

ENGLAND AND WALES / JUDGMENT

Ballard v Solicitors' Regulation Authority (Rev 1) [2017] EWHC 164 (Admin) (09 February 2017)

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Neutral Citation Number: [2017] EWHC 164 (Admin) Case No: CO/3503/2016 & CO/3845/2016 IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION ADMINISTRATIVE COURT Royal Courts of Justice Strand, London, WC2A 2LL 09/02/2017 B e f o r e : LORD JUSTICE BEATSON MR JUSTICE NICOL and

Between: TERRENCE BALLARD Appellant

- and - SOLICITORS' REGULATION AUTHORITY Respondent

The Appellant in person Geoffrey Williams QC (instructed by Solicitors Regulation Authority) for the Respondent Hearing date: 27 January 2017

HTML VERSION OF JUDGMENT APPROVED

Crown Copyright © Lord Justice Beatson : I. Overview: The two appeals before this court pursuant to section 49(1) of the Solicitors Act 1974 concern the decision of the Solicitor's Disciplinary Tribunal ("the Tribunal") dated 21 June 2016 in proceedings by the Solicitors Regulation Authority ("the SRA") against Mr Terrence Ballard, a solicitor on the roll. The disciplinary proceedings concerned Mr Ballard's conduct, described at [12] – [16] below, when acting for a Mr DE in relation to criminal proceedings and Mr Ballard's subsequent non-compliance with the directions of the Legal Ombudsman and the County Court at Eastbourne. It was alleged that Mr Ballard had breached a condition in his practising certificate, and the principles in the SRA Code of Conduct 2011. After a two-day hearing, the tribunal found that three of four allegations had been proved. It imposed a fine of £2,500 on him, and ordered that he pay £18,000 in costs. Mr Ballard appeals against the findings and the penalty. The SRA has raised a cross-appeal, contending that the amount of the fine was, in the words of Sir Thomas Bingham

MR in Bolton v Law Society

[1994] 1 WLR 512, 518 an insufficient sanction "to maintain the reputation of the solicitors' profession as one in which every member ... may be trusted to the ends of the earth" and thus to maintain public confidence in the solicitors' profession. Mr Ballard's practising certificate for 2012/2013 was granted and approved by the SRA subject to the condition that he was "not a sole practitioner or sole director of a recognised body". The main issue in his appeal is whether the tribunal erred in finding that he was at all material times in relation to the conduct which formed the charges a "sole practitioner" and therefore in breach of the condition. Mr Ballard argued that, in order to be a "sole practitioner", he had to be employed in connection with the provision of legal services by one of the entities listed in section 1A of the Solicitors Act 1974 and that, in relation to the conduct charged he had not been practising as a solicitor for the purposes of the Solicitors Act 1974 and the Legal Services Act 2007, but had acted as a McKenzie Friend or an authorised exempt person. This "entity" or "other entity" point is at the core of his case, which he regards as having important implications for solicitors who seek to promote and use "new vehicles" for the delivery of legal services in order to improve competition and access to justice. The SRA regards the case as a simple one in which a solicitor, whose practising certificate is subject to a restriction limiting the work he can do, has acted in a way which breaches that restriction and also refused to comply with directions by the Legal Ombudsman to pay money to Mr DE. II. The Legal and Regulatory Framework: (i) Practising requirements The material provisions for these appeals are sections 1 and 1A of the Solicitors Act 1974, section 12 of the Legal Services Act 2007 and schedule 3 to that Act, and rule 1.1 of the SRA's Practice Framework Rules 2011. (a) Solicitors Act 1974 "1. Qualifications for practising as solicitor No person shall be qualified to act as a solicitor unless—

- (a) he has been admitted as a solicitor, and
 - (b) his name is on the roll, and
 - (c) he has in force a certificate issued by the Society in accordance with the provisions of this Part authorising him to practise as a solicitor (in this Act referred to as a "practising certificate").
- 1A Practising certificates: employed solicitors A person who has been admitted as a solicitor and whose name is on the roll shall, if he would not otherwise be taken to be acting as a solicitor, be taken for the purposes of this Act to be so acting if he is employed in connection with the provision of any legal services—
- (a) by any person who is qualified to act as a solicitor;
 - (b) by any partnership at least one member of which is so qualified; . . .
 - (c) by a body recognised . . . under section 9 of the Administration of Justice Act 1985 (incorporated practices) or

- (d) by any other person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which is a reserved legal activity (within the meaning of that Act). (b) Legal Services Act 2007 Section 12(1) of the 2007 Act provides that "reserved legal activity" means inter alia "the exercise of a right of audience". Section 13 is concerned with entitlement to carry out a reserved legal activity. Section 13(2) provides that person is entitled to do so where he or she is an authorised person in relation to the relevant activity, or is an exempt person in relation to that activity. Authorised person" in relation to a reserved legal activity (referred to as "the relevant activity") is defined by section 18 "as inter alia : "(1)(a) a person who is authorised to carry on the relevant activity by a relevant approved regulator in relation to the relevant activity (other than by virtue of a licence under Part 5)". It is clear that a solicitor is an "authorised person" within this provision. The question whether a person is an exempt person for the purpose of exercising a right of audience is dealt with in section 19 and Schedule 3 to that Act. Schedule 3 defines "exempt person" as follows: "(1) This paragraph applies to determine whether a person is an exempt person for the purpose of exercising a right of audience before a Court in relation to any proceedings (subject to paragraph 7).
- (2) The person is exempt if the person—
- (a) is not an authorised person in relation to that activity, but
- (b) has a right of audience granted by that Court in relation to those proceedings.
- (3) The person is exempt if the person—
- (a) is not an authorised person in relation to that activity, but
- (b) has a right of audience before that Court in relation to those proceedings granted by or under any enactment. ...
- (6) The person is exempt if the person—
- (a) is a party to those proceedings, and
- (b) would have a right of audience, in the person's capacity as such a party, if this Act had not been passed." (c) SRA's Practice Framework Rules 2011 Rule 1.1 provides: "You may practise as a solicitor from an office in England and Wales in the following ways only:
- (a) as a recognised sole practitioner or the employee of a recognised sole practitioner; ..." (ii) Legal complaints and the Ombudsman Scheme The material provisions for these appeals are sections 125, 128(1) 132 of the Legal Services Act 2007. Section 125 is entitled "Jurisdiction and operation of the Ombudsman Scheme" and provides: "(1) A complaint which relates to an act or omission of a person ("the respondent") in carrying on an activity is within the jurisdiction of the ombudsman scheme if—
- (a) the complaint is not excluded from the jurisdiction of the scheme by section 126, or by scheme rules made under section 127,

- (b) the respondent is within section 128, and
 - (c) the complainant is within section 128 and wishes to have the complaint dealt with under the scheme.
- (2) In subsection (1) references to an act or omission include an act or omission which occurs before the coming into force of this section.
- (3) The right of a person to make a complaint under the ombudsman scheme, and the jurisdiction of an ombudsman to investigate, consider and determine a complaint, may not be limited or excluded by any contract term or by notice." Section 128(1) of the 2007 Act provides that the respondent to a complaint "is within this section if, at the relevant time, the respondent was an authorised person in relation to an activity which was a reserved legal activity (whether or not the act or omission relates to a reserved legal activity)". Section 132 of the 2007 Act makes provision for continuity of complaints. It provides: "(1) The ability of a person to make a complaint about an act or omission of a partnership or other unincorporated body is not affected by any change in the membership of the partnership or body. Subsections (2) – (4) require scheme rules to make provision determining the circumstances in which an act or omission of one person who ceases to exist and another person succeeds to the business of the first person to be treated as an act or omission of the second person, complaints against the first person which are outstanding when he or she ceases to exist, and where the complainant has died or is unable to act. (iii) McKenzie Friends In July 2010 the then Master of the Rolls and President of the Family Division published a Practice Guidance Note on McKenzie Friends. Substantial parts of this are set out at §§49.2 – 4 of the tribunal's decision and it is not necessary to set them out here. It suffices to state that paragraph 2 states that litigants have the right to have reasonable assistance from a layperson and that the document does not refer to solicitors, let alone the possibility that a solicitor would act as a McKenzie Friend. The Law Society issued a Guidance Note on Unbundling Civil Legal Services, dated 4 April 2016. This states at paragraph 6.2: "As an alternative to traditional advocacy you may wish to consider providing your client with a professional McKenzie Friend service in appropriate cases. The role of a McKenzie Friend is to provide advice and support to a litigant in person during the course of a hearing, but a McKenzie Friend has no right to address the Court, save for exceptional circumstances where the Court sees fit to grant leave." (iv) The Principles in the SRA Code of Conduct 2011 Principle 4 states: "You must act in the best interests of each client" Principle 5 states: "You must provide a proper standard of service to your clients" Principle 6 states: "You must behave in a way that maintains the trust the public places in you and in the provision of legal services." Principle 7 states: "You must comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner." (v) Disciplinary Proceedings Sections 46 – 49A of the Solicitors Act 1974 make provision for a Solicitors Disciplinary Tribunal and the rules governing the tribunal are in the Solicitors (Disciplinary Proceedings) Rules 2007 SI 2007 No. 3558. In relation to this appeal, it is only necessary to state that, in an appeal from the tribunal to this

court pursuant to section 49(1) of the Solicitors Act 1974, section 49(4) provides that, this court has power "to make such order on an appeal under this section as it may think fit", and that rule 5 of the Solicitors (Disciplinary Proceedings) Rules provides that the SRA must serve a statement containing the allegations and the facts and matters supporting the application on the person charged. III. The Factual and Procedural Background This section is based on what was common ground in the tribunal and before this court and the findings and decision of the tribunal which are summarised at [22] – [24] below. Mr Ballard was admitted as a solicitor in 1997 and set up a sole practice, Terry Ballard & Co, in 2004. That practice closed after he was made bankrupt on 27 September 2011. In respect of the year 2011/2012, the SRA gave Mr Ballard a practising certificate which was subject to the condition that he could only act as a solicitor in employment. His practising certificate for 2012/2013, the period material for this appeal, was subject to the condition that I have mentioned; that he was "not a sole practitioner or sole director of a recognised body". At the material times in 2013 Mr Ballard was employed by CR Burton & Co ("Burtons"). Burtons permitted him to work for third parties, including other firms provided he did not use the firm's name, reputation, banking facilities or insurance when doing so. In June 2013, Mr Ballard agreed to act privately for a fee and outside the arrangements he had with Burtons for an individual, Mr DE, who had been charged with a criminal offence. Mr DE understood that Mr Ballard was a solicitor. His evidence to the Tribunal was that Mr Ballard provided him with a business card with the words "Terry Ballard – locum solicitor/higher Court advocate/legal consultant" on it. At the hearing before this court, Mr Ballard stated that he did not recall giving a card to Mr DE, but expressed concern that only one side of it had been before the Tribunal and the side stating that the services he provided as "a consultant are not reserved legal activities for the purpose of section 12 of the Legal Services Act 2007" was not. Mr Ballard claimed he was acting for Mr DE in relation to the criminal proceedings as a McKenzie Friend or an exempt person. Mr DE's evidence to the tribunal was that Mr Ballard gave him general legal advice and looked at court documents but did not draft court documents or put his name on the record as acting. A fee of £750 was agreed by Mr DE and Mr Ballard for Mr Ballard to appear at a hearing at the Brighton and Hove Magistrates' Court on 5 August 2013. Mr Ballard attended and is recorded as "attending solicitor" in the court's memorandum of entry. He stated this was the result of an error or a misunderstanding by the usher to whom he had fully explained his status. Mr DE's evidence was that Mr Ballard sat in the rows used by advocates. As a result of a previous case overrunning, the judge stated that Mr DE's case would have to be adjourned; Mr Ballard informed the judge that he agreed to the adjournment without prefacing his remarks by indicating that he needed the court's permission in order to address it. Later on 5 August 2013, there was a disagreement between Mr Ballard and Mr DE about funding and whether Mr DE had paid in full before the hearing. Mr Ballard informed Mr DE that he no longer wished to represent him. Although no longer acting for Mr DE, at the adjourned hearing on 4 November, Mr Ballard attended and sat in the public gallery. On 9 September 2013, Mr DE reported Mr Ballard's conduct to the Legal Ombudsman. After her investigation, the Ombudsman, in a letter to Mr Ballard dated 2 January 2014, stated that "the legal service provided to Mr DE was woefully

inadequate and was not to the standard that should have been provided". She directed Mr Ballard to repay the £750 and to pay Mr DE £250 compensation for distress and inconvenience by 17 January 2014. Mr Ballard refused to make the payment on the ground that he had not been acting in the capacity of a solicitor or regulated person and the Ombudsman had no jurisdiction to make the direction. The Ombudsman applied to the County Court at Eastbourne for an order allowing her to enforce her award and, on 14 May 2014, the Court made the order. In later enforcement proceedings, a suspended committal order was made against Mr Ballard. At an earlier stage, in a letter dated 14 March 2014, the SRA had informed Mr Ballard that it was "moving to formal investigation" in respect of allegations concerning his involvement with Mr DE, including failure to comply with the conditions on his practising certificate, practising without indemnity insurance, and failing to act in the best interests of his client. Mr Ballard replied to the SRA's "Explanation with Warning Letter" on 18 April 2014 denying the allegations but admitting that he acted for Mr DE as a McKenzie Friend and for a fee. Mr Ballard's employment with Burtons ceased in 2014 and he was later employed as a solicitor at another firm as a "consultant/locum". Mr Ballard's evidence to the Tribunal was that a number of courts including the Court of Appeal Criminal Division had permitted him to act as a McKenzie friend or to address the Court as an "exempt person" with full knowledge that he was also a solicitor (see decision §§ 55.84, 94, and Goymer

- [2013] EWCA Crim 79. IV. The Disciplinary Proceedings: Disciplinary proceedings pursuant to the Solicitors (Disciplinary Proceedings) Rules 2007 were instituted against Mr Ballard. The rule 5 statement containing the allegations and the facts and matters supporting the application served on him is dated 16 June 2015. It contains the following allegations: Allegation 1.1: During and/or before August 2013, Mr Ballard breached the conditions of his 2012/2013 Practising Certificate when acting on his own account for Mr DE in criminal proceedings, contrary to Principles 6 and/or 7 of the SRA Code of Conduct 2011; Allegation 1.2: During and/or before August 2013, Mr Ballard was operating a separate business/ consultancy and provided a prohibited separate business activity in breach of Outcome 12.1 of the SRA Code of Conduct 2011; Allegation 1.3: In acting for Mr DE in a private capacity from June 2013, Mr Ballard failed to act in the best interest of his client and/or failed to set out the terms and scope of his instructions and/or failed to provide a proper standard of service to his client in breach of Principles 4 and/or 5 and/or 6 of the SRA Code of Conduct 2011; Allegation 1.4: Mr Ballard breached Principle 7 of the SRA Code of Conduct 2011 in that he failed to comply with directions from the Legal Ombudsman to pay monies to Mr DE within a certain time as directed by the Ombudsman and/or to comply with subsequent orders made by the Court. V. The Tribunal's Decision on the misconduct alleged: The tribunal stated that the SRA was required to prove the allegations "beyond reasonable doubt" (§ 53). It found that the SRA had done so in relation to allegations 1.3 and 1.4 and had done so in part in relation to allegation 1.1. It found that allegation 1.2 was not proved, and that conclusion is not the subject of an appeal by the SRA, so it is not necessary to refer further to it. The tribunal's decision is 55 pages long. It

set out the factual background (§§ 3 – 35), the statutory scheme (§§ 36 – 48 and 50.1 -50.3), the position of the SRA in relation to McKenzie Friends and the 2010 Practice Guidance Note by the MR and the PFD on what McKenzie Friends may and may not do (§§ 48 – 49.4), statutory guidance notes (§§ 50.4), what evidence was given (§§ 51 - 52), and then turned to its findings of fact and law in relation to each of the allegations. Before recording its findings of fact and its conclusions on the legal issues under the allegation, it summarised the factual and legal submissions of the SRA and Mr Ballard, and the evidence in a way reminiscent of a "notebook summing up" by a Crown Court judge presiding over a criminal trial. This in part reflected the range of issues raised, but it resulted in a very long decision. I summarise the findings and the decision as follows: Findings of fact : From about April/ May 2013, and in particular after June 2013, Mr Ballard provided advice and assistance to Mr DE in relation to the relevant criminal proceedings, whilst practising as a solicitor who held a practising certificate subject to the condition that he could not be a sole practitioner. The tribunal did not rely in any way on two business cards in the bundle which Mr DE said Mr Ballard had given him: §§ 55.73 – 55.75. Mr DE knew Mr Ballard was a solicitor who held a practising certificate but Mr Ballard did not inform him that he proposed to act in a capacity other than that of a solicitor/ authorised person. Mr Ballard did not set out or confirm the terms of his arrangement with Mr DE in writing and had not explained the position adequately to Mr DE. Mr DE did not understand that there was a risk that the trial would commence but that Mr Ballard would not be given permission to speak on his behalf or cross examine witnesses: §§ 55.77, 55.79. On 5 August 2013, Mr Ballard: attended court; sat in the rows used by advocates; spoke to several people at court; addressed the bench on his own account without prefacing his remarks by indicating that he needed permission to do so, and the record of the hearing noted that he was present as Mr DE's solicitor: § 55.80. Mr Ballard had been and was held out to be a solicitor: § 55.88. Conclusions on the legal issues: Allegation 1.1 The legal and procedural advice provided by Mr Ballard prior to 5 August 2013 was a "legal activity" rather than a reserved activity: § 55.76. The tribunal was not satisfied that the circumstances in which Mr Ballard advised Mr DE before 5 August 2013 amounted to a breach of the condition on his practising certificate: §§ 55.89. Mr Ballard acted as a solicitor at Court on 5 August 2013. There was no other capacity in which he could have acted unless and until the Court had ordered otherwise and given him permission to address it. He was acting "on his own account" because he received payment directly and was not instructed by a regulated entity: §§ 55.89, 55.91-92. Mr Ballard's activity in court on 5 August was a breach of the condition on his practising certificate, and thus a failure to comply with his legal and regulatory obligations in breach of SRA Principle 7: § 55.93. Allegation 1.3 As Mr Ballard had been providing Mr DE with legal services, whether or not those services fell within the definition of reserved legal activities at all relevant times, he was obliged to comply with the SRA Principles. A solicitor who is aware (as Mr Ballard was) that he may not be permitted to represent a client at a criminal trial should have advised the client clearly, and in writing, to seek alternative representation: §§ 57.10. The tribunal found that the lack of explanation and clarity about the terms and (limited) scope of what Mr Ballard

could do in return for the £750 was in itself sufficient to show a failure to act in the best interests of the client contrary to principle 4 and a failure to provide a proper standard of service contrary to principle 5. It could not be in the client's best interests. The public would regard the lack of clarity about the arrangement as a matter of concern and this would undermine rather than maintain the trust the public would place in Mr Ballard and in the provision of legal services: §§ 57.11-12. The tribunal found that the manner in which Mr Ballard terminated the retainer was intemperate and unprofessional. It stated that terminating without good reason amounted to a failure to provide a proper standard of service or act in the best interests of the client, contrary to principles 4 and 5. The tribunal was, however, not satisfied that Mr Ballard's presence in open court during Mr DE's hearing in November 2013 was in itself a breach of his professional obligations: §§ 57.15 - 16. Allegation 1.4 The tribunal decided that sections 125 et seq. of the Legal Services Act 2007 gave the Legal Ombudsman jurisdiction over a complaint against Mr Ballard because he was an authorised person in relation to an activity which was a reserved legal activity. In this case, he was a solicitor, and he was an authorised person who had provided legal services to Mr DE. Mr Ballard could have challenged the order of the Ombudsman by making an application for judicial review. He could also have appealed or challenged the order of the County Court at Eastbourne that he pay the Ombudsman's award. He did neither. The Tribunal concluded that his failure to comply with the orders or take prompt steps to appeal or seek a judicial review of them was clearly wrong and inappropriate behaviour on the part of a solicitor: §§ 58.11 – 58.13. VI. The appeal against the substantive decision: Mr Ballard advanced four broad, and to some extent, overlapping, grounds of appeal: errors of law, serious procedural irregularities, perverse findings of fact, and bias. I consider each in turn. (a) Errors of law: Mr Ballard submitted that in finding that, on 5 August 2013, he was a sole practitioner in contravention of the condition on his practising certificate and thus that allegation 1.1 was proved, the tribunal erred in law. This part of his case is based on the "entity" point to which I have referred and which he described as the "genesis" of his case. The core of his argument is his contention that an individual solicitor can only be a sole practitioner if he or she is employed or engaged by one of the entities listed in section 1A(a)-(d) of the Solicitors Act 1974 or Rule 1.1(a) of the SRA's Practice Framework Rules 2011. He submitted that he could not have acted for Mr DE in the capacity of a solicitor because Mr DE retained him directly as a "potential/would-be McKenzie Friend ... providing non-reserved legal advice, assistance and advocacy support in a private capacity rather than as a sole practitioner", and "side-stepping" all recognised entities as a cost saving measure. The "entity" point also underlies the submission that the tribunal made two errors of law in relation to allegation 1.4. The first is that the tribunal erred in finding that the Legal Ombudsman had jurisdiction to investigate Mr DE's complaint against him. Relying on the judgment of Patterson J in *R (Kerman & Co LLP) v Legal Ombudsman*

[2014] EWHC 3276 (Admin),

[2015] 1 WLR 2081 , Mr Ballard argued that the Ombudsman only has jurisdiction to investigate a complaint against an individual solicitor if the solicitor was acting on behalf of a regulated or recognised entity. He had not been acting on behalf of Burtons in relation to Mr DE, and he maintained that the closure of Terry Ballard & Co on 27 September 2011 deprived the Ombudsman of jurisdiction to entertain a complaint against him as an individual solicitor. The second of the alleged errors was Mr Ballard's argument, on the basis of the decisions in *Zissis v Lukomski*

[2006] EWCA Civ 341 and *Wandsworth LBC v Winder*

[1985] AC 426 that the tribunal erred in not finding that, because the Ombudsman did not have jurisdiction, he was justified in disobeying her decision and raising the lack of jurisdiction as a defence in the county court and as a collateral defence before the tribunal. I reject these submissions. In my view, the Tribunal was right to find that Mr Ballard acted for Mr DE in the capacity of a solicitor in breach of the condition of his practising certificate. There is no need for an individual solicitor to have been employed or engaged by one of the entities listed in section 1A of the Solicitors Act 1974 because that section is only concerned with a person who "would not otherwise be taken to be acting as a solicitor". Mr Ballard ignored those words in his submissions and focussed on his description of the capacity in which he claimed he was acting rather than the capacity in which Mr DE, the court officials, and the judge would have taken him to be acting. He was a solicitor. Mr DE knew he was a solicitor, and the tribunal was entitled to find on the evidence it considered that Mr Ballard did not inform Mr DE that he proposed to act in a capacity other than that of a solicitor and of the risk that the court would not give him permission to address it as a McKenzie Friend. Mr Ballard did not tell either the usher or the court that, on that occasion, he was not acting as a solicitor. More fundamentally, a solicitor on the roll must comply with Principles 6 and 7 of the Principles in the SRA Code of Conduct 2011 at all times. They are stated to be "mandatory Principles which apply to all" and (Note 2.3) "to apply to individuals and firms we regulate". Solicitors are told "always [to] have regard to the Principles ..." (Note 2.2). I accept Mr Williams' submission that solicitors who remain on the roll cannot opt out of their regulatory duties simply by calling themselves something else and making a private arrangement. The SRA's rules and principles are designed to protect clients and the public and, in my judgment, cannot be side-stepped in this way. In my judgment, the tribunal's conclusion that it could not be sure that what Mr Ballard did before the hearing on 5 August 2013 amounted to a breach of the condition in his practising decision could be seen as a generous one in his favour. Whether or not that is so, at that hearing Mr Ballard plainly acted in his capacity as a solicitor. What he did in court was evidence of how he held himself out at the hearing. He spoke to court officials, sat on the advocates' bench, and agreed to the adjournment. He thus carried out the reserved legal activity of exercising a right of audience before the judge. The tribunal was clearly entitled to find that this activity meant he was acting as a sole practitioner. The use of the term "de facto sole practitioner" is simply a description of what Mr Ballard was doing by accepting instructions directly from Mr DE, appearing at the hearing, and

participating in it on Mr DE's behalf without informing the bench of his position and seeking permission to act. Having dealt with the points strictly relevant to the tribunal's decision on this point, I now refer to, and comment on, what it said about Mr Ballard's evidence that he has appeared in other courts including the CACD (see Goymer's case at [18] above, a renewed application for permission to appeal) as a McKenzie Friend or an exempt person. The tribunal considered §55.84) that the Legal Services Act 2007 did not appear to limit the jurisdiction of the courts to determine whether to permit any individual to address the court, so that it could not be said that courts which had permitted Mr Ballard to do so on that basis had been wrong. But it also stated (see §§55.84-85) that it appeared to it that the correct reading of Schedule 3 to the Legal Services Act 2007 together with the Solicitors Act 1974 suggested that a solicitor was an authorised person and therefore could not correctly be described as an exempt person if granted special permission by a court to appear as an advocate or to assist as a McKenzie Friend. I observe that, in Goymer's case, Treacy LJ made it clear that Mr Ballard only appeared by way of "concession" and that the transcript would be sent to Mr Goymer, the person, and not to Mr Ballard. The tribunal also noted that the July 2010 Practice Guidance Note on McKenzie Friends to which I have referred suggested that McKenzie Friends were not or were not likely to be authorised persons. At §55.94, it observed that the Practice Guidance Note stated that courts should be slow to grant rights of audience to those who were not authorised for the protection of court users and to ensure that those who appeared as representatives understood their duties to the court. While declining to comment in general on the desirability or legality of solicitors such as Mr Ballard offering unregulated services if permitted by the court, it stated with regard to the professional obligation of a solicitor to act in a way which would maintain the trust of the public and the provision of legal services, that providing unregulated services in a way which was not spelled out with great clarity would damage that trust. It is not clear from the transcript of the proceedings of the CACD in the case of where Mr Ballard is entered as an "exempt person" whether he had informed the court of the condition on his practising certificate when seeking permission to address the court in that capacity. In any event, as I have stated, Treacy LJ referred to the permission as a "concession", and Mr Williams accepted that courts have jurisdiction to give such permission as a matter of concession. Since Mr Ballard had not asked for permission on 5 August, the matter does not fall for decision. I therefore express no opinion on it, save to observe that I incline to the view of the tribunal as to the effect of Schedule 3 to the Legal Services Act 2007 read together with the Solicitors Act 1974. I turn to the Legal Ombudsman's jurisdiction. I consider that Mr Ballard's argument is totally misconceived. Section 128(1) makes it clear that a person about whom a complaint is made to the Ombudsman is subject to the jurisdiction of the Ombudsman Scheme "if, at the relevant time, ... [he or she] ... was an authorised person in relation to an activity which was a reserved legal activity (whether or not the act or omission relates to a reserved legal activity). Mr Ballard, a solicitor on the roll, was an authorised person in relation to a reserved legal activity, albeit subject to a condition, and the fact that his practice closed in September 2011 is therefore irrelevant. R (Kerman & Co LLP) v Legal Ombudsman

[2014] EWHC 3276 (Admin),

[2015] 1 WLR 2081 is also irrelevant to the present case. It concerned section 132 of the 2007 Act (see [7] above) which provides for continuity of complaints and preserves recourse to the Ombudsman Scheme where the subject of a complaint has transferred his practice or has ceased to exist. It was held that Kerman & Co fell within the Ombudsman's jurisdiction in respect of a complaint made against service given by PS Levy, a predecessor firm in which Mr Levy was a sole practitioner. On the transfer Mr Levy himself became a consultant with Kerman & Co. In the present case section 132 is irrelevant because there was no change in Mr Ballard's status after the complaint was made. Moreover, the statement in Kerman's case (at [68]) that the "broad reach" of the Legal Ombudsman Scheme shows that "person" is "not restricted to an individual human being" is inconsistent with Mr Ballard's contention. Further, the reference (see [61]) to the regulatory objectives of the Scheme including the protection and promotion of the public interest and maintenance of professional principles including that authorised persons should act in the best interests of their clients strongly support giving the continuity provisions in section 132 a broad interpretation rather than what Patterson J (at 75) described as an "artificial and strained meaning". The passages at [69] – [71] and [73] – [74] of the judgment upon which Mr Ballard relied must be seen in the particular context of section 132 and the facts of Kerman's case. I turn to Mr Ballard's "collateral defence" point. It is axiomatic that the application of the established common law public law principles enables a person to challenge the validity of an administrative act and the jurisdiction of an administrative body collaterally by way of a defence to criminal or civil proceedings as well as directly in judicial review proceedings. No case was drawn to our attention in which this principle has been applied where a regulatory body's lack of jurisdiction is raised as a defence to disciplinary proceedings, but it appears to me that such a defence should be available. There are, however, two factors which mean that in my judgment it is utterly misconceived to seek to deploy this argument in the circumstances of the present case. Additionally, I consider that one of the exceptions to the principle that the lack of jurisdiction of a subordinate body may be raised collaterally by way of a defence may apply in the circumstances of his case. The first factor is that, for the reasons I have given, Mr Ballard's contention that the Legal Ombudsman had no jurisdiction over Mr DE's complaint is wrong. Accordingly, his collateral defence argument goes nowhere. In relation to the second factor, I proceed on the basis that Mr Ballard was entitled to ignore the Legal Ombudsman's direction as made without jurisdiction, and was not obliged to challenge it by judicial review or otherwise. In those circumstances, I consider that he was entitled to raise the lack of jurisdiction point in the proceedings in the County Court. But, in my judgment, once the County Court made its order, he was under a duty either to comply with the order of the court or to challenge it by instituting an appeal or judicial review proceedings. In *Blakey v Solicitors Regulatory Authority*

- [2014] EWHC 2168 (Admin) this court held that a solicitor who did not comply with orders made against him because he wished to demonstrate that the orders were tainted by fraud and were nullities did not have a defence to disciplinary proceedings brought for breach of Principles 6 and/or 7 of the SRA's 2011 Principles. Foskett J stated at [19] that "[t]he general principle is that a court order (even one made without jurisdiction) is valid and enforceable until it is set aside": see also [11] – [14]. The general principle stated by Foskett J may apply with particular force to persons such as Messrs Blakey and Ballard because of their particular positions as solicitors and officers of the court. But the principle does not only apply to court orders made against solicitors. It reflects an exception to the availability of a defence by way of collateral challenge to the jurisdiction of a body. It is clear from the modern authorities and texts I refer to in the next paragraph that there are some limited situations in which a collateral challenge to the jurisdiction of a subordinate decision is not allowed. One of the factors that has guided the approach of the courts in determining whether a case falls within an exception is whether the individual involved has had a fair opportunity to vindicate his or her rights in court proceedings. So it has been held that the validity of an ASBO cannot be raised collaterally before the magistrates' court trying a breach of the order. In *CPS v T*
- [2006] EWHC 728 (Admin) ,
- [2007] 1 WLR 209 , giving the judgment of the court, Richards LJ stated at [27]: " ... [T]he normal rule in relation to an order of the court is that it must be treated as valid and be obeyed unless and until it is set aside. Even if the order should not have been made in the first place, a person may be liable for any breach of it committed before it is set aside. Secondly, the person against whom an ASBO is made has a full opportunity to challenge that order on appeal or to apply to vary it: indeed, the respondent did appeal the order made against him in this case, though the matter was not pursued to a conclusion. Accordingly, in so far as any question does arise as to the validity of such an order, there is no obvious reason why the person against whom the order was made should be allowed to raise that issue as a defence in subsequent breach proceedings rather than by way of appeal against the original order. The policy consideration that influenced the finding in [*Boddington v British Transport Police*
- [1999] 2 AC 143] that the magistrates' court had jurisdiction to determine issues of validity of a byelaw or administrative decision is wholly absent when the issue is the validity of an order of the court." After referring to a number of cases in family courts, Richards LJ stated (at [31] ff) that the exception applied to courts of limited jurisdiction and (at [33]) that: There are strong arguments in favour of the view that, whichever court makes the order, the order must be treated as valid and must be obeyed unless and until it is set aside or varied on appeal or on an application to vary: during the intervening period it cannot be treated as a nullity and of no legal effect. See also the discussion in Wade and Forsyth, *Administrative Law* th ed., 2014 pp 237-238 and de Smith's *Judicial Review* th ed., 2013 3-112 – 3-115. In the present case, Mr Ballard decided not to challenge the initial decision

of the Legal Ombudsman, but waited until enforcement proceedings were brought by the Ombudsman and raised his lack of jurisdiction point to those proceedings. He may have been entitled to do that, despite the availability of a remedy by way of judicial review to challenge the Ombudsman's ruling. However, in my judgment he was not entitled to ignore the order of the county court and wait until further proceedings were brought either in court or in the Solicitors Disciplinary Tribunal and raise the point again. As in Blakey's case the SRA was entitled to institute disciplinary proceedings alleging that his failure constituted a breach of Principle 7 of the SRA Code of Conduct 2011. (a) Serious procedural irregularity : There are several limbs to this ground. The first is that the tribunal inappropriately anonymised persons to whom it referred, including Mr DE and thus disregarded the need for open justice. The second is that the statement of reasons is unsigned. The third is that the reasons given are defective because "critical submissions" that Mr Ballard placed at the heart of his defence were not "fully and properly answered with all relevant legal routes precisely described". In this connection, he referred to the absence of reasons rejecting a number of his arguments, including: (i) that if he was not 'in business' for the purposes of allegation 1.2, he could not have been 'in practice' for the purposes of allegation 1.1; (ii) that it was not possible to be guilty of allegation 1.1 without also being guilty of practising without professional indemnity insurance, which was never charged; and (iii) those based on the difference between a regulated person and a regulated entity which showed that the relevant principles of professional conduct did not apply to individual solicitors. I reject these submissions. The anonymising of parties in the tribunal's judgment reflects standard practice and Mr DE was named in the Rule 5 statement. The absence of the signatures of two members of the tribunal on the judgment and the order are not procedural irregularities, let alone serious ones. It is common for the person who chairs a multi member adjudicative body to sign or initial the orders, and Mr Ballard did not point to any prejudice to him. As to the reasons challenge, it is surprising that Mr Ballard, who has been a solicitor for 20 years, is unaware of the nature of the duty to give reasons. The most commonly cited modern statement of what is required is that of Lord Brown in *South Bucks DC v Porter* (No 2)

[20014] UKHL 33,

[2004] 1 WLR 1953 at [26]. His Lordship stated that reasons must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal controversial issues". He also stated that reasons can be "briefly stated" and need only refer to the main issues and not every material consideration. It is absolutely clear from the decision why the tribunal rejected his submissions on what he called "the entity point" and considered the relevant principles of professional conduct applied to Mr Ballard: see for example §§ 55.87 – 88, 55.91 – 94, 57.10 – 17, and 58.11 – 13. See also my summary of the decision in Part V above. There was no need for the tribunal to give reasons as to why Mr Ballard was not 'in business' but was 'in practice'. It is obvious from the tribunal's decision, that it considered these to be different questions. It did consider whether he was 'in business' when addressing allegation 1.2 and stated (at §56.9) that

"business" must mean something which was done regularly or, in any event, more than once for some commercial gain. Whether his conduct on 5 August 2013 constituted 'practice' as a solicitor for the purposes of allegation 1.1 raises quite different questions of the quality of what was done rather than its regularity or continuity. The fact that Mr Ballard was not charged with practising without professional indemnity insurance was irrelevant to determining whether he was guilty of allegation 1.1. The decision as to which charges to pursue lay with the SRA. Once the SRA had decided not to pursue the insurance matter, there was no need for the tribunal to address it. (b) Perverse findings of fact Mr Ballard argued that the tribunal erred in finding that Mr Ballard had two business cards, in accepting Mr DE's evidence that he did not properly advise him; and in accepting hearsay evidence that Burtons merely permitted Mr Ballard to work for other firms of solicitors. He argued that it was perverse to find that nothing turned on the business card issue and not to take it into consideration in assessing Mr DE's credibility. I do not consider that any of these submissions are sustainable. The tribunal made it clear (at §55.75) that nothing turned on the business cards. It was not disputed that Mr DE knew Mr Ballard was a solicitor, and the tribunal ultimately relied on other evidence to determine the nature of his arrangement with Mr DE. The assessment of the credibility of a witness, here Mr DE's evidence as to the state of his knowledge, is ultimately for the finder of fact, here the tribunal, and an appellate court should be very slow to interfere with it. In any event, I consider that the tribunal was entitled to conclude that Mr Ballard had not properly advised Mr DE about the parameters of his representation. While there were emails referring to Mr Ballard's attempts to get Mr DE to find a solicitors' firm to instruct him, there is no evidence of Mr Ballard's advice after such a firm was not found. At that stage if not earlier, it would have been appropriate for Mr Ballard to give Mr DE a clear written statement of what he could and could not do in the light of the condition on his practising certificate. Mr Ballard did not put any material before the court which leads me to believe that it is not arguable that the tribunal was not entitled to accept Mr DE's evidence that Mr Ballard had not informed him that he proposed to act in a capacity other than a solicitor. (c) Bias: Mr Ballard developed his written submissions on the "bias" ground as follows. His defence to the disciplinary proceedings was that he was seeking to provide services more cheaply than solicitors' firms in an innovative way. He submitted that the SDT sought to 'bury' the legal, regulatory and professional issues that arise about new vehicles for the delivery of legal services in a market and regulatory system that is hostile to innovation under a mountain of undisputed and irrelevant facts. He submitted that the SDT's approach, including its invention of the term "de facto sole practitioner", anonymising the names of those involved in the case, and the failure to address submissions critical to his defence, its determination to treat Mr DE as a witness of truth, and its decision not to examine Mr DE's discreditable conduct in his criminal proceedings "would strongly suggest to an independent and objective observer a partiality by the SDT to fellow members of the same regulatory community and hostility to new vehicles". In my judgment, the tribunal's decision reveals no basis for concluding that the test in modern cases such as *Magill v Porter*

[2001] UKHL 67 ,

[2002] 2 AC 357 at [103] and *Lawal v Northern Spirit Ltd.*

[2003] UKHL 37

[2004] 1 All ER 187 at [14] and [20] has been satisfied in this case. That test requires that a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased and that it would not apply the regulatory regime fairly. The ground is largely contingent upon Mr Ballard's submissions about the treatment of his arguments and the tribunal's findings which I have rejected when considering the other grounds advanced earlier in this judgment. It is also undermined by the fact that on a number of issues, in particular whether his advice to Mr DE before August 2013, the tribunal found in his favour. (d)

Conclusion:

For the reasons I have given, in my judgment Mr Ballard's appeal against the substantive decision must be dismissed. VII. The appeal and cross-appeal against the penalty: The tribunal dealt with the sanctions at §§ 66 -72 of its decision. It had regard to its December 2015 Guidance Note on Sanction and the purposes of sanction in the tribunal as discussed in *Bolton v The Law Society*. It considered (at §§ 67 -69) that Mr Ballard was solely responsible and therefore culpable for the events before and during August 2013. He must have realised that his refusal to pay an order by a body established to deal with complaints was a serious matter. He had failed to take advice on what was permissible when seeking to provide legal services to clients more cheaply than the services provided by solicitors. Furthermore, he made the decision to ignore the Ombudsman's order, whilst not taking steps to challenge or appeal it. The tribunal concluded that imposing a fine was the reasonable and proportionate sanction. At its invitation Mr Ballard had provided some information about his income, outgoings, living arrangements and the work he undertook for the firm of solicitors, but he had not provided a statement of means or claimed to be impecunious. The tribunal considered that there was no reason to adjust the appropriate level of fine for the offending conduct and concluded that the appropriate level of fine to reflect the seriousness of the matter, was £2,500. It stated that its view that this was proportionate was reinforced by the fact that this was ten times the amount of compensation ordered by the Ombudsman. The High Court may interfere with a sentencing decision if it is satisfied that the decision was "clearly inappropriate" (see *Salsbury v Law Society*

[2009] 2 All ER 487 at [30]). The appropriate penalty is very much a matter for the informed determination of the specialist tribunal (see *Blakey v Solicitors Regulation Society* at [21]) and the Solicitors Disciplinary Tribunal is particularly well placed to assess what measures are required to deal with defaulting solicitors and to protect the public interest (see *Salsbury v Law Society* at [30]). In *Bolton v Law Society* , the Court of Appeal at 520 criticised the Divisional Court for in effect substituting its own view on penalty for that of the professional tribunal and acting contrary to settled principles in giving no good

reasons for interfering with the decision. In determining whether the tribunal's imposition of a fine of £2,500 was "clearly inappropriate", I have regard to the aggravating and mitigating factors, which were referred to by the tribunal at §§67-69. Mr Ballard was solely responsible and therefore culpable for his conduct on and before 5 August 2013. He failed to seek advice about the capacity in which he was able to represent Mr DE or other clients. Furthermore, he made the decision to ignore the Ombudsman's order, whilst not taking steps to challenge or appeal it. On the other hand, the most serious sanctions will be imposed in cases of dishonesty, and a solicitor's lapse is "less serious" if he "is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness" (see *Bolton v Law Society*, at 518). In Mr Ballard's case, the mitigating factors include that the tribunal did not find him to be dishonest and he did not handle client funds; the misconduct was not planned; and he has no other disciplinary findings against him. As to Mr Ballard's appeal against sentence, I consider that the tribunal's decision sufficiently identified its view as to the degree of his culpability at §§ 67 – 70, which I summarised at [58] above. In the light of the seriousness of Mr Ballard's breaches, and for the reasons that I give when considering the SRA's cross appeal, I consider that Mr Ballard's grounds of appeal against the penalty are utterly unarguable. I therefore turn to the cross-appeal. Mr Williams submitted that the tribunal found Mr Ballard guilty of three serious allegations and that the imposed fine is nominal in respect of the totality of the findings against him. The guidelines on sanctions provide no indication of the level of fine that may be appropriate; other than that it may be "unlimited". Mr Williams stated that this was because of the variety of cases that come before the tribunal. He did not put the level of fine in any other case before the court because that is an intensely fact-specific matter. The fact-sensitivity of offending behaviour has, however, not prevented the development of guidelines for sanctions in other legal and regulatory contexts. Moreover, the absence of any guidelines as to level of financial penalty or the factors to be taken into account makes it difficult for a court to evaluate the force of grounds of appeal against the amount of a fine imposed on a solicitor in what Foskett J in *Blakey*'s case (at [21]) described as "the informed determination of the specialist tribunal". *Blakey*'s case concerned an appeal by a solicitor against a fine by the tribunal of £2,000 for breaches Principles 6 and/or 7 of the SRA Principles 2011. The conduct in that case involved deliberate non-payment by the solicitor of a wasted costs order to ensure that he would ultimately be made bankrupt in order to secure evidence to support his own allegations of dishonesty by those who had applied for the order. That conduct is comparable to the conduct in the present case which gave rise to allegation 1.4: both cases involved non-payment of an order for behaviour that breached the SRA Principles. *Blakey*'s case did not, however, also involve a breach of the conditions in the solicitor's practising certificate, or a failure to advise a client clearly, as occurred in Mr Ballard's case in relation to the conduct which was the subject of allegations 1.1 and 1.3. In this case, the tribunal also emphasised its conclusion that Mr Ballard's conduct undermined the trust the public would place in the provision of legal services, and the way in which it did so. I recognise that, a differently constituted panel of the SDT might

have imposed a higher fine and Mr Ballard may therefore have got off lightly. I might have done so myself. But that is not enough to make the fine imposed "clearly inappropriate". This court is less specialised than the tribunal, and the authorities I referred to at [60] above show that its role is not to form a fresh view on the merits of the level of the fine, as Mr Williams in effect invited us to do, but to recognise the tribunal's experience and expertise in the regulatory issues concerning solicitors and what amounts to an appropriate sanction for misconduct. Although the scope of a statutory appeal such as this is in some respects wider than the supervisory jurisdiction of this court in judicial review proceedings, it remains a reviewing process, and some guidance can be obtained from the well-known principles of public law. "Clearly inappropriate" appears to be a wider ground for intervention than the public law ground of *Wednesbury* unreasonableness or "perversity". But, in the case of a fine, in considering what is "clearly inappropriate", as well as taking account of the degree of culpability and the amount of the fine, the other classic grounds of review; unlawful purpose, failure to take into account a relevant consideration, and taking account of an irrelevant consideration are of assistance. The allegations made against Mr Ballard all stem from his conduct on 5 August 2013 (the subject of allegations 1.1 and 1.3), and the tribunal was entitled to take an overall view of the seriousness of his conduct. This is particularly so in view of the overlap between the issues raised by his conduct on 5 August and his later failure to comply with the directions of the Ombudsman and the county court (the subject of allegation 1.4). But the breaches found in respect of allegations 1.1 and 1.3 are different in nature to the breach found in respect of allegation 1.4. In my judgment in determining that overall sanction, the tribunal failed to take into account the different nature of the offences under 1.1 and 1.3 and that under 1.4. The tribunal may have failed to refer to the different nature of the offences because it did not consider the appropriate penalty in respect of each of the breaches which it found, and then (by analogy to the way criminal courts proceed) consider whether the total fine was clearly excessive. But, whatever the reason, I am satisfied that because the tribunal failed to take into account the different nature of the offences under 1.1 and 1.3 and 1.4, its decision was "clearly inappropriate". In my judgment, the cross appeal against the penalty must be allowed. Doing the best that I can in the absence of any guidance whatsoever from the regulatory scheme, and taking account of the fact that at the date of the tribunal's decision, Mr Ballard's failure to either challenge or to comply with the direction of the Ombudsman and the order of the county court had lasted for some two and a half years. I consider that a fine of £6,000 should be substituted. Mr Justice Nicol: For the reasons given by Lord Justice Beatson, I agree that the appeal by Mr Ballard should be dismissed and that the cross appeal by the SRA should be allowed. I also agree that the fine imposed by the tribunal should be quashed and a fine of £6,000 should be substituted. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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