document dictated by the appellant. That set out the appellant's views on certain of the charges and certain parts of the evidence. That document also contained a request for a 42 day adjournment to enable the appellant to provide evidence before the Tribunal imposed sanctions.

14. The Tribunal considered that the representations made essentially sought to challenge on the findings that they had made rather than relating to possible sanctions. The Tribunal therefore continued with the sanctions hearing. They imposed the sanction of disbarment in respect of three charges. On one charge, charge 2, the sanction was a prohibition on applying for a practising certificate for 12 months.

15. The appellant appealed to the High Court. She instructed counsel on 5 February 2020 to represent her at that hearing. A conference took place with counsel on 16 February 2020. The evidence indicates delays and difficulties in securing instructions at various points. On 21 April 2020, for example, Ms McDougall e-mailed counsel saying that the appellant found it overwhelming talking to anybody about any of this matter and that solicitors had been unable to receive instructions at some points. On 29 June 2020, Ms McDougall e-mailed counsel to say that the appellant had stressed that counsel was not to file documents until the appellant had read through them. On 4 August 2020, an application was made to amend the grounds of appeal and to adduce the evidence of a clinical psychologist who assessed whether the appellant had attention deficit hyperactivity disorder. On 3 October 2020, Ms McDougall e-mailed counsel attaching a pdf document which was said to respond to some of the arguments in the BSB skeleton

argument and noted that the appellant understood the point about admitting fresh evidence but found that hard to accept (that appeared to be a reference to the first report of Dr Acosta). On 4 October 2020, there is an e-mail from the appellant to counsel headed "Instructions, please read" and there was a pdf document attached. On 5 October 2020, the appellant e-mailed counsel to state what her preferred overall outcome from the appeal would be.

16. The appeal hearing was held on 6 and 7 and 19 October 2020. Following the hearing the Judge circulated a draft judgment to counsel. The BSB requested that they be able to show the draft judgment to the father in case he wished to make any application for reporting restrictions. The father made written representations but those were not shown to the appellant or her legal representatives. In his judgment and order, the judge dismissed the application to adduce further evidence. He allowed the appeal in relation to one charge. He dismissed the appeal in relation to three other charges. He decided that he would not grant an order under CPR 39.2 to anonymise the name of the appellant in his judgment, although he continued a temporary order granting the appellant anonymity pending the determination of any application by this Court of an application for anonymity by the appellant.

THE FIRST GROUND OF APPEAL – CAPACITY AND ADMISSION OF NEW EVIDENCE

Submissions

17. The appellant seeks permission to appeal to this court. The first ground of appeal is that the appellant lacked capacity (1) to participate in the hearing before the Tribunal in January 2020 and (2) to give instructions in relation to the conduct of the appeal to the High Court. Mr Southey KC, on behalf of the appellant, submitted that there was a context, or significant history, of mental health problems which were known about in the period prior to the hearing before the Tribunal. He seeks permission to adduce the witness statement of Ms McDougall which, it is said, evidences concerns as to the appellant's mental health. Mr Southey also seeks permission to rely on the two reports of Dr Acosta. He submitted that those two reports, in particular, demonstrate that the appellant lacked capacity to participate in the Tribunal proceedings and to give instructions in relation to the appeal. He submitted that the methodology used by Dr Acosta in those reports was approved by Dr Cumming in his report. He submitted that permission should be given to adduce that new evidence relying on the observations of Laws LJ in *Terluk v Berezovsky* [2011] EWCA Civ 1534 especially at paragraph 32. He submitted that the test for granting permission for a second appeal in CPR 52.7 was satisfied. He submitted that permission to appeal should be granted and the appeal allowed.

18. Ms Evans KC for the respondent submitted that the test for adducing fresh evidence on an appeal was not satisfied. Further, the evidence viewed as a whole did not establish that the appellant lacked mental capacity to participate in the Tribunal hearing or to give instructions in relation to the appeal to the High Court. All the evidence had to be considered including the material indicating that at different times the appellant was engaging with the disciplinary process and the appeal. Further, Dr Acosta omitted any consideration of that material in her reports. The evidence may demonstrate that the appellant avoided engaging with the disciplinary process because she found it stressful but that fell a long way short of being evidence to rebut the presumption that the

appellant had mental capacity at the material times. Similarly, in relation to the appeal, the evidence at most was that appellant understood the charges, and the advice she was given, but had difficulty in focussing on current issues and got ahead of herself when she looked to a future re-hearing or going into the past. That, too, was a long way short of establishing that the appellant lacked mental capacity to give instructions in relation to the appeal.

Discussion

The Principles Governing the Admission of Fresh Evidence

19. CPR 52(2)(b) provides that an appeal court will not receive evidence which was not before the lower court. Prior to the making of the CPR, the admission of new evidence required the satisfaction of three conditions, namely that (1) the evidence could not have been obtained for use at the trial with reasonable diligence (2) if the evidence had been given, it would have probably have had an important influence on the result of the case and (3) the evidence is apparently credible: see *Ladd v Marshall* [1954] 1 WLR 1489. That is no longer a rule but those three factors are the relevant considerations governing the exercise of the discretion to admit new evidence: see *Terluk* at paragraph 32.

20. In the present case it has been necessary to consider, and receive full submissions on, all the new evidence. If the evidence did establish that the appellant lacked mental capacity to participate in either the Tribunal hearing in January 2020 or the appeal hearing in October 2020, then it would have an important influence in relation to ground 1 of the appeal. If it did not establish that, then it could not have an important influence on the appeal.

The Law Relating to Mental Capacity

21. The principles governing capacity can be stated shortly for present purposes. A person must be assumed to have capacity unless it is established that he or she lacks capacity. A person lacks capacity if he or she is unable to make a decision for himself or herself in relation to the matter because of an impairment of, or a disturbance in the functioning of the mind or brain. A person is unable to make a decision for himself or herself if the person is unable (a) to understand information relevant to the decision (b) to retain that information (c) to use or weight that information as part of the process of making the decision or (d) to communicate his or her decision. See sections 1(1), 2(1) and 3(1) of the Mental Capacity Act 1985 ("the Act"). For present purposes, the principles governing the assessment of capacity were usefully summarised in the judgment of Baker J. in *A Local Authority v P* [2018] EWCOP 10 at paragraph 15:

> "15. The general legal principles to be applied when determining whether a person has capacity are set out in the Mental Capacity Act 2005 and in the Mental Capacity Act 2005 Code of Practice, supplemented by a series of reported cases. Those principles can be summarised as follows:
>
> (1) A person must be assumed to have capacity unless it is established that she lacks capacity: s.1(2). The burden of proof

therefore lies on the party asserting that P does not have capacity. The standard of proof is the balance of probabilities: s.2(4).

(2) A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or disturbance in, the functioning of the mind or brain: s.2(1) . Thus the test for capacity involves two stages. The first stage, sometimes called the "diagnostic test", is whether the person has such an impairment or disturbance. The second stage, sometimes known as the "functional test", is whether the impairment or disturbance renders the person unable to make the decision. S.3(1) provides that, for the purposes of s.2 , a person is unable to make a decision for himself if he is unable (a) to understand the information relevant to the decision; (b) to retain that information; (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision whether by talking, using sign language or any other means.

(3) Capacity is both issue-specific and time-specific. A person may have capacity in respect of certain matters but not in relation to other matters. Equally, a person may have capacity at one time and not at another. The question is whether at the date on which the court is considering the question the person lacks capacity in question.

(4) A person is not to be treated as unable to make a decision unless all practicable steps to help her to do so have been taken without success: s.1(3). The Code of Practice stresses that "it is important not to assess someone's understanding before they have been given relevant information about a decision" (para 4.16) and that "it is important to assess people when they are in the best state to make the decision, if possible" (para 4.46).

(5) It is not necessary for the person to comprehend every detail of the issue. It is sufficient if they comprehend and weigh the salient details relevant to the decision (per Macur J, as she then was, in *LBL v RYJ [*2010] EWHC 2664 (Fam).

(6) A person is not to be treated as unable to make a decision merely because she makes an unwise decision: s.1(4) .

(7) In assessing the question of capacity, the court must consider all the relevant evidence. Clearly, the opinion of an independently instructed expert will be likely to be of very considerable importance, but as Charles J observed in *A County Council v KD and L* [2005] EWHC 144 (Fam) [2005] 1 FLR 851 at paras 39 and 44, "it is important to remember (i) that the roles of the court and the expert are distinct and (ii) it is the court that is in the position to weigh the expert evidence against its

> findings on the other evidence… the judge must always remember that he or she is the person who makes the final decision".
>
> (8) The court must avoid the "protection imperative" — the danger that the court, that all professionals involved with treating and helping P, may feel drawn towards an outcome that is more protective of her and fail to carry out an assessment of capacity that is detached and objective: *CC v KK [2012] EWHC 2136 (COP)* ."

22. The principles were reviewed, and the sequence in which the relevant questions are to be answered were further considered by the Supreme Court in *A Local Authority v JB* [2021] UKSC 51, [2022] AC 1322, at paragraphs 66 to 78.

The Position at the time of the Tribunal Hearing in January 2020

23. The first question is whether the new evidence demonstrates that the appellant lacked capacity to participate in the disciplinary process leading to the Tribunal hearing in January 2020.

24. First, the starting point is that the appellant is presumed to have capacity unless it is established that she lacked capacity at the material time. Secondly, the most contemporaneous evidence is that of Dr Isaacs of 19 September 2020. He is a consultant psychiatrist who assessed the appellant. He concluded that the appellant had capacity to give instructions and to take a meaningful part in the disciplinary proceedings before the Tribunal and, indeed, could represent herself if necessary. It is, of course, possible that the position could have changed by the time of the hearing in January 2020. There is, however, no contemporaneous evidence to indicate that that was the case. The appellant's solicitors sought an adjournment on the basis of physical injuries that the appellant had suffered in May 2019 but not on the basis of a deterioration in mental condition resulting in the loss of capacity. Further there is some evidence that the appellant did engage to a degree with the disciplinary process. She did e-mail the Tribunal secretariat on 24 January 2020, the morning of the third day when the Tribunal was dealing with sanctions. The contemporaneous evidence would not, therefore, be sufficient to demonstrate that the presumption that the appellant had capacity had been rebutted.

25. The appellant relies significantly on two reports from Dr Acosta. The first is dated 20 September 2020. So far as one can ascertain from the report, the consultant was instructed to carry out a psychiatric assessment with the aim of commenting on diagnosis, any impact of that diagnosis on the appellant's professional conduct at the time of the allegations, capacity to attend proceedings in January 2020 and capacity to make a statement and attend the appeal hearing in October 2020. There are significant difficulties with this report. Dr Acosta does not in this report specifically address the test, or all the relevant factors, for assessing capacity. Dr Acosta had access to some of reports that had been prepared in relation to the appellant. However, as Dr Acosta noted at paragraph 30 of her second report, she did not have access to the appellant's GP or other psychiatric records as the appellant declined to allow access to these documents. As Dr Acosta recognises, the fact that she did not have access to these records impacted on her ability to have a full picture of the appellant's psychiatric problems and

presentation. In addition, Dr Acosta either did not know, or did not address, the various actions that the appellant did undertake in relation to the disciplinary proceedings in January 2020 in order to consider whether the appellant understood the information relevant to decisions relating to the proceedings, was able to retain that information, was able to use or weigh that information and was able to communicate decisions.

26. The fundamental difficulty with the September 2020 report, however, is this. Dr Acosta considers that since 2007 the appellant has developed underlying mental health conditions including, in particular, post-traumatic stress disorder said to result from abuse from the father. She considers that the severity of the appellant's mental illness was not always the same and there were periods, of variable duration, where the appellant was not as severely affected by her symptoms and was able to function well enough to do things such as write a book, or submit applications to court. The ability to function depended on the appellant's perception of danger and risk from the father which, whether true or not, impacted on her mental state. Having said that, Dr Acosta then concluded:

> "104 Regarding attending proceedings in January 2020 at Bar standards association: in my opinion [the appellant] lacked capacity at the time to attend and participate in proceedings, due to the severity of her mental health problems, namely Post Traumatic Stress Disorder (PTSD"). The severe symptoms of avoidance of triggers for the flashbacks and nightmares, namely anything related to [the father] prevented her from being able to leave her home. I also believe that she wouldn't have been able to follow the proceedings due to the same reasons plus her attention and concentration difficulties, part of her ADHD, not even diagnosed at the time".

27. There is no proper evidential basis for that conclusion. It amounts simply to an assertion that because the appellant had post-traumatic stress disorder she lacked capacity to attend and participate in proceedings. Dr Acosta does not seek to assess whether the appellant was capable of understanding information relevant to the proceedings, retaining and using that information, or communicating decisions. The reference to ADHD is difficult to understand. That appears to be a reference to the report by Ms Licht, a psychologist who diagnosed ADHD. That report, however, considers the possible impact of that condition on the appellant's behaviour in respect of the conduct during 2014 to 2016 which gave rise to the allegations of professional misconduct. There is no assessment of the relevance of any diagnosis of ADHD to capacity. Further, and significantly, given Dr Acosta's expressed views that the severity of the condition varied, it is difficult to see on what basis Dr Acosta concluded in September 2020 that the appellant lacked capacity in January 2020. The appellant may well have had mental health difficulties over a number of years. She may have had difficulties in addressing professional misconduct charges relating to events that involved the father. The report of September 2020, however, does not itself provide a proper evidential basis for rebutting the presumption that the appellant had capacity to take the decisions necessary to enable her to participate in the January 2020 proceedings.

28. Dr Acosta prepared a further report dated 22 February 2021. She was specifically asked, amongst other things, how she could be confident of the position at the time of the hearing in January 2020 if the appellant's condition was variable. At paragraph 102 of

the report, Dr Acosta stated that she "was confident of [the appellant's] presentation at the time of the BSB hearing (and her lack of capacity" due to a number of factors. Two relate to the appellant's description of symptoms at January 2020 and the corroboration of her presentation at that time by Ms McDougall. That is a reference to paragraph 51 of the report where Dr Acosta records the appellant as saying that during the hearing and approaching it, the appellant was frightened as she did not know where the father was. That falls far short of evidence of incapacity to take decisions relating to proceedings. It confuses, or merges, fears arising from the symptoms with the different question of whether the appellant can understand, retain and use information, reach decisions and communicate them.

29. That is also reflected in the third and fifth reasons that Dr Acosta gives, namely the appellant's presentation was the same before the appeal hearing in October 2020 (which Dr Acosta regards as a similar event with similar stress factors to the January 2020 hearing). Dr Acosta concludes that the appellant would have lacked capacity due to the symptoms such as daily panic attacks and the feeling of being paralysed by the idea of the father's presence. That, however, is again to confuse questions of capacity with the question of ensuring a fair hearing where a person has vulnerabilities. Dr Acosta then deals with the first half-day of the appeal hearing in October 2020. She refers to the appellant's presentation of panic (it is not clear how that was displayed as we are told that the hearing was a remote hearing and the appellant did not have to appear on screen) and what Dr Acosta describes as her "almost lack of ability to communicate" with Dr Acosta. No details are given of what communications are being referred to or how that affected her ability to understand, retain and use information. The conclusion is that those factors in Dr Acosta's opinion "diminished [the appellant's] capacity to instruct counsel during the proceedings". It is noteworthy that Dr Acosta does not say that the appellant lacked capacity, simply that that was "diminished". It is not clear what is meant by that. Reading the September 2020 and February 2021 reports individually, and together, they do not begin to provide a proper evidential basis for concluding that the presumption that the appellant had capacity to participate in the disciplinary proceedings culminating in the Tribunal hearing in January 2020 is rebutted. Participation may have been difficult and adjustments might have had to be made to ensure, for example, that the appellant did not see the father as recommended by Dr Isaacs. That is not, however, the same as saying that the appellant lacked capacity to take the decisions necessary to enable her to participate in the disciplinary process.

30. The appellant also seeks to rely on a witness statement dated 16 May 2021 made by Iona McDougall who has been employed as the appellant's personal assistant since 2015. Ms McDougall describes the events of 22 to 24 January 2020 but principally focusses on events after that hearing. Ms McDougall is not, and does not suggest, that she is qualified to assess whether or not the appellant lacked capacity to participate in the disciplinary process in January 2020. Her evidence on what was happening, and her observations of the appellant at that time, do not establish that the appellant lacked capacity at that time.

31. The appellant also sought to rely on a report by Dr Cumming. He had not assessed the appellant. He was asked to comment on the two reports of Dr Acosta. In relation to the first report, he says that he had no reason to doubt the diagnosis of post-traumatic stress disorder but noted that Dr Acosta had seemed to accept the formulation around ADHD and there was no exploration of that issue. On capacity, Dr Cumming noted that Dr

Acosta had made an argument about capacity but without meeting the appellant, Dr Cumming said it was difficult for him to challenge the finding. He then deals with the second report where Dr Acosta considered that the appellant had capacity to understand the charges and advice and then focused on the capacity to give instructions. In his opinion, he makes it clear that he is commenting on the reports and that there are limitations on what he can say about the reports particularly as he had not assessed the appellant. He also notes that retrospective reports can be hazardous as the mental state of patients can vary over time. He concluded that he had no reason to doubt Dr Acosta's diagnosis of the appellant, that capacity was specific to the decision required and varied over time, that there were different views expressed about capacity, but he had no reason to consider that Dr Acosta's findings were inaccurate.

32. The question for this court is whether the appellant lacked capacity to participate in the disciplinary process in January 2020. Dr Cumming cannot and does not express a view about that question. His report reviewed Dr Acosta's report but, given the limitations inherent in that exercise, and the fact that he had not assessed the appellant, he had no basis on which he could express the view that her findings were incorrect. I do not consider that report assists in assessing whether or not the appellant did lack capacity at the material time in the relevant respects.

33. For all those reasons, and considering all the evidence, individually and cumulatively, and including, in particular the two reports of Dr Acosta, I am satisfied that there is no proper evidential basis for concluding that the presumption that the appellant had capacity to take the decisions necessary to enable her to participate in the disciplinary process culminating in the Tribunal hearing in January 2020 is rebutted.

34. There is a difference between questions of capacity and the fairness of proceedings. A person may well have vulnerabilities arising from underlying mental health conditions. Those may require adjustments to ensure that proceedings are fair. Special measures may need to be taken to accommodate a witness with vulnerabilities or who has a fear of being present at a hearing with a particular person. There may need to be an adjournment because of physical or mental conditions. In the present case, the difficulties that have been identified in relation to the appellant are ones that were relevant to the way in which the disciplinary process might need to be conducted to ensure fairness (as Dr Isaacs pointed out in his assessment of September 2019). They do not provide a sufficient basis on which to conclude that the presumption of capacity has been rebutted. In the present case, the appellant's solicitors sought an adjournment on the basis of her physical condition and the fact that she also had to deal with a second hearing in that week but no adjournment was sought by them on the basis of her mental health. The adjournment was refused and there has been no appeal against that decision. The appellant could have participated in the disciplinary process by, for example, providing her witness statement by the 19 November 2019 (as ordered) but did not do so. Problems at any hearing, including concerns about being present in the same room as the father could have been addressed (in fact, we are told that he gave evidence by video link). There has, however, been no complaint about the fairness of the disciplinary process.

The Appeal and the Hearing in October 2020

35. Mr Southey also submitted that the appellant lacked capacity to give instructions in relation to the appeal against the disciplinary findings which was heard in the High

Court in October 2020. The provisions of the CPR apply to the High Court appeal proceedings (but not to the hearing before the Tribunal). CPR 21.2 provides that a protected party must have a litigation friend to conduct proceedings. A protected person is a person who lacks capacity within the meaning of the Act to conduct the proceedings: see CPR 21.1. Any step taken in litigation before a protected party has a litigation friend "has no effect unless the court orders otherwise" (CPR 21.3(3).

36. First, the starting point is that the appellant is presumed to have capacity to conduct proceedings: see section 1 of the Act. Secondly, there is evidence that the appellant did instruct counsel in February 2020 to represent her in an appeal and did give instructions in about July or August 2020 to file amended grounds of appeal and to make an application to adduce fresh evidence (the report of Ms Licht on whether the appellant had ADHD and how that would have affected her conduct). Whilst there is evidence of difficulties and delays in giving instructions, an appeal was lodged based on nine grounds of appeal. Thirdly, in relation to the period immediately before the appeal began on 6 October 2020, there is evidence of the appellant reading the skeleton argument prepared by the BSB and giving her responses to her counsel.

37. Fourthly, the appellant relies heavily upon the reports of Dr Acosta. I have noted above that Dr Acosta did not have certain medical information available as she did not have for example the GP records. As is clear from paragraphs 2 and 4 of the first report dated 20 September 2020, Dr Acosta was instructed, amongst other things, to assess the appellant's capacity to make a statement and attend the appeal proceedings in October 2020. Paragraph 106 of the first report says that:

> "106. Regarding a capacity to provide a statement and attend appeal proceedings in October 2020: Unless something substantially changes in her mental health presentation, in my opinion [the appellant] more likely than not will not have capacity to provide a statement for the hearing or be able to attend the proceedings, either in person or remotely, especially if her alleged perpetrator is present. Even though she understands the Court proceedings, due to her untreated severe PTSD, anxiety with panic attacks and ADHD she will more likely than now [sic], not be able to fully retain or weigh information."

38. It is not easy to relate those findings to the question of whether the appellant had capacity to conduct the proceedings. It is difficult to see that the appellant needed to make a statement (as it was an appeal where no fresh evidence would be allowed) or needed to attend. Mr Southey, however, submitted that the appellant was entitled to attend and entitled to give instructions if the need arose and lacked capacity to give instructions.

39. Further, and more significantly, there is no proper analysis in Dr Acosta's first report of why it is said that the appellant would lack capacity. Dr Acosta noted that the appellant understood the court proceedings but, due to her PTSD, anxiety and ADHD, Dr Acosta said that the appellant would not be able to fully retain or weigh information presented in the proceedings. The reference to "fully" does not indicate whether the appellant would be able to retain and weigh information to the degree necessary to make any decisions on the conduct of proceedings that is called for. Dr Acosta makes no

reference to what practicable steps could be taken to help her to take any decision (as required by section 1(3) of the Act).

40. In any event, Dr Acosta prepared a further report in February 2021 and it is appropriate to read the first and second reports together. In the later report, Dr Acosta does consider questions of capacity in relation to specific matters. She concludes that the appellant does have capacity to understand the charges (and explains why she reaches that conclusion). She concludes that the appellant has capacity to understand the advice given to her by her then solicitor and counsel as "she can understand, retain, weigh up and communicate her decision, when one is speaking to her about it". On the question of whether the appellant has capacity to give instructions in the light of the advice, Dr Acosta says that this "is a difficult question to answer". She says that the appellant "frequently gets ahead of herself, giving instructions regarding a hopeful future re-hearing at the BSB" and had "expectations for the outcome she wishes that is not currently on the table". She says that the appellant "fluctuates from having capacity to give instructions at times to not having capacity to provide instructions at others, i.e. the latter when she is getting ahead of herself to a future re-hearing she hopes for and going into the past". Dr Acosta says that she was able to bring the appellant back to the current issues (and, it seems, by implication had capacity when that was done). She then does refer to the need to take practicable steps to assist the appellant to be able to take a decision and offers suggestions as to what the appellant's legal team can do to achieve that. Dr Acosta then says that, having talked to the appellant's current legal team, the appellant has been unable to provide meaningful instructions pertaining to the current appeal (i.e. the appeal to the Court of Appeal). She concludes at paragraph 100:

> "100. Given all of the above, in answer to the above questions, in my opinion [the appellant] lacks capacity currently to provide instructions and conduct her ongoing appeal".

41. Reading the report as a whole, it is difficult to see any proper evidential basis for the conclusion that the appellant lacked capacity to conduct the appeal in October 2020. The conclusion relates to the current appeal rather than the October 2020 appeal. More fundamentally, the position is that the appellant appears to have understood the court proceedings in October 2020 and understood the charges and the advice but (at least in February 2021) there may have been problems because the appellant would get ahead of herself and focus on what would happen if an appeal were successful rather than addressing the current issues. That, however, falls far short of evidence sufficient to demonstrate that the appellant lacked capacity to conduct proceedings in October 2020.

42. Ms McDougall gives details in her witness statement about the effect proceedings were having the appellant from about February 2020, and particularly in June and July 2020. However, that material falls far short of demonstrating a lack of capacity to conduct proceedings. Similarly, the report of Dr Cumming does not assist for the reasons given earlier. The appellant also seeks to rely on a letter from solicitors for the counsel who represented her from February 2020 up to and including the October 2020 hearing. That responds to Ms McDougall's witness statement and other letters. I do not consider that that letter assists the appellant. The counsel says that he was aware of the appellant's history, and that on occasions she was emotional when dealing with the topic of her disbarment and the appeal. However, the letter says that the counsel did not consider her to be incapable of making decisions in relation to the appeal.

43. For all those reasons, and considering all the evidence, individually and cumulatively, and including, in particular the two reports of Dr Acosta, I am satisfied that there is no proper evidential basis for concluding that the presumption that the appellant had capacity to conduct the appeal proceedings culminating in the hearing in October 2020 is rebutted.

44. Even if that had been established (which it has not), this would be a case where I would exercise the power conferred by CPR 21.3.(3) and order that the steps taken in the conduct of the appeal were to have effect notwithstanding the fact that no litigation friend had been appointed. The relevant principles are identified at paragraph 31 of the judgment of Kennedy LJ in *Masterman-Lister v Jewell* [2003] EWCA Civ 1889, 2003] 1 WLR 1511. There would be no disadvantage to the appellant in making such an order. She wished to appeal and advance grounds of appeal against the decision of the Tribunal. She did so. She succeeded in relation to one charge, where the appeal was allowed. She did not succeed in relation to the other charges. She continues to advance some of those grounds in this Court (where a litigation friend has acted for her in accordance with CPR 21.5). She would have suffered no disadvantage in the appeal by not having a litigation friend if one had been needed (which it was not).

Conclusion

45. For those reasons, the two reports of Dr Acosta, the report of Dr Cumming, the witness statement of Iona McDougall and the letter from the former counsel's solicitor would not have an important influence on the outcome of this appeal. They do not provide a sufficient evidential basis, considered individually, or cumulatively, or with all the other evidence in the case, to rebut the presumption that the appellant had capacity to take the decisions necessary to enable her to participate in the disciplinary process which concluded in January 2020 or the conduct of the appeal to the High Court which concluded in October 2020. I would refuse permission to adduce that evidence. In those circumstances, ground 1 of the appeal, that the appellant lacked capacity at material times, has no realistic prospect of success and there is no other compelling reason for the court to hear an appeal on that ground. I would refuse permission to appeal on this ground.

46. This is a second appeal. There may be significant difficulties in considering appeals based on an alleged lack of capacity for the first time on a second appeal. In the circumstances of this case, however, it has been possible to address the issue and the evidence, and to conclude that permission to rely on fresh evidence and to appeal on this ground should be refused. It is not necessary to address those difficulties.

THE SECOND GROUND – THE SCOPE OF THE DISCIPLINARY OFFENCE

47. Mr Southey submitted that the conduct in question could not amount to a violation of Core Duty 5 or rule 8. The conduct here concerned matters within the private life of the appellant, namely, the conduct by her of litigation in her own right (not while acting as a barrister). The BSB Handbook provides that conduct is not likely to be treated as a breach of those principles if it involves conduct in private life (unless it amounted to an abuse of the barrister's professional position). The disciplinary provisions were penal and should be interpreted narrowly where they were uncertain. They set objective rules and it was for the court to determine if the conduct amounted to a breach of those rules. Mr Southey submitted that the Judge erred by deciding only that it was open to the

Tribunal to treat the conduct as a disciplinary offence rather than deciding the matter for himself and he should have concluded that the conduct could not amount to professional misconduct within the meaning of the relevant provisions of the Code of Conduct or the rules.

48. In considering that submission, it is necessary to look at what the Judge concluded. The Judge considered the ground of appeal which asserted that Core Duty 5 and rule 8 were inapplicable on the facts of this case as the guidance on the meaning of professional misconduct in the Handbook did not extend to matters within a barrister's private or personal life. He said at paragraph 70 of his judgment that the public/private distinction was a filter that a tribunal was bound to apply in any case clearly involving a barrister's conduct in his or her personal life rather than in his or her practice as a barrister. If a Tribunal's decision on that could be shown to be wrong as a matter of law, then an appeal would succeed. He summarised the submissions of counsel. The Judge's conclusion on the issue is expressed at paragraphs 74 to 75 of his judgment where he said:

> "74. It seems to be that, applying the guidance, conduct in a person's private or personal life is in general not likely to be treated as a breach of CD5 but nevertheless can be so treated for good reason. The reason could be that the conduct, though personal or private, clearly is or is analogous to conduct which contravenes other provisions of the Code.
>
> 75. In the present case the relevant conduct involved acts and omissions in, or closely connected with, court proceedings. There is no doubt at all that conduct such as misleading a court, disobeying court orders and wasting or misusing the court's time to the detriment of other users would be professional misconduct if committed in the course of a barrister's professional practice. In my judgment it was open to the tribunal to rule that conduct of that kind was professional misconduct though committed in a personal capacity if, in fact it infringed a provision such as CD5 or r8.2."

49. There is nothing arguably wrong in the Judge's approach or his conclusion. He was entitled, indeed correct, to take the view that the conduct in question, although occurring in litigation conducted by the appellant on her own behalf, was capable of amounting to conduct which breached Core Duty 5 (acting in a way likely to diminish public trust and confidence in the barrister or the profession) and as undermining the barrister's honesty and integrity. The way the Judge expressed himself discloses no realistic prospect of success and no other compelling reason for the court to hear an appeal. I would refuse permission to appeal on this ground.

THE THIRD GROUND – CHARGE 4 AND THE PRINCIPLE IN *HENDERSON V HENDERSON*

50. This ground arises out of the fact that initially the BSB decided to refer charge 4 to the Tribunal in December 2017. Under the rules as then drafted, a complaint made by a third party against an unregistered barrister could not be referred to the Tribunal. When that problem came to light, no further steps were taken in relation to charge 4. Rather,

the BSB waited until the rules were amended and then decided in November 2018 to refer the second set of proceedings (charge 4) to the Tribunal.

51. Mr Southey submitted that the principle of res judicata identified in *Henderson v Henderson* applied and meant that the BSB could not proceed with charge 4 for a second time.

52. The submission is misconceived. *Henderson v Henderson* was a case where there had been a trial, and a judicial determination, of claims concerning the distribution of an estate. Subsequently, one of the next of kin sought to issue proceedings claiming that the estate in fact owed him money for certain transactions. The court held that:

> "In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

53. The question arose in *Barber v Staffordshire County Council* [1996] ICR 379 whether that principle applied where a person withdrew a claim for unfair dismissal and subsequently wished to bring another claim in the light of subsequent case law. The withdrawal of the claim took effect only when the employment tribunal dismissed the proceedings (although it did not give any reasoned decision on the facts and law in the case when doing so). The Court of Appeal held that the person could not bring a further claim as the first claim had been the subject of a judicial act, namely the order of the tribunal dismissing the claim.

54. The present position is different. There had been no adjudication on the charge which the BSB had decided to refer to a Tribunal in 2017. There was no judicial act involved in the fact that the charge was not proceeded with before the Tribunal as the BSB realised that there was a gap in its powers to make referrals. When that was corrected and the rules amended, the BSB did decide again to refer the charge to the Tribunal. That does not involve the principle of res judicata. The principle of res judicata did not prevent the BSB taking a second decision to refer the charge when it had power to do so. There may be principles governing whether charges may be referred where that would be oppressive or an abuse of process. But no such claim is made here. For that reason, there is no realistic prospect of this ground of appeal succeeding and no other compelling reason for an appeal to be heard. I would refuse permission to appeal this ground.

THE FOURTH GROUND OF APPEAL – REPORTING RESTRICTIONS

55. This ground of appeal arises because the judge agreed that his draft judgment could be shown to the father prior to it being handed down as his interests might be affected by reporting of the hearing or the judgment and he might wish to make applications in respect of that matter. The father made written representations but those were not shown to the appellant or her legal representatives. Mr Southey submits that that was wrong.

56. We do not have a copy of the representations. We do, however, have a summary of what they were and how the Judge dealt with them which is set out in a confidential annex to the Judge's judgment. The annex is confidential as it relates to one matter where there are reporting restrictions in place. It is not necessary to refer to that matter in this judgment.

57. The written submissions dealt with three matters. First, they suggested various changes to the draft judgment. The Judge refused to make those changes because, amongst other reasons, the father was not a party to the litigation. Secondly, the father asked that he be anonymised. The Judge refused to make any order for anonymity in relation to the father pursuant to CPR 39.2(4) and accepted the submissions of counsel for the appellant that such an order was not necessary for any of the reasons specified in the CPR. Thirdly, the father submitted that if he were to be named in the judgment, the appellant should be named as well. In fact, the Judge decided as a matter of discretion not to name the father in his judgment but to use the cipher "Mr X" as that was fair and did not involve a significant encroachment on the principle of open justice (and there is no appeal against the fact that he was not named in the judgment). As such, there was no basis for any argument that the appellant be named because the father was to be named in the judgment. Any decision on anonymity for the appellant would depend on considerations entirely separate from the written submissions, and the position, of the father.

58. In general, material that is provided to a judge as part of the process of dealing with a case should be shown to the parties in the case although there are exceptions to that general position. In the present case, however, the written representations have not had any material effect on the issue of reporting restrictions. I would therefore refuse permission to appeal on this ground as there is no realistic prospect of this ground leading to any different decision in this case.

59. That still left the question of whether or not the appellant or any other person should be the subject of an anonymity order. No application for anonymity had been made at the time of the hearing. The possibility of such an application being made appears to have been contemplated by paragraph 1 of the order of the Judge. At the hearing, Mr Southey indicated that there may need to be an application depending on the nature of the matters referred to in the judgments in this Court. Following the procedure indicated at the hearing, the judgments of this Court were circulated in draft. The appellant was given a opportunity to make an application for an anonymity order before the judgments were handed down. She did so, together with written submissions in support. The respondent made written submissions and the appellant then made written submissions in reply. For the reasons given in the order of the court, that application was refused.

60. There is one other point. Section 24(4) of the Crime and Courts Act 2013 provides that a decision of the High Court on an appeal under section 24 is final. Section 24(5)

provides that "Subsection (4) does not apply to a decision disbarring a person". The High Court may on appeal deal with a case where there are different charges where a sanction of disbarment was imposed in relation to some charges and a different and lesser sanction imposed in relation to another charge. That happened in this case. Two of the charges involved disbarment; one involved a prohibition on applying for a practising certificate for a period of 12 months. The question may arise as whether a person may appeal to the Court of Appeal against all aspects of the decision of the High Court (i.e. those aspects of the decision relating to charges resulting in a sanction of disbarment and those involving a lesser sanctions). Or is the decision of the High Court on those charges which involve sanctions less than disbarment final so that there can be no further appeal in relation to those matters? We have had limited argument on that issue. It is not necessary to resolve it in this case. It is better that that issue be decided in a case where it is necessary that it be resolved.

CONCLUSION

61. I would refuse permission to adduce the new evidence. I would refuse permission to appeal against the decision of the Judge on all grounds.

LORD JUSTICE EDIS

62. I agree.

LORD JUSTICE MOYLAN

63. I also agree.