Neutral citation number: [2023] EWHC 1990 (Ch)

Claim No. K30MA035

IN THE COUNTY COURT IN MANCHESTER

BUSINESS AND PROPERTY COURT WORK

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 31 July 2023

Before:

His Honour Judge Pearce

- -

Between:

RICHARD THOMAS BARNES	**Claimant**
- and –	
THE ROYAL INSTITUTION OF CHARTERED SURVEYORS	**Defendant**

- -
- -

The Claimant in person

Mr Joshua Pemberton by **Blake Morgan** for the **Defendant**

Hearing dates: 28 June 2023

- -

APPROVED JUDGMENT

This judgment was handed down remotely at 11.30am on 31 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

INTRODUCTION

1. By this claim, the Claimant seeks an order for costs, alternatively damages, together with interest consequential upon orders made against him by the Defendant exercising its regulatory capacity.

2. The Defendant seeks an order striking out the Particulars of Claim, alternatively for summary judgment. The claim was filed in the County Court at Stockport and was transferred to Manchester pursuant to an order of District Judge Lettall made on 23 January 2023. Whilst there may be some ambiguity as to whether the intention of this order (or the later order of District Judge Richmond dated 9 March 2023) was for the case to proceed in the High Court rather than County Court, it has not in fact been transferred to the High Court and therefore continues for all purposes (most particularly the route of appeal) in the County Court. On 5 May 2023, District Judge Richmond directed that the application be heard by a judge sitting in the Business and Property Courts who is also authorised to sit in the Administrative Courts.

3. Pursuant to this order, the application came before me on 28 June 2023, following which I reserved judgment.

THE PARTIES

4. The Defendant is a body incorporated by Royal Charter. It is a membership body concerned with providing groups of qualifications for surveyors and maintaining professional standards. Membership is not compulsory and there are other routes through which one can practice as a surveyor.

5. The Claimant is a surveyor. He applied to join the Defendant in 2006 and became a member on 1 January 2007. In 2015 he successfully applied to become a Fellow.

6. It is common ground that the relationship between the Defendant and its members is contractual in nature. The Claimant pleads a claim for breach of contract and the Defendant accepts that contractual duties arise.

THE BACKGROUND FACTS

7. In 2019, the Claimant applied to join the RICS President's Panel of Construction Adjudicators. As part of that process, he was required to submit an adjudication decision of his. The Defendant's regulations permitted candidates to submit either an actual arbitration decision (where the candidate was already sitting as an arbitrator) or a "mock" decision, for example one created by the candidate when training to be an adjudicator. The Claimant submitted a document which purported to be a mock adjudication decision ("the Decision").

8. As part of the investigation process, the Claimant was interviewed. One question raised of him related to the process of obtaining information from the parties for the adjudication decision that he had submitted. One interviewer commented, "*I'm interested in what you take into account because I was a bit concerned that you might have a standard template, and that worries me slightly. There is no harm in having a standard template, but one size doesn't fit all."* The Claimant responded, "*No, no, and I appreciate that obviously depending on what obviously was received from the RICS and the documents, it may be sensible to change that. But obviously there is – it's good to have a standard template as a guideline and obviously to vary from that if required. And so from that template I would invite the parties – I would set out the information that I received so far, confirm who the parties are. I would request the documents are sent to me electronically in the native format because I think it's important to use native format documents. Not a lot of adjudicators do that, but I think as time moves on I think we'll see more of that because obviously a lot of documents now are searchable. So I think that's a personal benefit for me, so that's something that I've developed from the standard template. I would confirm my terms to the parties as well*."

9. However, on investigation it became clear that document he had submitted was substantially similar to an adjudication decision by another adjudicator, Mr Michael Conway ("the Conway Decision"). This led to the Defendant conducting an investigation, following which charges against the Claimant of dishonesty and lack of integrity in submitting the Decision were referred to a hearing in front of a disciplinary panel ("the Disciplinary Panel").

10. The Disciplinary Panel found that, in submitting the Decision, the Claimant had submitted work that was not his own. They found that he knew the work was not his own and that in consequence the two charges of dishonesty and four of the five charges of lack of integrity were made out. The Panel particularly commented on the Claimant's description of his use of a template in the interview referred to above, stating, that if the Claimant "*held a genuine belief that his methodology in producing the Decision was legitimate, he would have taken the opportunity at that stage to disclose his use of Mr Conway's decision as a template. Instead, he talked about his use of templates in general by reference to a basic structure to which he would add the relevant detail*."

11. The Disciplinary Panel went on to find that, by reason of their findings, the Claimant was liable to disciplinary action and imposed a sanction by way of reprimand, a fine of £5000 and the imposition of conditions preventing the Claimant from making an application for inclusion on the RICS President's Panel until a period of 5 years had

elapsed from the date of the decision; requiring that any application made by the Claimant to the RICS President's Panel must meet the criteria by other means than a "mock adjudication from other forums;" and requiring the Claimant to attend a course on professional ethics within 24 months of the date of the decision.

12. The Claimant exercised his right to appeal, contending that the panel had erred in tis findings. The Defendant cross appealed, alleging that the sanction was unduly lenient. Both appeals were heard by an appeal panel ("the Appeal Panel"). Both were dismissed.

THE RELEVANT CONTRACTUAL TERMS

13. The admission and registration of members by the Defendant was, at the relevant time, governed by their bye-laws dated February 2020.

13.1. Bye-law 2.3.5 provides:

"*Undertaking on Admission.*

Any person admitted to any class of membership of RICS shall give an Undertaking on Admission in writing in such terms as Regulations may prescribe. Such Undertaking on Admission will include that:

(a) he will abide by the Charter, Bye-Laws, Regulations and Rules (as amended from time to time)

(b) …

(c) he will be liable whilst a member and will remain liable after ceasing to be a member to pay to RICS promptly on demand any monies payable by him to RICS, including but not limited to any fee, subscription, levy, fine or other penalty, or reimbursement in accordance with any scheme of compensation;

(d) …"

The Claimant had given such undertakings both on being admitted as a member and on being made a Fellow.

13.2. Bye-law 5.2 dealing with conduct states, so far as material:

"Liability of members

"B5.2.1 Every Member shall:

(a) conduct himself in a manner befitting membership of RICS; and

(b) comply with any Regulations and Rules laid down to govern the manner in which his profession or business is conducted; and

(c) …

(d) …

"B5.2.2 A Member may be liable to disciplinary action under these Bye-Laws, whether or not he was a Member at the time of the occurrence giving rise to that liability, by reason of:

(a) conduct liable to bring RICS into disrepute; or

(b) …; or

(c) a failure to adhere to these Bye-Laws or to Regulations or Rules governing Members' conduct; or

(d) …"

13.3. Bye-law 5.4 deals with the Defendant's powers in relation to conduct issues.

"B5.4.2 RICS shall have the power to impose one or more of the disciplinary penalties specified in B5.4.3 if, after due enquiry, a Member or Firm is found to have committed one or more of B5.2.2(a)-(d) or B5.3.2(a)-(c) respectively

…

"B5.4.3 The disciplinary penalties referred to in B5.4.2 are:

(a) to caution the Member or Firm against repeating the conduct or action which is found to have constituted the contravention;

(b) to reprimand the Member or Firm;

(c) to require the Member or Firm to give one or more undertakings as to future conduct;

(d) to fine the Member or Firm in accordance with policy objectives set by the Standards and Regulation Board from time to time;

(e) to impose conditions on the Member's continued membership of RICS;

(f) to impose conditions on a Firm's registration;

(g) to make an order requiring a Member or Firm to take specified action, and stating the penalty imposed if the Member or Firm fails to comply with that action;

(h) to expel the Member from membership of RICS;

(i) to remove a Firm's registration.

...

"B5.4.6 RICS may make such order as it considers just and reasonable for a payment:

(a) by a Member or Firm to RICS in relation to its costs in connection with any investigation and/or hearing under B5.4.1-5.4.3, and/or in relation to the costs of monitoring compliance; or

(b) to any Member or Firm in relation to costs incurred in connection with an investigation and/or hearing under B5.4.1-5.4.3.

(c) ...

"B5.4.8 The powers referred to in B5.4 shall be exercised by the Regulatory Tribunal, the Head of Regulation or a Nominated Person in such circumstances and to such extent as the Standards and Regulation Board may authorise in Rules."

13.4. Bye-law 5.5 deals with Appeals and Reviews:

"*B5.5.1 Rules shall be made by the Standards and Regulation Board setting out the circumstances and manner in which Members and Firms may appeal against a disciplinary penalty imposed under B5.4.*

B5.5.2 The Chair of Governing Council may require the Appeal Panel to review a finding or penalty imposed under B5.4 as provided by Rules if he believes that the penalty concerned is unduly lenient."

14. Pausing here, it is common ground that, pursuant to the contractual terms between the parties as a result of the Claimant giving an undertaking under Bye-Law 23.5, the Defendant was empowered to investigate allegations that the Claimant was guilty of conduct likely to bring the Defendant into disrepute or had failed to adhere to its Bye-Laws or to Regulations or Rules governing members' conduct; that, after due enquiry, the Defendant's Regulatory Tribunal was empowered to impose one of a variety of disciplinary penalties if such conduct was found proved; and that the Regulatory Tribunal was empowered to make such order as it considered just and reasonable in relation to the Defendant's costs in connection with any investigation and/or hearing.

15. The Defendant's Standards and Regulation Board has authorised the exercise of the powers under B5.4 in the Regulatory Tribunal Rules ("the Rules"). Relevant parts of the Rules include:

15.1. Rule 92, dealing with costs:

"*A Panel may make such order for costs against the Regulated Member, Applicant or RICS as it considers fair and reasonable, subject to the requirement that an estimate of costs incurred by a party will ordinarily be served on the other parties at least 24 hours before the hearing."*

The wording here of *"fair and reasonable"* is marginally different from the phrase *"just and reasonable"* used in the Bye-Laws. It is unclear whether that difference has particular significance in any context, though it is not suggested to do so here.

15.2. Rule 125, dealing with Regulatory Sanctions:

"*In accordance with Bye-Laws B5.4.2 and B5.4.3, the Regulatory Sanctions available to a Disciplinary Panel are:*

a. to caution the Regulated Member against repeating the conduct or action that has resulted in the liability to disciplinary action

b. to reprimand the Regulated Member;

c. to require the Regulated Member to give one or more undertakings as to future conduct;

d. to fine the Regulated Member in accordance with the guidance provided in the Supplement 2 to the Sanctions Policy: Fines, Costs and Administration Fees approved by the Standards and Regulation Board;

e. to impose conditions on the Regulated Member's continued membership/registration with RICS;

f. to expel Regulated Members from RICS or remove a Firm's registration;

g. *to make an order requiring a Regulated Member to take a specified action and stating the Regulatory Sanction to be imposed if the Regulated Member fails to comply with that action*."

15.3. Within Part X of the Rules dealing with appeals:

"*163 The parties may not provide new evidence to the Appeal Panel without leave of the Appeal Panel.*

...

"165 The burden will be on the Appellant to satisfy the Appeal Panel that the finding made or Regulatory Sanction imposed by the Disciplinary Panel, or decision made by the Registration Panel, was wrong.

"180 The Appeal Panel may (a) a grant the Appeal only where the Panel considers that the finding made or Regulatory Sanction imposed by the Disciplinary Panel, or decision made by the Registration Panel, was wrong…"

16. The Defendant's Sanctions Policy, referred to in the Rules, sets out a variety of factors relevant to the imposition of sanctions in different circumstances.

16.1. The status of the policy is provided by clause 3.1 to be as follows:

"*Those making decisions on the application of RICS' Regulatory Sanctions are expected to comply with this Policy. However, the circumstances of every case are different, and each case must be considered on its own individual facts. It is accepted that there may be cases in which a different approach is required. Where a decision is taken to depart from the Policy, an explanation must be provided and recorded."*

16.2. Part VI deals with costs, stating at paragraph 26.1;

"*In the case of a Regulatory Compliance Order, Single Member decision or Panel hearing, Head of Regulation, a Single Member or a Panel may make an order that they consider just and reasonable for the payment of costs."*

16.3. Paragraph 27.1 deals with the situation where a member is found to be in breach of any rule:

"*Where the Regulated Member is found by a Single Member or Panel to be in breach of any rule, RICS will seek full recovery of the costs it incurred in relation to the investigation and hearing of the case, and will ask the Panel to make an award in its favour. These costs can include:*

a. the cost of investigating and preparing RICS' case for a Single Member decision or Panel hearing;

b. those associated with the services of the Single Member or convening the Panel and

c. *the cost of any legal or professional advice and representation*."

16.4. Supplement 2 to the Sanctions Policy deals with the fines, costs and administration fees. Paragraph 3, dealing with costs, states:

"*The costs that can be imposed are as follows:*

Cost	*Amount*
*Hearing costs**	*£2,650*
Disciplinary Panel without an oral hearing	*£600*
Single Member decision	*£350*
Investigation costs	*£75 per hour*
Visit, solicitor and paralegal costs	*Visit – £1,125* *Solicitor – £200 per hour* *Paralegal – £75 per hour*
External legal representation	*As incurred by RICS*
Expert witness costs	*As incurred by RICS*

**Where a hearing takes place outside of the UK, the costs will amount to the actual costs incurred. This could include, but will not be limited to, the following costs:*

(a) Panel Members;

(b) Solicitor and/or Instructed Counsel on behalf of RICS

(c) legal assessor

(d) Recording

(e) hire of venue

(f) *teleconferencing costs for virtual hearings*."

THE RELEVANT LAW – STRIKING OUT AND SUMMARY JUDGMENT

17. CPR 3.4 deals with the court's power to strike out statements of case:

"*(2) The court may strike out a statement of case if it appears to the court:*

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order."

18. The law concerning applications to strike out statements of case under CPR 3.4(2)(a) was neatly summarised by Pepperall J in Tejani v Fitzroy Place [2020] EWHC 1856:

"21. The principles are not controversial:

21.1 The whole or part of a statement of case may be struck out pursuant to r.3.4(2)(a) if it does not disclose a ground of claim or defence known to law (e.g. Price Meats Ltd v. Barclays Bank plc [2000] 2 All ER (Comm) 346) or where the court is otherwise certain that the claim or defence is bound to fail (Harris v. Bolt Burdon [2000] CP Rep 70; Hughes v Colin Richards & Co. [2004] EWCA Civ 266, [2004] PNLR 35).

21.2 As Clarke LJ (as he then was) observed in Royal Brompton Hospital NHS Trust v. Hammond [2001] EWCA Civ 550, at [104], the focus in applications under r.3.4(2)(a) is upon the statement of case rather than the evidence. In that respect, the approach differs from applications for summary judgment under Part 24. Accordingly, on this application, the court must assume the truth of the Claimant's pleaded case.

21.3 While there are other categories of abuse that are not relevant to this application, the court may strike out Particulars of Claim under r.3.4(2)(b) where they are so badly drafted that they fail to identify the case that the Defendant has to meet. In such cases, strike out is, however, very much a remedy of last resort and the court should usually first allow the Claimant an opportunity to file a coherent and intelligible claim.

21.4 The hurdle is, as one would expect, high. Striking out is an exceptional course and most cases should simply be defended on their merits."

19. The court's power to give summary judgment arises under CPR24. CPR24.2 provides:

> "*The court may give summary judgment against a Claimant or Defendant on the whole of a claim or on a particular issue if –*
>
> *(a) it considers that –*
>
> *(i) that Claimant has no real prospect of succeeding on the claim or issue;*
>
> *(ii) that Defendant has no real prospect of successfully defending the claim or issue; and*
>
> *(b) there is no other compelling reason why the case or issue should be disposed of at a trial."*

20. The principles to be applied on such an application were formulated by Lewison J in Easyair v Opal Telcom [2009] EWHC 339 and approved by the Court of Appeal in JC Ward v Catlin [2009] EWCA Civ 1098. They can be summarised as follows:

20.1. The court must consider whether the Claimant has a "realistic" as opposed to a "fanciful" prospect of success;

20.2. A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable;

20.3. In reaching its conclusion the court must not conduct a "mini-trial";

20.4. This does not mean that the court must take at face value and without analysis everything that a Claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents;

20.5. However, in reaching its conclusion the court must consider not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial;

20.6. Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case;

20.7. On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be

allowed to go to trial because something may turn up which would have a bearing on the question of construction.

21. In Begum v Maran (UK) Limited [2021] EWCA Civ 326, the Court of Appeal affirmed the earlier line of authorities to the effect that that the test in an application for summary judgment under CPR 24.2 is the same as the test for strike out under CPR 3.4(2)(a)

THE CLAIMANT'S CLAIM

22. The Claimant's Particulars of Claim are extremely prolix, running to 108 paragraphs, some of which have several sub paragraphs. They contain considerable amounts of comment and submission. They certainly do not amount to a "*concise statement of the nature of the claim*" (as required by CPR 16.2(1)(a)). The importance of discipline in the drafting of Particulars of Claim (and statements of case more generally) is well recognised. Leggatt J, as he then was, observed in Tchenguiz v Grant Thornton UK LLP [2015] EWHC 405 (Comm):

> *"Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the test of time because they serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial."*

23. In any event, the following claims by way of breach of contract are identifiable, for example by reference to paragraph 53 of the Particulars of Claim.

    23.1. That the costs awarded by the Disciplinary Panel and the Appeal Panel exceeded that which they were contractually entitled to award against the Claimant;

    23.2. That the Appeal Panel erred in finding that the Disciplinary Panel had given proper weight to the Claimant's evidence;

    23.3. That the Disciplinary Panel erred in applying the wrong test as to whether the Claimant was dishonest.

    Whilst this is the order both in which the allegations of breach of contract are put in the Particulars of Claim and in which they are dealt with in the Claimant's Particulars of Claim, I propose to deal with them in the opposite order - it seems natural to deal with the original hearing before the Disciplinary Panel before dealing with the appeal therefrom and to deal with the costs order as a consequential matter since if the

Claimant were to succeed on either of the first grounds, the costs order would stand to be set aside in any event.

24. Paragraph 53 of the Particulars of Claim also includes a claim in respect of the Claimant's own costs before the Disciplinary Panel and the Appeal Panel. Clearly that is a second order remedy, consequential upon the Claimant making out its case on one of the alleged breaches of contracts.

THE DEFENDANT'S CASE ON THE APPLICATIONS TO STRIKE OUT/FOR SUMMARY JUDGMENT

25. The Defendant contends as follows:

    25.1. The Particulars of Claim do not disclose reasonable grounds for bringing the claim and/or the claim carries no real prospect of success, and there is no other compelling reason for the case to proceed to trial. The Particulars of Claim ought therefore to be struck out pursuant to CPR 3.4(2)(a), and/or summary judgment should be entered against the Claimant under CPR 24.2.

    25.2. The Particulars of Claim are vague and deficient and are likely to obstruct the just disposal of these proceedings. They ought therefore to be struck out, pursuant to CPR 3.4(2)(b).

    25.3. The Claimant has failed to comply with CPR 16.4 and article 2 of the Civil Proceedings Fees Order 2008. The Particulars of Claim ought therefore to be struck out, pursuant to CPR 3.4(2)(c).

26. On the first of these arguments, that the Particulars of Claim do not disclose reasonable grounds for bringing the claim and/or the claim carries no real prospect of success, the Defendant contends that the court can, and as a matter of proper case management, should conclude that the Claimant's case as pleaded is fundamentally flawed on the first three of the cases advanced in paragraph 53 of the Particulars of Claim and that on the fourth case, which is a costs argument predicated on success on one or more of the first three cases, the Claimant is therefore bound to fail.

27. The Defendant rejects the argument that either the Disciplinary Panel or the Appeal Panel erred in assessing the evidence as to the Claimant's alleged dishonesty and/or lack of integrity by failing adequately to take into account the Claimant's evidence as to what he believed to be the case and/or took into account matters that were not relevant to its assessment of those issues.

28. The Defendant contends that the Disciplinary Panel, in considering allegation of dishonesty, was obliged to apply the test approved by the Supreme Court in Ivey v Genting Casino [2017] UKSC 67:

> *"[74] When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the Defendant must appreciate that what he has done is, by those standards, dishonest*."

29. The Defendant says that this was exactly the test applied by the Disciplinary Panel. This is apparent from its summary of the legal advice received at paragraph 32 of the determination but more importantly it can be seen from the reasoning of the Panel to have been applied in coming to its conclusions about the Claimant's lack of honesty and/or integrity within paragraph 34 of the determination. The same care can be seen in the appeal panel's approach to the decision of the Disciplinary Panel.

30. As it is put at paragraph 42 of the Defendant's skeleton argument:

> *"Both Panels considered the question of Mr Barnes' subjective beliefs on the question of plagiarism, and found that his explanations was untenable considering his intelligence and experience. While Mr Barnes evidently disagrees with the Panel's finding, it is inescapable that it was reached in accordance with the terms of the contract between Mr Barnes and the RICS – that is, after "due inquiry", and having accorded Mr Barnes a right to be heard*."

31. Turning to the argument that the costs exceeded that which the Disciplinary Panel and/or Appeal Panel could properly award, the Defendant contends that this claim too is fundamentally flawed. The Claimant's case is that the power to award costs was limited by Supplement 2 to the Sanctions Policy. However the Defendant contends that this is unarguable. On a simple reading of the contractual material, the court should conclude that Supplement 2 is not contractually binding in so far as it is argued to limit the sums awarded by way of costs. The undertaking signed by the Claimant incorporates into the contract between the parties the Bye-laws, Rules and Regulations

of the Defendant (including the Regulatory Tribunal Rules), but there is no reference to the Sanctions Policy. Further, whilst the Defendant concedes that Rule 125 of the Regulatory Tribunal Forms expressly limits the powers of a Disciplinary Panel in imposing a fine by reference to the guidance in the Supplement to the Sanctions Policy, at no other point is the Sanctions Policy (or Supplement 2) incorporated into the Bye-laws, Rules or Regulations. Accordingly, apart from on the exercise of a power to fine, compliance with the Sanctions Policy is not a term of the contract between the parties.

32. As to the argument that Rule 125(d) incorporates Part 3 of Supplement 2 into the contract on the ground that an order for costs amounts to a "fine", the Defendant rejects this, contending that:

    32.1. The normal use of the word "fine" would not include a costs order – a fine is something penal in nature whereas the purpose of a costs order is to compensate the party who is put out of pocket in the process;

    32.2. The drafting of Supplement 2 clearly distinguishes between fines and costs by dealing with the former in part 2 and the latter in part 3.

33. In any event, the Defendant says that, on its true construction the Sanctions Policy does not limit the sums that the Disciplinary Panel can award to those set out in part 3 of Supplement 2, since clause 3.1 of the Sanctions Policy makes clear that in an appropriate case the Disciplinary Panel can depart from the Policy. It would only be in the circumstance that Supplement 2 was incorporated into the contract but the Sanctions Policy more generally was not that the incorporation of Supplement 2 would assist the Claimant by making a blanket restriction on that which is recoverable.

34. As to the Claimant's alternative argument that the Defendant is limited in recovering costs to that which it has actually incurred, the Defendant does not necessarily disagree with the premise of the argument but does not accept the Claimant's case that the costs that were ordered exceeded that which the Defendant had in fact incurred.

35. In oral submission, the Defendant raised in passing a question as to whether the Claimant is in fact entitled to recover the figure paid over by way of costs pursuant to the contract as pleaded in the Particulars of Claim. The Defendant says that what he seeks is more in the way of a restitutionary remedy, which has not been pleaded. However, the Defendant conceded this to be a pleading point rather than a point of substance.

36. The second argument for strike out is based on the vagueness and deficiency of the Particulars of Claim. The Defendant contends that this is a long winded document

which fails properly to particularise the Claimant's case. The Claimant fails properly to particularise the contractual relationship alleged between the Defendant and himself and specifically the basis upon which it is said that the Sanctions Policy and Supplement 2 form part of the contract between the parties. Further, the Claimant's criticism both of the Disciplinary Panel and the Appeal Panel is discursive in nature, failing to identify how the alleged failings amount to a breach of contract.

37. The third argument for strike out, that the Claimant has failed to comply with a rule, practice direction or court order, is based on the contention that the Claimant paid the wrong issue fee. The fee of £332 that was paid is the proper fee for a claim that is otherwise than for the recovery of a sum of money (see paragraph 1.5 of Schedule 1 to the Civil Proceedings Order 2008). However, the Claimant claims to recover a sum of money (see paragraphs 105 and 106 of the Particulars of Claim). Accordingly, this is a claim for the recovery of money but because no limit is placed on the claim in the Claim Form, the fee payable under paragraph 1.1 of column 1 of Schedule 1 to the 2008 Order is £10,000.

38. As I indicated during the course of argument, I consider the Defendant's argument on this point to be correct. I am however satisfied that the failure to pay the correct sum is an oversight rather than a deliberate manipulation of the court's process and in those circumstances an order striking out the claim on this ground would be draconian. Accordingly, if the claim is otherwise permitted to proceed, it is necessary for the Claimant to pay the difference between the fee actually paid and the appropriate fee (whether £10,000 for a claim that is unlimited or some lesser sum if the Claimant were to amend by limiting the claim) but no further order by way of strike out would be appropriate unless the Claimant failed to pay the relevant fee. Accordingly I do not need to consider this argument further.

THE CLAIMANT'S CASE ON THE APPLICATION TO STRIKE OUT/FOR SUMMARY JUDGMENT

39. I deal first with the Claimant's argument that the Disciplinary Panel erred in its assessment of his evidence when concluding that he acted dishonestly and/or without integrity. The Claimant's starting position is that the Defendant is only entitled to make disciplinary findings following a process of "due enquiry." If the Defendant's enquiry is flawed as a matter of law, it would not be "due enquiry" and therefore any consequential disciplinary finding and/or sanction and/or costs order would not be open to the Defendant pursuant to the terms of the contract.

40. The Claimant contends that, in assessing his evidence, the Disciplinary Panel was required to consider two matters:

    40.1. What did the Claimant know or believe to be the factual situation at the time that he submitted the decision and/or was interviewed about it by the interview panel?

    40.2. In the light of that knowledge or belief, was his conduct dishonest by the standards of ordinary decent people?

41. In considering the first of these issues, the Disciplinary Panel was required to make an assessment of the Claimant's state of mind on a subjective basis. On the second, it was concerned only with the objective standards of ordinary decent people.

42. The Claimant contends that, in analysing his knowledge and/or belief, the Disciplinary Panel failed to have regard to a number of factors:

    42.1. His belief that the use of a template for the preparation of the decision was permitted;

    42.2. The fact that he had been provided with a template when he had attended a "familiarisation" day organised by the Defendant in November 2019;

    42.3. His belief that the Conway Decision was only used by him as a template;

    42.4. The fact that he had spent six hours in preparing the Decision;

    42.5. The fact that he had openly sent the Decision to Mr Conway prior to his interview;

    42.6. His belief that the Decision only contained about 20% to 25% of the words in the Conway Decision, such words appearing in standard paragraphs.

43. The Claimant also contends that both the Disciplinary Panel and the Appeal Panel were unduly influenced by the Claimant's acceptance that he should not have used the Conway Decision as a basis for his own document. That concession is recorded in paragraph 7 of the opening note prepared on behalf of the Claimant for the hearing before the disciplinary panel. The exact wording is:

> "*With the benefit of the insight, and hindsight, that the investigation process leading to this hearing has afforded Mr Barnes, it is accepted that*
>
> *7.1 the Decision bore excessive similarity to the adjudication decision previously made by Mr Conway; and*

7.2 Mr Barnes accepts that he should not have sought to provide documentary support for his application to join the Panel by using the Decision, or by using it in the manner in which he did."

44. This paragraph is cited at paragraph 33 of the determination of the Appeal Panel, with the exclusion of the opening words, "*With the benefit of the insight, and hindsight, that the investigation process leading to this hearing has afforded Mr Barnes…"* The Claimant contends that this exclusion distorts the meaning of the quote and demonstrates that the reasoning of the Appeal Panel was flawed. Further, he contends that the Disciplinary Tribunal was unduly influenced by his acceptance of the excessive similarity without bearing in mind that this was an acceptance with the benefit of hindsight.

45. As to the determination of the appeal panel, the claimant's primary focus is upon the test which is applied in determining the appeal. Rule 165 of the Regulatory Tribunal Rules (which contract between the parties) referred to the Appellant bearing a burden of showing that the decision of the Disciplinary Panel was "wrong". The Appeal Panel cited this rule at paragraph 3 of its determination. Further, Rule 180(a) refers to the Appeal Panel only allowing an appeal where the previous decision was "wrong." However, the Claimant has drawn attention to an email of 26 May 2022, which includes a written determination by the Chair of the Appeal Panel dealing with a number of issues, including a request for an oral hearing, disclosure issues and the admission of new evidence. In that determination, it is stated. "*The heavy onus is on Mr Barnes to establish that the seemingly well argued Determination of the Tribunal is wrong in law…*"

46. The Claimant accepts that the hearing before the Appeal Panel was by way of review not rehearing. But he contends that the reference to showing that the Disciplinary Panel's decision was "*wrong in law*" misstates the test to be applied. In particular, he contends that the Appeal Panel was bound to consider what factual evidence as well as the legal test applied by the Disciplinary Panel.

47. Turning to his argument as to costs, the Claimant's core contention it that the costs as awarded exceeded that which is permitted under Supplement 2 to the Sanctions Policy. In arguing that Supplement 2 is incorporated into the contract between the parties, there are two potential mechanisms by which Supplement 2 to the Sanctions Policy might be argued to be incorporated into the contract between the parties:

    47.1. By virtue of it being expressly incorporated pursuant to Rule 125(d) of the Regulatory Tribunal Rules;

47.2. By virtue of it being incorporated pursuant to an implied term.

48. The Particulars of Claim do not deal with the basis upon which Supplement 2 is alleged to be incorporated into the contract. Within both that document and the Claimant's skeleton argument, there is passing reference to Rule 125(d) of the Rules, although neither make clear the basis upon which the Claimant says that this incorporates into the contract the terms of the Supplement as to the amount of recoverable costs.

49. During the course of oral submission, it became apparent that the Claimant's argument as to the express incorporation of Supplement 2 sets into the contract is as follows:

49.1. An order for costs is a "fine" within the meaning of the Regulatory Tribunal Rules;

49.2. By Rule 125(d) of the Regulatory Tribunal Rules, the power to fine is limited to doing so in accordance with Supplement 2;

49.3. The Defendant's contractual right and power to exercise its disciplinary functions under B5.4 are limited to that which is in compliance with the Regulatory Tribunal Rules by virtue of B5.4.8;

49.4. Accordingly the terms of Supplement 2 as to the limit on costs are contractually binding as between the parties.

50. Additionally or in the alternative, the Claimant contends that the Defendant is acting inconsistently in respect of Supplement 2. At various times, both before the Disciplinary Panel and before the Appeal Panel, the Defendant has sought to rely upon supplement 2, as set out at paragraph 23 of the Claimant's skeleton argument. It is not open to the Defendant to "blow hot and cold" on whether Supplement 2 is binding.

51. More generally, the Claimant invites the Court to construe the contract in a manner which incorporates Supplement 2. For example, paragraph 26 of the Claimant's skeleton argument invites the Court to determine how the schedule of costs within Supplement 2 should operate.

52. I am not entirely clear how, as a matter of law, the Claimant contends that the court is to have regard to Supplement 2 if it is not incorporated into the contract between the parties. In my judgment, the only plausible basis for a finding that the Defendant's power to award costs is limited by the provisions in Supplement 2 is a finding of some contractual term to that effect. The only basis upon which this is put as an express term is the argument in respect of Regulation 125(d) referred to above. If this argument fails, the Claimant would have to show incorporation of the schedule by means of an implied term.

53. If the Claimant shows incorporation of part three of Supplement 2 into the contract, he contends that he has a good arguable case that the costs awarded by the Disciplinary Panel exceed that permitted by part three. The costs claimed by the Defendant were as follows:

53.1.	Hearing costs – six days x £2,170 per day =	£13,020
53.2.	Investigation costs – 42 hours x £75 per hour =	£3,150
53.3.	Lawyers' costs for preparation – 40 hours c £200 per hour =	£8,000
53.4.	Lawyers' costs for attendance at hearing – 21 hours x £200 per hour =	£4,200
		Total - £28,370

The order as to costs made by the Disciplinary Panel was in fact limited to £25,000 by reason of the Claimant's resources. Nevertheless, if that figure exceeds that which is properly allowable under Supplement 2, the Claimant is entitled to argue that he should not have been obliged to pay the sum.

54. Of these costs, only the hearing costs arguably exceed the amount stated in Part 3 of Supplement 2. The hourly rates for investigation costs and solicitor costs fell within the scale prescribed. However the Claimant argues that the hearing costs for £2,650 within Part 3 is not a daily rate but a total figure. If this were correct, the recoverable costs would be limited to £18,000, less than the Claimant has paid. (I should note that, whether the hearing costs is to be treated as a daily or a global figure, the difference between the cost in paragraph 3 of £2,650 and the cost claimed of £2,170 is explained by the reduced cost of holding a hearing remotely using Teams.)

55. The Claimant contends in the alternative that the Defendant is limited to recovering costs that it has actually incurred. Bye-law 5.4.6, permitting an order for the payment of costs that are *"just and reasonable ... in connection with any investigation and/or hearing"* must on its true construction be limited to costs actually incurred by the Defendant. The table of costs at Part 3 of Supplement 2 refers to solicitors' costs at £200 per hour and the costs of investigating and/or work by paralegals at £75 per hour. However, as the Claimant seeks to demonstrate by the production of documents next to a letter dated 30 December 2022, these hourly rates are far in excess of what the Defendant pays to solicitors, investigators and/or paralegals.

DISCUSSION

56. In considering the Claimant's allegations of breach of contract in respect of the conduct of the proceedings before the Disciplinary Panel and the Appeal Panel, I accept for the

purpose of this application the Claimant's starting position that, if he can show that either the Disciplinary Panel or the Appeal Panel (or both) erred in law in dealing with the proceedings brought against the Claimant, the Defendant would not have been entitled to make disciplinary findings against him and any consequential sanction and/or costs order which it purported to impose would amount to a breach of contract. An enquiry that involved the wrong application of the law or that reached factual conclusion outside of the range of reasonable conclusions open to the Disciplinary or Appeal Panel on the material before it would not amount to "*due enquiry"* as contemplated by the Bye-Law 5.4.2. In so far as any sanction or costs order was outside of the powers of the panel on a proper construction of the terms of the contract between the parties, it would equally be inconsistent with the contractual terms.

57. I deal first with the allegations that the Disciplinary Panel failed properly to deal with the Claimant's evidence as to the use of the Conway Decision as a template. In my judgment, the determination of that panel shows a conspicuously careful analysis of the issue of dishonesty and the evidence relating thereto. First, the Panel clearly correctly stated the law within the determination. The Claimant does not seriously dispute this. Of course, the mere fact that the law was correctly stated does not mean that it is correctly applied. However, in paragraph 34 the determination, the Panel looks with considerable care at the Claimant's use of the Conway Decision. In particular, it is clear that the panel rejected the suggestion that the Conway Decision was a "template" in the normal sense of that word or, crucially, that the Claimant believed it to be so in the normal sense of that word.

58. It follows that the Claimant's belief as to whether it was legitimate to use a template was irrelevant to the Panel's determination. It found that he did not believe that he was using a template and furthermore that he obfuscated when interviewed about this issue. This conclusion also undermines the argument that the disciplinary misunderstood the concession that the Claimant made in his draft opening. The Appeal Panel dealt with this point in paragraph 34 of its determination – the Claimant's evidence as to his state of mind when he submitted the Decision was rejected by the Disciplinary Panel.

59. It is said that the determination of the Disciplinary Panel does not include reference to everything that the Claimant had to say about the preparation of the Decision. However, if one looks, for example, at the bottom of page 14 and the top of page 15 of the Decision (using the internal numbering of the document) one can see that the Panel has taken care to analyse the Claimant's evidence as to the changes that were made to the Conway Decision. A review of the bundle of material before the court shows that the Disciplinary Panel had a large amount of material in front of it. It could not be

expected to refer to every factual assertion that had been made. To do so would have been to produce a determination of disproportionate length. In complying with its duty to perform "due enquiry", I cannot see that the Panel was obliged, in giving its reasons, to go beyond that which it is well established is the duty of the court in giving reasons, namely to show the parties and the appeal court the principles upon which it acted and the reasons that led to its decision (see English v Emery Reimbold [2002] EWCA Civ 605 and Union of Construction and Allied Trades Technicians v Brain [1981] IRLR 225.)

60. As to the argument that the Appeal Panel misstated or misunderstood the law, it is true to say that the Chair's determination referred to in the email of 26 May 2022 contained a gloss on the wording of the Regulatory Tribunal Rules. However, I see no material that could lead to the conclusion that the Appeal Panel in fact misapplied the relevant test.

60.1. Since the appeal is conceded to be by way of review not rehearing, the duty of due enquiry required the Appeal Panel to look at the manner in which the Disciplinary Panel weighed the evidence before it.

60.2. At paragraph 29 of its determination, the Appeal Panel *"reminded itself to exercise particular restraint in interfering with findings of fact where the original tribunal had the benefit of seeing, hearing and evaluating the witnesses' credibility and that it should only interfere with those findings if the original tribunal could not properly and reasonably have decided those facts in that way*."

60.3. The determination of the Appeal Panel shows that it undertook exactly that exercise. By way of example, at paragraph 31 of the determination, the Appeal Panel considered those arguments raised above by the Claimant as to how the Disciplinary Panel had failed to take into account the Claimant's evidence as to what he understood to be a legitimate way of using a template and how he assessed his use of the Conway Decision in that manner. In rejecting a ground of appeal the Appeal Panel's determination shows a careful review of how the Disciplinary Panel had addressed the evidence before it, leading to the conclusion that the Disciplinary Panel was entitled to come to its conclusion on the facts.

61. In my judgment, the Claimant has no real prospect of success in showing that the Defendant was in breach of contract in its due enquiry into and determination of the disciplinary proceedings brought against him.

62. I turn to consideration of the issue as to whether the Defendant is contractually entitled to recover the sums claimed under the costs order.

63. The argument that the costs regime in the Sanctions Policy was expressly incorporated into the contract between the parties by virtue of Rule 125(d) of the Regulatory Tribunal Rules, is flawed for the following reasons:

    63.1. Legal costs would not be included in the normal use of the term "fine." I accept the Claimant's argument that a "fine" connotes the imposition of a penalty. However, an order for the payment of costs is not considered to be penal in nature - rather it is a compensation for the losses suffered by a party engaged in litigation or similar dispute resolution processes;

    63.2. It would make no sense to make a careful distinction in Supplement 2 between a fine in Part 2 and costs in Part 3, only to use the word "fine" interchangeably to mean either when referring to the Supplement in Rule 125;

    63.3. Rule 125 is expressly said to deal with "regulatory sanctions" in accordance with B5.4.2 and B5.4.3. By cross-reference to B5.4.2 of the Bye-Laws, this is a reference to "disciplinary penalties" but the list of such penalties does not include costs. Costs are separately dealt with at B5.4.6 of the Bye-Laws. Thus, the structure of the Bye-Laws themselves, referred to in Rule 125, clearly makes the distinction between costs on one hand and disciplinary penalties on the other. I see no reason to stretch the normal use of the English language, at least in the context of dispute resolution, to elide the distinction.

64. As to the incorporation of the Sanctions Policy generally or Supplement 2 particularly, by way of implied term, the Claimant's pleaded case and indeed his written and oral arguments on the application do not address the issue. Doing the best I can, I see no ground for implying a term incorporating either in the contract between the parties as a matter of law. As for the argument that a term might be implied in fact, it would be necessary for such implication to pass one of the two grounds set out by Lord Hughes in Ali v Petroleum Company of Trinidad and Tobago [2017] UKPC 2 at [5] that the implication of such a term either "*is so obvious that it goes without saying"* or "*is necessary to give the contract business efficacy."*

65. Either argument has the immediate problem that those responsible for drafting the Defendant's regulatory scheme saw fit to incorporate the part of the Sanctions Policy dealing with fines into the Regulatory Tribunal Rules and therefore, by virtue of the undertaking, into the contract between the Defendant and its members, whereas they

did not see it be necessary to include that part of the Sanctions Policy dealing with costs.

66. At a more basic level, I do not see that the alleged implied term meets the test either of obviousness or of business efficacy. It is not obvious that a detailed Sanctions Policy would be contractually binding between the Defendant and its members. It is certainly not necessary for such a term if the contract of membership is to have business efficacy. Accordingly, the Claimant fails to show that either the Sanctions Policy generally or Supplement 2 specifically were incorporated into the Claimant's contract of membership of the Defendant.

67. If I were wrong on this, the question would arise as to whether the costs order made by the Disciplinary Panel and affirmed by the Appeal Panel exceeded that which is permitted under the terms of Part 3 of Supplement 2. I should note that the issue appears not to have been taken either before the Disciplinary Panel or before the Appeal Panel. It follows that this court does not have the benefit of the analysis of those Panels. It would appear that the Disciplinary Panel considered that the sum for hearing costs in Part 3 was not a global figure of £2,560 but rather a daily rate of that sum since, had it considered otherwise, it would presumably have stated reasons for not limiting itself to that set out in Supplement 2, given the obligation to do so under Paragraph 3.1 of the Sanctions Policy.

68. In my judgment:

    68.1. If only Supplement 2 and not the Sanctions Policy more generally were incorporated into the contract, I agree with the Claimant that it is arguable that the recoverable hearing costs were limited to £2,650 and that the Claimant has paid a greater sum than the Defendant was entitled to recover.

    68.2. If the Sanctions Policy more generally were incorporated, I consider it arguable that the Defendant was still limited to the figure of £2,650 for hearing costs because, although paragraph 3.1 permits departure from the Sanctions Policy, it does so only when an explanation is provided and recorded. No such explanation has been provided and recorded here (probably, as I say, because the Disciplinary Panel in fact did not interpret Supplement 2 as limiting the amount that could be awarded for hearing costs to a global sum rather than a daily figure).

    68.3. I consider the Claimant's case that the costs recovered exceeded the amount in fact incurred by the Defendant to be unarguable. Whilst the Defendant has not provided proof of the actual cost of the investigation and the hearing, the

Sanctions Policy sets rates that appear reasonable for the activities involved. The mere fact that (by way of example) a lawyer whose time is charged at £200 per hour might be paid considerably less is of little assistance. The costs of employing staff go considerably beyond simply the direct cost of their salary. For example, the employer is likely to have to pay National Insurance costs, pension contributions, training costs and sick pay as well as to fund ancillary services relating to accommodation and administration. The Claimant's evidence as to the costs of employing a lawyer do not deal with any of these. If the figure claimed by the Defendant were off the scale for what is usually claimed for such costs, I accept that it might be arguable that the costs exceeded that which the Defendant was likely to have incurred. But the rates here are, for example, well within the Guideline Hourly Rates in the Guide to the Summary Assessment of Costs 2021. I can see no basis for the Claimant showing that such rates are not correctly treated as being incurred by the Defendant.

68.4. I do not consider that the possibility that the Claimant has wrongly formulated his remedy as one in breach of contract rather than restitution to be a ground for giving summary judgment or striking out the claim.

69. Accordingly, had I found the terms of Supplement 2 to be incorporated into the contract (whether or not the remainder of the Sanctions Policy was incorporated), I would have refused summary judgment on the claim based on the recovery of costs to the extent that I would have found the Claimant had a real prospect of success in showing that Sanctions Policy limited the recoverable hearing costs to a total figure of £2,650, but not otherwise.

70. As to the second and third grounds of the strike out application:

70.1. Whilst I am critical of the value and long winded nature of the pleading, it is not necessary to indicate that I would have struck the claim out on this ground. Had the Defendant not persuaded me to grant summary judgment, the Claimant might have persuaded me that the Particulars of Claim could have been saved from strike out, especially if the Claimant had undertaken to amend the Particulars of Claim so as to refine the issues to which the Defendant would have had to plead.

70.2. As I have indicated above, I would not have struck the claim out on the ground of payment of the wrong fee.

A FURTHER POINT

71. In the course of oral submissions, the Claimant asserted that he did not consider that he had had a fair trial either before the Disciplinary Panel or before the Appeal Panel. This appeared to be a somewhat broader criticism of the whole process than was put in his Particulars of Claim. If such criticism had merit, it would need to be pleaded if it were to be permitted to proceed to a trial. No amended pleading has been put before this Court, but I bear in mind that the Claimant is a litigant in person, who, though subject to the same procedural code as any other litigant, is entitled to argue that, if his case might be put right by amendment, the Court should carefully consider giving the opportunity for such an amendment to be drafted. Apart from anything else, this might amount to "some other substantial reason" to allow the claim to proceed to trial.

72. The Claimant put his argument on the basis that it would be one thing if the Disciplinary Panel had found him to have told "a pack of lies." They did not do so. The disciplinary process was therefore disproportionate and unfair.

73. One can see that such a challenge to the disciplinary process is more in the form of a public law claim than one based upon contractual rights. That might be the reason why it has not been pleaded. However, even on the Claimant's own terms, it is far from obvious that the process was disproportionate and/or unfair. It is true that the Disciplinary Panel did not describe the Claimant as having lied. However they did find that he had deliberately obfuscated matters when he was asked by the interview panel about the use of a template and that, at the time of submitting the Decision he knew that it was not genuinely his own work. Those findings amount to a significant criticism of a professional person and are clearly capable of justifying a finding of dishonesty and/or lack of integrity. I can see nothing in this more general criticism of the disciplinary process to justify the conclusion that it was unfair or to lead to the conclusion that this claim should be permitted to proceed.

CONCLUSION

74. For the reasons identified above, I am satisfied that the Claimant has no real prospect of succeeding on the claim. I have considered whether there any other compelling reason why the case should be disposed of at trial. I am not satisfied that there is any such reason. Accordingly, the Defendant is entitled to summary judgment on the claim against it.

75. Had I not entered summary judgment, I would have struck the claim out as disclosing no reasonable ground for bringing the claim.

76. I invite the parties to seek to agree an order consequential open this judgment. If they are not able to do so, the case will be listed for hearing remotely at 11am on 1 September 2023.