Case No: HQ10X03054

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

1st June 2012

Before :

MR JUSTICE FOSKETT

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Between :

Nigel Barry Adams	**Claimant**
- and -	
(1) The Law Society of England and Wales	**Defendants**
(2) Alison Crawley	
(3) David Middleton	
(4) Michael Calvert	
(5) Robin Penson	
(6) Caroline Giles	
(7) Derek Johnston	
(8) Nicholas Heelam	
(9) Susan Faulkner	
(10) Carol Featherstone	
(11) Andrew Bain	

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Nigel Adams (in person)
James McClelland (instructed by **Field Fisher Waterhouse LLP**) for the **Defendants**

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Final ruling on issues raised following the hand down of the judgment on 17 April 2012

Mr Justice Foskett :

Final ruling on issues raised following the hand down of the judgment on 17 April 2012

Introduction

1. A number of issues arise for consideration following the handing down of the judgment in this case. Originally, I had set the date for receipt of the submissions by email as 4pm on 2 May, but I extended this at Mr Adams' request without objection on behalf of the Defendants. In due course the submissions from Mr Adams dealing with the Defendant's applications were received on 23 May as directed.

2. I have received extensive submissions from Mr Adams, in particular in support of his application for permission to appeal and in respect of the suggestion that I should recuse myself from further involvement in the case. His submissions deal also, of course, with the applications that the Defendants make.

The recusal issue

3. In relation to the "recusal issue", I gave an interim ruling on 16 May which, for completeness, is attached to this ruling. If Mr Adams continues to pursue this matter, it will be necessary for his initial submissions in this regard to be reviewed, along with my interim ruling, his "Second post-judgment submissions dated 21 May" and my response to the suggestion that the way complaints in my former chambers were handled "requires investigation" as set out in an email sent to him on my behalf by my Clerk on 22 May, the text of which reads as follows:

> "The judge has looked briefly at your further submissions sent this morning before going into court.
>
> He is happy to confirm that he had no role at all in the management of his chambers at the time: he was not a member of the chambers' management committee and played no role in the investigation of complaints. The matter does not require "further investigation" and, as far as he is concerned, the issue is closed.
>
> He sees absolutely no reason to recuse himself from further involvement in this case simply because you have now drawn his attention to something of which he was previously wholly unaware. That you may have had a dispute with his former chambers will have no bearing at all upon the decisions he makes concerning the consequences of a judgment handed down 5 weeks ago.
>
> He has noted the issues you have raised with Mr Gibson about one of the individual defendants. Neither that nor the matters you have raised in your most recent e-mail to me changes his direction given last week that you should submit your representations in response to the defendants' submissions by **4pm tomorrow**.

> He is unwilling that I should become involved in further e-mail correspondence. I will look forward to receiving your further representations by the time stipulated by the Judge."

4. I see from his "Third post-judgment submissions dated 23 May" that Mr Adams was proposing to make further inquiries. That, of course, is a matter for him, but it does not alter my view that there was and is no basis at all for recusing myself from further involvement in this matter.

5. Having reviewed the papers for the purposes of preparing this ruling, I have noted that I have not dealt expressly with the suggestion that, because I have displayed "irritation" with Mr Adams through the use of the words "ludicrous" and "impertinent" in my interim ruling, I should disqualify myself from adjudicating on the final issues. I used the word "ludicrous" because this was a suggestion from a solicitor that a judge would contact his former chambers to see if there was any information about that solicitor, presumably for the purposes of informing the judge's judgment in the case. The word does not connote irritation, but a high degree of incredulity that such a suggestion should be made by a solicitor. I do not resile from the word "impertinent" in connection with him asking me after the hearing about my association with the Law Society. Mr Adams indicates that he "was fairly sure … [that I] had not been a member of one of the very small number of chambers who do regulatory work for the Law Society", this presumably being his state of mind prior to the hearing before me. Given his sensitivities about this case in general and about how the Law Society has dealt with him, I am surprised, if it be the case, that he had not taken some steps to check that I had no association with the Law Society through my former Chambers before the hearing. I would simply observe that it is very easy nowadays to check that kind of information on the internet even if an old Bar Directory is not to hand. At all events, as I understand it, Mr Adams is content to accept that the Law Society issue is not an issue.

6. The way I have expressed myself about those two matters will have no bearing at all on the way I deal with the consequential applications to which I now turn. (I should say that I see no reason to delay dealing with the consequential matters for the reasons Mr Adams advances in paragraph 6 of his "Third post-judgment submissions").

The form of the order

7. The first issue is the form of the order. No order has yet been drawn up because I have, of course, delayed dealing with all consequential matters until now. For the reasons given in the judgment I had reached the conclusion that I should make "no order" on the strike out application because I had effectively determined the merits of that application as part of dealing with whether to accede to Mr Adams' application for the extensions of time he sought.

8. Mr McClelland has drawn my attention to the disadvantages of leaving matters on that basis: see paragraphs 6-9 of the Defendant's written submissions dated 9 May. Mr Adams suggests that if I adopt this approach I will be making a "significant change" to the judgment handed down. I do not agree. Nothing changes about the substance of my views and the merits of the case, but the consequences of the order I had in mind were matters upon which I had not fully focused. I can see the force of what Mr McClelland says. My intention (plainly) was that the action should be at an

end (subject, of course, to any appeal). Accordingly, I agree that the appropriate form of the order is that Mr Adams' applications should be dismissed, that the claim should be struck out and the action should be dismissed. The order should also include the aspect that had been agreed concerning the 5th and 11th Defendants.

Costs

9. Mr Adams agrees that he cannot in principle oppose the Defendant's application for costs, though he does suggest that a significant part of the costs should be disallowed for the reasons identified in paragraph 7 of his "Second post-judgment submissions". I see those matters simply as aspects of his objection to the whole basis of the Law Society's approach to him and to his case and I do not think that they afford any grounds for depriving the Defendants of any part of their costs in principle.

10. It follows that I will make an order for costs in their favour. I will deal with any question of a stay of execution later.

11. The first question is whether the order should be on an indemnity basis as the Defendants submit it should. I will not review the authorities to which Mr McClelland drew my attention. Plainly, there must be something in the conduct of the litigation that takes the case out of the norm and it is well established that making unfounded allegations of dishonesty can provide the basis for an order of indemnity costs.

12. It will be apparent from paragraph 162 of the substantive judgment that I have been concerned that individuals were named in these proceedings against whom allegations of misfeasance in public office were made which, as I have found, have no prospect of success. I suggested that "in an appropriate case" the court might well order indemnity costs if no pre-action protocol letter had been sent in good time to "flush out" the answer to the question of whether the institution concerned (here the Law Society) would accept vicarious liability.

13. I have to judge the issues, it seems to me, at least initially as if I was looking at the position when the proceedings were commenced. Having seen, in the proceedings before me and their aftermath, the way that Mr Adams turns his fire on any individual who might not agree with his position, I might have been inclined to say that the decision to name all these individuals was simply a reflection of that characteristic. However, that would be applying some recent evidence to something that should, in principle, be judged by reference to the time when the decision to name the individuals was made. I do not, of course, know the full extent to which Counsel who drafted the Amended Particulars of Claim gave him advice and was herself in a position truly to influence his approach: I have only Mr Adams' account of the advice he received and I have little doubt that he was a very demanding client. However, she was prepared to put her name to the pleading and her Skeleton Argument, though expressed in suitably cautious terms, did suggest that, on his account of things, there was merit in his case and that it was appropriate to incorporate the individual defendants.

14. In those circumstances, and not without some good deal of hesitation, I do not propose to make an order for costs on an indemnity basis. I rather suspect the question may ultimately prove to be academic, but that is not the reason for deciding not to award costs on the indemnity basis.

Interim payment

15. Notwithstanding Mr Adams' alleged impecuniosity, I can see no reason in principle why an interim order for payment on account of costs should not be made. I have seen the Statement of Costs to the end of the hearing before me in the sum, inclusive of VAT, of approximately £105,000.00. There is no particular science in my approach other than to recognise that some of that sum might be "lost" on a detailed assessment (which I shall order) and the payment to be ordered is merely on account of the eventual sum. I do not think I will be doing any injustice by ordering a payment of £40,000 as an interim payment on account.

Case "totally without merit"?

16. I am asked by the Defendants to certify that the claims and applications were "totally without merit" because the Defendants may wish to seek a civil restraint order against Mr Adams.

17. My observations in the final paragraph of the substantive judgment will be noted. It was so obvious that Mr Adams would wish to appeal that I thought the right course was simply to warn him that, if he sought to appeal, he ran the risk of such an order being made by the Court of Appeal. It is quite clear that he proposes to pursue an appeal. Since I am now specifically invited to say whether I regard the claim as "totally without merit", it seems to me that I should consider the issue and express a view.

18. It must be plain from the way I expressed myself in the judgment that, in my view, this case was "doomed to fail". That is not necessarily the same as the case being "totally without merit". However, I am of the view that the claim always has been "totally without merit" in the sense that (a) it reflected a scattergun approach to serious allegations against individuals who were undoubtedly simply doing their job and which (b) both intrinsically and because of that fact those allegations were never going to succeed given the high evidential threshold that was going to be required. This conclusion is also not altered by the fact that experienced Counsel was prepared to put her signature to the Amended Particulars of Claim. As with any Counsel, when instructed by a client that certain facts are facts, it is not wholly possible simply to withdraw from a case and decline to act. Her position could only be that, on the basis of Mr Adams' instructions, he had an arguable case. I, of course, have looked at the matter in the round with the availability of other material that was not available to Counsel and have decided that the case is hopeless.

19. Accordingly, I am prepared for the order that is made to reflect my view that the claim and the applications made by Mr Adams were "totally without merit". According to CPR 3CPD.1, having made that decision, I should go on to consider whether to make a civil restraint order. Since Mr Adams is undoubtedly going to seek permission to appeal from the Court of Appeal if I refuse permission to appeal, I propose not to decide that issue: it can be decided by the single Lord/Lady Justice or the full Court of Appeal in due course if he/she/they agree with my assessment and consider that the order is justified. If they do not agree with my assessment then, of course, the issue becomes irrelevant. The order that should be drawn up should, however, include a provision that in the event of the proposed appeal not being

pursued or being abandoned, the question of whether to make a civil restraint order should be submitted to me for determination.

Permission to appeal

20. I have received Mr Adams' submissions about this issue which run to very many pages. I have noted that Mr McClelland, on behalf of the Defendants, sought to make a pre-emptive strike so far as this issue was concerned. I should say quite clearly that my practice (which I believe is reflected by other judges, and indeed the Court of Appeal) is to say that submissions by the victorious party on any actual or proposed application for permission to appeal by the losing party is "by invitation only". I have, accordingly, not paid any attention to those representations.

21. I have endeavoured to digest the numerous points made by Mr Adams. However, the material I have been sent is so voluminous that I could not possibly (and certainly do not intend to) address each point directly.

22. One point he makes towards the beginning of his submissions is that he was disadvantaged at the hearing because he had less time than he wanted to make his submissions. As to that (a) I do not believe that he was at all disadvantaged and (b) he will recall that he was late on both days of the hearing, resulting in a total loss of 30-40 minutes of court time. I had, to my mind, read enough of the background to see where the major issues going to the question of "reason to suspect dishonesty" which, of course, is what lay at the heart of the whole case. I made it very clear in the judgment (paragraph 16, in particular) that I could not possibly reflect on every issue that Mr Adams raised and that it was necessary to focus on the most important details. It seemed to me that, if the apparently most serious allegations did not give rise to a "reason to suspect dishonesty", nothing else would (or should) and that is why I concentrated on the issues I mention. That those issues may have to some extent been different from those that Mr Adams wished to focus upon seems to me to be nothing to the point. Mr Adams' submissions are replete with suggestions that I "ignored" aspects of his case and "remained completely silent" about others. If I had addressed every aspect of the points he sought to raise the judgment would have been far more extensive than it in fact was (or needed to be).

23. At all events, in his submissions, he has identified all the areas that he says I ignored. As I said in the judgment, merely because I did not mention something did not mean that I ignored it: it simply means that I did not consider that, looked at in the round, it advanced his case to any significant degree. I draw attention to paragraphs 119-121, in particular.

24. Just as I could not deal with every aspect of his case below (because it was not necessary to do so), I cannot deal with every aspect of the criticisms he makes of me in his written submissions. I suspect I will have missed some, but I simply refer to the following:

    i) He says that I had not summarised his case on the "£95,000 issue" fairly. He suggests in that connection that I showed "a disturbing and unjust tendency to be looking for the tiniest things to impeach [his] good faith and honesty". I am happy to leave that for others to judge, but I think he misunderstands and himself misrepresents my approach. My approach was to see if there were

reasons why the Defendants had "reason to suspect dishonesty". He suggests that I have done him a "huge injustice" by not giving him the opportunity to rebut certain matters which he characterises as "illusory" flaws in his case. Again, I am perfectly happy for others to judge whether that was so, but I do not recognise any aspect of my judgment that is to that effect. He suggests that I have been unfair in characterising his Counsel's pleading as "convoluted" in relation to one aspect. I wish to make it quite plain that I did no such thing: I said that the explanation (which must have come from Mr Adams) was "convoluted". The pleading was bound to be convoluted if it reflected accurately Mr Adams' account.

ii) He says that I misrepresented his submissions in some respects (for example, under the heading "Failing to deal with positive aspects"). He suggests I have adopted "an approach of extreme insouicance to reckless allegations that [he] was a thief". I do not think that any fair reading of my judgment could lead to that conclusion.

iii) I see that he suggests that I kept my cards "close to my chest" and that I should have been more interventionist. He will forgive me for observing that had I been more interventionist by asking pertinent questions I have little doubt that I would now be facing accusations of having made up my mind at too early a stage. He does acknowledge, I note, that I really did want him to deal with the £95,000 issue that seemed to me to be some way down his agenda.

iv) I see that he also suggests that I ignored the "clearly documented racism practiced by the" Law Society. I have to say that I have absolutely no recollection of that issue being raised at all during the proceedings. I am sure that Mr Adams will suggest that it shows that my memory is fallible. However, I have no recollection of it being raised at all, it would have been totally irrelevant (as Mr Adams himself acknowledges) and I am bound to say I simply do not understand why the issue has been raised.

25. At the end of the day, having reviewed his submissions (upon which I must assume that his Grounds of Appeal will be based) and having asked myself whether there are any arguable grounds for appeal that have any real prospects of success, my answer is "no". I can see no other compelling reason for there to be an appeal.

26. Accordingly, I refuse permission to appeal.

Extension of time

27. In accordance with what I told Mr Adams from an early stage, in order that he should not be disadvantaged by there having been no hearing at which he could apply orally for permission to appeal, I will extend the time for lodging the documents necessary to seek the permission of the Court of Appeal to **4pm on Friday, 22 June.** I should make it plain to Mr Adams that that is my order. If he requires further time to lodge his appeal documents he must apply to the Court of Appeal, not to me.

Stay

28. So that Mr Adams will not be distracted by other matters, I will stay the order directing a detailed assessment of the Defendants' costs and the order for an interim payment on account of costs until his application for permission to appeal has been determined upon the terms that he proceeds with the application with all reasonable expedition.

The order

29. I invite Mr McClelland to recast the draft order sent to me a few weeks ago to incorporate the matters referred to in this ruling. If that can be done during the course of today (1 June) and I am satisfied with the draft, I will initial it and will make arrangements for it to be returned to the Queens Bench Office so that it can be drawn up appropriately. If that cannot be achieved, the order may be drawn up with my permission to Mr Adams to lodge an unapproved (in other words, not initialled by me) order with the papers to be lodged with the Court of Appeal because I shall be unavailable to initial any such draft since I am on leave until 22 June. If I have not been able to approve the order today, I will consider it on my return, but I make it plain there will be no reason for Mr Adams to delay putting in his papers to the Court of Appeal without a finally approved order. If necessary, he should draw the attention of the Civil Appeals Office to this paragraph of the ruling should any issue be taken about the lack of a finally approved order.

30. In order to try to deal with matters today, my Clerk will supply Mr McClelland with an e-mail address to which the draft order should be sent and which will then be forward to me for initialling. I will ensure it reaches the QB office in London.

'Leapfrog' appeal

31. I should simply say, for the record, that Mr Adams' desire to leapfrog this case to the Supreme Court is theoretical given the refusal of the Defendants to consent. I think it highly unlikely that I would have exercised my discretion in favour of such a course in any event; but the position is now academic.

Conclusion

32. I shall make it plain that as far as I am concerned, I have dealt with all matters that need to be dealt with and I require no further submissions or representations from any party. It is for Mr Adams now to get his papers before the Court of Appeal.

ATTACHMENT

Interim Ruling

1. I have now received the post-judgment submissions of Mr Adams and of the Defendants.

2. In view of one matter that Mr Adams has raised, I need to make an interim ruling before taking matters any further. Mr Adams invites me to "recuse [myself] forthwith on the grounds of actual or apparent judicial bias as a result of [my] connection with a party or parties with whom [he] was in dispute (not being one of the parties to this claim)" and that, if I should agree to this course, to direct that the case be referred to another judge with a view to a re-hearing of the parties' applications.

3. In paragraphs 5-21 of his written submissions (which run to 259 paragraphs over 89 pages accompanied by 2 annexes, one of which runs to 43 pages), he refers to a dispute he apparently had with a member or members of my former Chambers, one of the clerks and the then Head of Chambers (a former Chairman of the Bar) which prompted Mr Adams to report the Head of Chambers, a junior member of those Chambers and one of the clerks to the Bar Council. Mr Adams indicates that he only discovered my association with those chambers during last week (namely, the week ending 11 May) and raises the matter, he indicates, with regret given the other laudatory comments he makes in paragraphs 2-4 of his submissions about the hearing over which I presided. He does not disclose precisely when during last week he discovered that I had been a member of those Chambers, from whom he heard it, the circumstances in which he came to learn it and why the issue had not occurred to him before.

4. He asks in his submissions whether I had any knowledge of the dispute or the cross-complaints or whether I was "peripherally involved in them". I can say quite categorically that, until receipt of his written submissions, I had absolutely no knowledge of the dispute. Whilst I was indeed a senior member of the Chambers at the time all this was apparently going on, there is no reason why I would have known about it: when matters such as this arose, my recollection is they were generally kept within the knowledge of those most directly affected and ordinarily did not become common knowledge within Chambers. At all events, I had never heard of the dispute until seeing Mr Adams' submissions yesterday and, so far as I am aware, I had never heard of Mr Adams until he appeared before me in March. He raises further the question of whether I might have made informal inquiries about him from my old Chambers. I am afraid I must characterise this question as quite ludicrous: no judge would dream of doing any such thing. I did not do so.

5. If he has, as he suggests, recently started receiving requests from my former Chambers for outstanding fees, then that is wholly coincidental. I note that he says this: "In fairness, I believe there was a recent previous letter earlier this year and presumably before this case was allocated to the Judge."

6. That deals with one matter he has raised. He then goes on to question whether I have any connection with the Law Society or the individual defendants.

7. I am bound to say that it is really wholly inappropriate now for Mr Adams to be asking whether I have any connection with any of the Defendants which, as I have said, he now seeks to do, presumably prompted by the fact that I have found against him. I have been very tempted not to reply at all to that question because it is, frankly, impertinent. However, lest my failure to answer the question is treated as some kind of admission or raises suspicions that I am part of some unspoken conspiracy, let me say again quite categorically that I have, so far as I am aware, never met or had any connection (direct or indirect) with any of the individual defendants none of whose names I even recognise. I do not believe I ever acted for the Law Society during my career at the Bar - to the extent that that is relevant to the present issue. As with, I suspect, many judges at all levels, I do know some people who have been Presidents of the Law Society – in my case three - but I do not know, have never met or ever had any dealings (direct or indirect) with the President who Mr Adams has sought to name in the present proceedings. I would add that I have not, of course, discussed this case with anyone associated with the Law Society.

8. Mr Adams has been generous in his praise for my method of conducting the proceedings before me. Whether that is justified is for others to judge, but I can tell him that my approach to the judicial role (as I am sure is the case with all judges) is to be completely scrupulous (a) when it comes to recusing myself from a case if I feel I should do so and (b) about revealing any possible connection with any party or participant in a case if I feel there is any possibility of conflict or embarrassment or any possibility of the appearance that I might be influenced by extraneous influences. I have recused myself from cases in the past. Had I thought there was the remotest prospect of any such issue arising in this case, I would have raised it.

9. My decision, therefore, is that there is absolutely no need to recuse myself from further involvement in the case. I do not believe that anyone would think that there is even the appearance of any bias and, accordingly, I will not recuse myself upon that ground either. If Mr Adams wishes to raise this matter elsewhere, that is a matter for him. However, I intend to complete my duties in this case until all consequential matters have been dealt with and I invite Mr Adams to engage in that process irrespective of whether he chooses to raise the recusal issue in the Court of Appeal. I must insist, however, that if he does so, then he must draw that court's attention to this interim ruling.

10. That ruling having now been made, as I promised in one of the several e-mails that have passed between him and my Clerk in recent weeks, I now give him the opportunity to reply to the following applications made by the defendants consequent upon the judgment:

1. That the claim form should be struck out[1].

2. That the defendants (a) should be entitled to their costs, to be assessed if not agreed, and (b) that they should be assessed on the indemnity basis.

3. That the defendants should be awarded an interim payment on account of costs.

4. That I should certify his applications and the underlying claims as being "totally without merit" within CPR 23.12 and CPR 3.3(7) respectively.

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[1] Irrespective of any further order I might make in the context of this application, I will direct (because Mr Adams agrees I should do so) that the claims against D5 and D11 are discontinued with no order as to costs.

11. He must do so by e-mail to my Clerk by **4pm on Wednesday, 23 May** – in other words, within 7 days. I will give a composite ruling on all the various matters that have been raised by both parties after that.

12. I should emphasise to Mr Adams that I do not require detailed submissions on the matters raised: I will not be prepared to grant any further extensions of time to accommodate these further representations. All he needs to do is to put down in short form any arguments that he wishes to advance against the applications the defendants make. I am, of course, aware that he is aggrieved by my judgment and that he wishes to appeal, but for present purposes I want him to focus clearly and concisely on the four issues I have mentioned above so that I can finalise my role in this case.

16 May 2012