Case No: CO/10884/2011

Neutral Citation Number: [2013] EWHC 661 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2013

Before :

LORD JUSTICE LAWS
AND
THE HONOURABLE MRS JUSTICE SWIFT DBE

- -

Between:

	BRUCE IHIONKHAN IGHALO	**Appellant**
	- and -	
	THE SOLICITORS REGULATION AUTHORITY	**Respondent**

- -
- -

Manjit Gill QC and Richard Alomo (instructed by **W and J Solicitors**) for the **Appellant**
Giles Wheeler (instructed by **David Barton Solicitors**) for the **Respondent**

Hearing date: 24 January 2013

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Judgment

The Honourable Mrs Justice Swift:

INTRODUCTION

1. This is the judgment of the Court. The appellant, Bruce Ihionkhan Ighalo, appeals pursuant to s. 49(1) of the Solicitors Act 1974 against an order made by the Solicitors Disciplinary Tribunal ("the Tribunal") on 6 September 2011 following a two-day hearing. That order was confirmed in the written decision of the Tribunal dated 10 October 2011.

BACKGROUND

2. The appellant was born on 1 June 1960. He was admitted to the Roll of Solicitors on 3 July 2000. He traded as First Solicitors LLP, Greenwich, from 10 March 2003 until 1 October 2008 when the firm ceased to trade.

3. On 13 May 2008, the respondent, the Solicitors Regulation Authority, began an investigation into the appellant's practice. The investigation was undertaken mainly by Ms Claire Guile, an investigating officer of the respondent. She was accompanied at some of her meetings with the appellant by a colleague, Mr Parmar. The form and outcome of the investigation was set out in a Forensic Investigation Report dated 19 March 2009 which was signed by Mr M.J. Calvert, the respondent's Head of Forensic Investigation. On 8 February 2010, Ms Susan Webb, an adjudicator of the respondent, made the decision to refer the conduct of the appellant to the Tribunal.

4. A Rule 5 statement dated 29 March 2011 was prepared by Mr David Barton, the independent solicitor advocate instructed by the respondent to prosecute the appellant before the Tribunal. The statement contained the allegations that the appellant ultimately faced before the Tribunal. The allegations against the appellant were that :

> *Allegations 1-4: he had breached the Solicitors Accounts Rules by withdrawing money on behalf of one client which exceeded the money held on that client's behalf; by failing to keep his accounting records properly written up; by failing to carry out reconciliation; and by failing to maintain bank statements.*

Allegations 1-4 were admitted by the appellant.

> *Allegation 5: he had breached Rule 1 of the Solicitors Code of Conduct 2007 by:*
>
> > *(a) (dishonestly) using loan funds advanced to him by his lender-client Abbey, which were intended for use in the remortgage of the appellant's own property, for an unauthorised purpose;*
> >
> > *(b) providing the respondent's investigation officers with a (dishonest) false explanation of his use of those funds;*
> >
> > *(c) failing to carry out his instructions in relation to four property transactions in which he acted for HBOS, in each of which he failed to register HBOS's legal charge over the properties in question;*
>
> *Allegation 6: in relation to the remortgage of his own property, in which the appellant acted for Abbey without disclosing his own interest in the matter, he had acted in circumstances of a conflict between his interests and those of his client;*
>
> *Allegation 7: contrary to Rule 10.05(1)(a) of the 2007 Code of Conduct, he had*

failed to fulfil an undertaking given to Cash Express on 30 October 2007 to repay a loan of £50,000;

Allegation 8: he had acted in breach of Rule 1 of the Solicitors Practice Rules 1990 by facilitating conveyancing transactions during the course of which he failed to be alert to and/or failed to draw his client's attention to certain suspicious characteristics of the transactions and was as a consequence grossly reckless.

5. The Tribunal found Allegations 5-8 proved and ordered that the appellant be struck off the Roll of Solicitors. The Tribunal further ordered that the appellant should pay the respondent's costs, summarily assessed in the sum of £30,000.

THE APPEAL

6. The original Grounds of Appeal, which were later amended, were directed at six of the Tribunal's findings. However, two days before the appeal hearing, Mr Richard Alomo, junior counsel who had been instructed on behalf of the appellant only a short time previously, served a Revised Skeleton Argument in which he indicated that only two of the original Grounds of Appeal were to be pursued. Those Grounds were that:

   i) the composition of the Tribunal was such that it could not be said to have been independent or impartial; and

   ii) the Tribunal had erred in law in finding that the appellant had acted dishonestly in using the loan advanced by Abbey for a purpose unintended by Abbey (Allegation 5(a)) and/or by lying to Ms Guile at a meeting on 3 September 2008 (Allegation 5(b)).

7. Before going on to discuss these Grounds in detail, it is appropriate to say something about the respective roles of the Tribunal and the respondent.

THE ROLES OF THE SOLICITORS DISCIPLINARY TRIBUNAL AND THE RESPONDENT

8. The Tribunal is an independent body created pursuant to the Solicitors Act 1974 for the purpose of determining applications and complaints relating to the professional conduct of solicitors. The Tribunal has a range of powers, including the power to strike a solicitor from the Roll. Tribunal members, the majority of whom are practising solicitors, are appointed by the Master of the Rolls for a five-year term which may be renewed on application. The Tribunal sits in panels of three members: two solicitors and

one lay member.

9. The respondent is an independent regulatory body which is responsible, *inter alia*, for investigating complaints or concerns about solicitors and, where appropriate, for referring cases to the Tribunal and prosecuting those cases before the Tribunal.

GROUND i)

10. The appellant's first Ground of Appeal was that the composition of the Tribunal was such that it could not be said to have been independent or impartial.

The appellant's submissions on Ground i)

11. The appellant's complaint concerned the presence on the Tribunal which heard his case of Mr Richard Hegarty, who had previously carried out work for the respondent. Mr Hegarty was one of the two solicitor members of the Tribunal and is a solicitor in independent private practice. The Court has seen a brief resumé of Mr Hegarty's professional activities, taken from his firm's website. He specialises in conveyancing work and has been involved with wider professional matters since his election to the Council of the Law Society in 1989.

12. From about 1997, Mr Hegarty held an appointment as a member of the respondent's Adjudication Panel (i.e. as an 'adjudicator'). That appointment, which was part-time and incidental to his practice as a solicitor, required him to make decisions on behalf of the respondent about various matters relating to the exercise of its regulatory functions. Those decisions would include such matters as whether the respondent should exercise its disciplinary powers in respect of a solicitor, whether the respondent should intervene in a solicitor's practice and whether a solicitor should be referred to the Tribunal. Mr Hegarty's appointment as an adjudicator ended in August 2009.

13. Three months later, in November 2009, Mr Hegarty was appointed as a solicitor member of the Tribunal. By the time of the hearing in the appellant's case in September 2011, more than two years had elapsed since Mr Hegarty's appointment with the respondent had ceased.

14. In his Revised Skeleton Argument, Mr Alomo argued that, as a result of Mr Hegarty's inclusion on the Tribunal, the Tribunal had been neither impartial nor independent. He pointed out that the investigation in the appellant's case began in May 2008, more than a year before the cessation of Mr Hegarty's appointment as an adjudicator for the respondent. He did not suggest that Mr Hegarty had had any involvement in that investigation or in the decisions made on behalf of the respondent in the appellant's case.

Nor did he suggest that Mr Hegarty had even been aware of the appellant's case during the course of his appointment with the respondent. However, he submitted that it would be surprising if those involved in the investigation of the appellant, including Ms Guile, had not been known to Mr Hegarty during his time as an adjudicator. That, he argued, was of particular importance since the Tribunal had had to determine an important dispute of fact as between the appellant and Ms Guile. The Tribunal had accepted the evidence of Ms Guile and had found that the appellant had dishonestly misled her. Mr Alomo made clear that, at the time of the Tribunal hearing, the appellant and his solicitor advocate were unaware of Mr Hegarty's former connection with the respondent. He said that, if they had been made aware of it, objection would have been raised at the time.

15. By the day of the appeal hearing, the focus of the appellant's case had changed somewhat. Mr Manjit Gill QC, who appeared for the appellant, laid considerable emphasis on the contention that members of the Tribunal should have made disclosures of interest before the start of the hearing in the appellant's case. That process would, he said, have required Mr Hegarty to disclose his previous appointment as an adjudicator and would have given the appellant and other members of the Tribunal the opportunity to ask further questions about his past involvement with the respondent and to ensure that there was no risk of bias or other concern that required further investigation. Mr Gill argued that, by failing to make disclosure, the Tribunal had deprived itself and the appellant of a vital opportunity to ensure the fairness of the proceedings.

16. Mr Gill argued that a requirement for disclosures of interest would have revealed that, in the case of Mr Hegarty, there was in fact real cause for concern as to his impartiality and independence. This concern arose from his previous role as head of the panel which had determined that the respondent should intervene in the practice of a firm of solicitors, Dean and Dean. As a consequence of the intervention, the former senior partner of Dean and Dean, Mr Rajesh Mireshkandari, had issued proceedings in California against the respondent and a number of individuals, including Mr Hegarty. Mr Gill argued that Mr Hegarty had a continuing interest in common with the respondent in defending those proceedings. It was possible that he also had a continuing financial involvement with the respondent, since the respondent might well be underwriting his legal costs and/or providing him with legal representation for the proceedings.

17. Although the Dean and Dean proceedings were commenced only in February 2012 (i.e. four months after the Tribunal hearing in the appellant's case), Mr Gill submitted that it was probable that both the respondent and Mr Hegarty had been aware at the time of the appeal hearing that proceedings were likely to be commenced. He observed that it was also likely that there had been joint consultations between Mr Hegarty and members of the respondent's staff about the stance to be adopted in relation to the threatened proceedings. In his written submissions, he asserted that these circumstances gave rise to "a clear case of bias".

18. Mr Gill submitted that, in the course of Mr Hegarty's time as an adjudicator, it was likely

that he would have become acquainted with some of the investigators and/or other personnel who had been involved in investigating the appellant's case. He told the Court that, since no information had been forthcoming from Mr Hegarty, the appellant's solicitor had written to the respondent's solicitor three days before the appeal hearing, identifying nine of the respondent's employees who had been involved in the investigation of the appellant and asking if they were known to Mr Hegarty. The respondent's solicitor had responded that he was unable to say whether Mr Hegarty knew any of the people named.

19. Mr Gill pointed out that the investigation in the appellant's case had been running for 15 months by the time Mr Hegarty's appointment as an adjudicator came to an end. During that time, Mr Hegarty would, Mr Gill suggested, have had access to the respondent's computer system and might have gained knowledge of the investigation by that means. However, even if Mr Hegarty had had no direct knowledge of the investigation, there must, Mr Gill suggested, have been a risk that, because of what Mr Gill termed Mr Hegarty's "close institutional connection" with the respondent at the time the investigation was going on, he would be resistant to any criticisms of the way the respondent had conducted the investigation.

20. Mr Gill argued that the respondent performs a public function and, like any other public authority, owes a duty to ensure that it does not bring about a breach of an individual's rights under the European Convention on Human Rights (ECHR). He submitted that the respondent also owes a duty under domestic law to take proactive steps to investigate once an issue of possible bias is raised, not least because it has a duty to assist in upholding the rule of law and to assist the Court.

21. Mr Gill complained that the respondent had done nothing to investigate the concerns about Mr Hegarty's independence. He submitted that those concerns had first been brought to the attention of the respondent in July 2012, when the appellant had served his Amended Grounds of Appeal. In his Amended Grounds, he had complained that the inclusion on the Tribunal of Mr Hegarty, who had been an adjudicator for the respondent during part of the time when the appellant was under investigation by the respondent, gave rise to apparent bias. Moreover, Mr Gill said that Mr Hegarty's involvement with the respondent's intervention into the practice of Dean and Dean had been notified to the respondent by the appellant's solicitors in a letter dated 10 August 2012. He said that, by failing to investigate the position and to disclose to the appellant and the Court information about any financial arrangements that might have been made between Mr Hegarty and the respondent in relation to the proceedings being brought against them, the respondent had acted in breach of its public duty.

22. Mr Gill submitted also that the Tribunal should have taken steps to clarify Mr Hegarty's position. He argued that Mr Hegarty should have been asked to comment on such matters as whether, and if so how well, he knew the investigators and other personnel who had been involved in the investigation of the appellant's case and about the extent

of his continuing connection (including financial connection) with the respondent arising out of the Dean and Dean proceedings. As it was, no information from Mr Hegarty was available to the Court or to the appellant, making it impossible to ascertain the extent to which his independence may have been compromised.

The respondent's submissions on Ground i)

23. The respondent argued that there was no evidence of bias, whether actual or apparent. Mr Wheeler, acting for the respondent, emphasised that Mr Hegarty had never been an employee of the respondent. He had not been based at the respondent's premises. Throughout his period as an adjudicator, his main work was as a solicitor in independent private practice. His role as an adjudicator merely required him to take decisions in relation to cases being investigated by the respondent as and when he was requested to do so.

24. Mr Wheeler said that there was no suggestion that, during his time as an adjudicator, Mr Hegarty had had any personal involvement with the investigation into the appellant and there was no evidence that he had even been aware of that investigation. Mr Wheeler argued that there was no duty on a member of the Tribunal to make any disclosure of interest unless the matter to be disclosed would of itself give rise to the risk of bias. He said that there was no general rule that disclosure should be given in every case; disclosure was the exception, not the norm. In most cases, no question of possible bias would arise. In a minority of cases, there would be an obvious risk of bias which would plainly make it inappropriate for the member to sit and would result in his/her withdrawal from the Tribunal. In practice, the need for disclosure of interest would only arise in a 'borderline' case where the member (or the Tribunal) had a genuine doubt as to whether the relevant interest might give rise to the risk of bias.

25. Mr Wheeler argued that there was no reason to believe that this has been a 'borderline' case. Mr Hegarty's appointment as an adjudicator had ceased more than two years before the appeal hearing. The mere fact that he had held that appointment in the past could not be a factor that would, without more, give rise to a risk of bias. The fact that his appointment had overlapped for a period with the ongoing investigation into the appellant would raise an issue of bias only if he had had some involvement in the investigation and there was no evidence of that.

26. Mr Wheeler accepted that, if Mr Hegarty had known Ms Guile well during his time as an adjudicator, it would not have been appropriate for him to sit on the Tribunal. However, there was no evidence that he had known her well. Moreover, it could safely be presumed that, if Mr Hegarty had known Ms Guile well, he would have disclosed that fact. Similarly, it could be presumed that, if either the Tribunal or the respondent had been made aware that Mr Hegarty knew Ms Guile well, that fact would have been disclosed to this Court. Mr Wheeler submitted that if the Court were to find that, in the

absence of any disclosure, a risk of bias had arisen in this case, this would come close to finding that anyone who had previously been associated with the respondent was disqualified from sitting on the Tribunal.

27. Dealing with the appellant's complaint that the respondent had not provided any information about Mr Hegarty's knowledge of the other members of the respondent's staff who had been involved in the investigation, Mr Wheeler pointed out that none of them had given oral evidence before the Tribunal and most of them had played only a peripheral part in the proceedings. Unlike Ms Guile, the Tribunal had not had to make any decision about their credibility or the accuracy of their recollection. It was difficult to see how, even if Mr Hegarty had known any of those individuals, that knowledge could have given rise to any risk or perception of bias. In any event, the same considerations as to disclosure would apply as in the case of Ms Guile.

28. Mr Wheeler submitted that Mr Gill's arguments about Mr Hegarty's involvement in the Dean and Dean proceedings had no merit. He took issue with Mr Gill's assertion that the respondent had been made aware of these arguments well before the appeal hearing. He pointed out that the appellant's reliance on the Dean and Dean proceedings had not been mentioned in the appellant's Amended Grounds of Appeal filed in July 2012 or in the Skeleton Argument lodged on his behalf on 6 August 2012. The arguments did not appear in Mr Alomo's Revised Skeleton Argument which had been served only two days before the appeal hearing. As to the appellant's letter dated 10 August 2012, which it was contended should have put the respondent on notice of the concerns about Mr Hegarty's involvement in the Dean and Dean proceedings, Mr Wheeler drew attention to its terms:

> "Following extensive investigation, we are now aware that on 12 December 2008 Mr Richard Hegarty headed the intervention panel into the Firm of Dean & Dean Solicitors … This in our view shows the involvement of Mr Hegarty with the SRA and which *(sic)* confirmed that by sitting as a member of the SDT Panel can not be said to be independent. …
>
> You will also note that the investigation into our client's firm started in April 2008 when Mr Hegarty was still a member of the Investigation and Compliance Team of the SRA. Whether Mr Hegarty was directly involved with the investigation is neither here nor there. Having headed a panel which intervened in another firm on behalf of the SRA, we believe that his independence has been greatly compromised. We are therefore surprised as to how he could have sat on any SDT panel to adjudicate on matters which requires *(sic)* independent personnel."

29. Mr Wheeler submitted that the reference in the letter to the firm of Dean and Dean was

confined to the part played by Mr Hegarty in the intervention into that firm's practice. No mention had been made of any proceedings arising from the intervention, or of the possible effect of such proceedings on Mr Hegarty's independence. The letter suggested that the significance of the fact that Mr Hegarty had been involved in the intervention was confined to providing evidence of his active involvement in the respondent's regulatory procedures. The respondent had not considered that the fact that Mr Hegarty had been involved in an intervention had any relevance to the appeal; it merely showed that he had been carrying out one of his functions as an adjudicator. Mr Wheeler said that there was nothing in the letter of 10 August 2012 that could have alerted the respondent to the fact that the appellant was suggesting that the Dean and Dean proceedings had any relevance to his appeal.

30. Mr Wheeler drew attention to a passage in the witness statement made by the appellant for the appeal hearing. The witness statement is undated, but appears to have been signed on or about 23 January 2013. At paragraph 7, the appellant stated:

> "In August 2012, or thereabout, I also became aware that Mr Hegarty led the intervention Panel into the firm of Dean & Dean in London in 2008. I also discovered that Mr Hegarty and the Respondent are co-defendants in a civil action commenced in the State of California arising from the said intervention. This was drawn to the attention of Mr Barton *(i.e. the respondent's solicitor)* by my legal representative by letter dated 10 August 2012. "

Mr Wheeler observed that if, as that passage indicated, the appellant had been aware before 10 August 2012 of the existence of the Dean and Dean proceedings and Mr Hegarty's involvement in those proceedings, it was very surprising that the letter of 10 August 2012 had made no mention of those proceedings. (In response to that observation and having taken instructions from the appellant, Mr Gill said the paragraph was ambiguous and gave a wrong impression of the chronology and that the appellant had not in fact have become aware of the Dean and Dean proceedings until after his solicitors' letter of 10 August 2012.)

31. Mr Wheeler said that, as it was, the first time that the respondent had been informed of the fact that the appellant intended to raise arguments about the Dean and Dean proceedings at the appeal hearing was the day before the hearing, when its solicitor received a letter from the appellant's solicitor stating:

> "We write further to the above-named subject, and most importantly to our letter dated 10th August 2012, forwarded to you be *(sic)* recorded delivery post.
>
> It has to be said that despite raising the issue of the composition

> of the SDT Panel with you, especially in respect of the involvement of Mr Richard Hegarty in the law suit instituted in the State of California, your office as well as your client (SRA) have stayed silent on this issue ever since."

Mr Wheeler pointed out that, contrary to what was said in that letter, the letter of 10 August 2012 had made no reference to Mr Hegarty's involvement in the Dean and Dean proceedings.

32. Mr Wheeler argued that in any event Mr Hegarty's involvement in the Dean and Dean proceedings could not found the basis for a finding of actual or apparent bias in this case. The proceedings had been commenced four months after the Tribunal hearing and the suggestion that they must have been preceded by consultations involving Mr Hegarty which would have been ongoing at or before the time of the Tribunal hearing was pure speculation. Even if such consultations had taken place, they would not have had the effect of giving rise to a risk of bias in the hearing of a wholly different and unrelated case.

33. In any event, Mr Wheeler argued that, since the arguments had been raised for the first time at the appeal hearing and the respondent had had no opportunity to consider and investigate them, the appellant should not be permitted to rely on them.

The relevant law on Ground i)

34. In *Porter v Magill, Weeks v Magill* [2002] 2 AC 357, Lord Hope set out what has become the accepted test for apparent bias at paragraph 103 of his judgment:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

35. Lord Bingham of Cornhill approved that formulation of the test in the case of *Davidson v. Scottish Ministers* (No 2) [2004] UKHL 34. At paragraphs 6 and 7 of his judgment, Lord Bingham elaborated on the type of circumstances that might give rise to apparent bias :

> "[6] The rule of law requires that judicial tribunals established to resolve issues arising between citizen and citizen, or between the citizen and the state, should be independent and impartial. This means that such tribunals should be in a position to decide such issues on their legal and factual merits as they appear to the tribunal, uninfluenced by any interest, association or pressure extraneous to the case. Thus a judge

will be disqualified from hearing a case (whether sitting alone, or as a member of a multiple tribunal) if he or she has a personal interest which is not negligible in the outcome, or is a friend or relation of a party or a witness, or is disabled by personal experience from bringing an objective judgment to bear on the case in question. Where a feature of this kind is present, the case is usually categorised as one of actual bias. But the expression is not a happy one, since bias suggests malignity or overt partiality, which is rarely present. What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment.

[7] Very few reported cases concern actual bias, if that expression has to be used, and it must be emphasised that this is not one of them… It has however been accepted for many years that justice must not only be done but must also be seen to be done. In maintaining the confidence of the parties and the public in the integrity of the judicial process it is necessary that judicial tribunals should be independent and impartial and also that they should appear to be so. The judge must be free of any influence which could prevent the bringing of an objective judgment to bear or which could distort the judge's judgment, and must appear to be so…".

36. At paragraph 19 of his judgment, Lord Bingham set out the procedure to be adopted when a question of bias arises:

"[19] Where a judge is subject to a disqualifying interest of any kind ('actual bias') this is almost always recognised when the judge first appreciates the substance of the case which has been assigned. The procedure is then quite clear: the judge should, without more, stand down from the case. It is rare in practice for difficulties to arise. Apparent bias may raise more difficult problems. It is not unusual for a judge, at the outset of a hearing, to mention a previous activity or association which could not, properly understood, form the basis of any reasonable apprehension of lack of impartiality. Provided it is not carried to excess, this practice is not to be discouraged, since it may obviate the risk of misunderstanding, misrepresentation or misreporting after the hearing. It is also routine for judges, before or at the outset of a hearing, to disclose a previous activity or association which would or might provide the basis for a reasonable apprehension of lack of impartiality. It is very important that proper disclosure should be made in such cases, first, because it gives the parties an opportunity to object and, secondly, because

> the judge shows, by disclosure, that he or she has nothing to hide and is fully conscious of the factors which might be apprehended to influence his or her judgment. When such disclosure is made, it is unusual for an objection to be taken.
>
> …
>
> There are of course a number of entirely honourable reasons why a judge may not make disclosure in a case which appears to call for it, among them forgetfulness, failure to recognise the relevance of the previous involvement to the current issue or failure to appreciate how the matter might appear to a fair-minded and informed observer who has considered the facts but lacks the detailed knowledge and self-knowledge of the judge. However understandable the reasons for it, the fact of non-disclosure in a case which calls for it must inevitably colour the thinking of the observer."

37. In *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, the Court of Appeal considered a number of cases where bias was alleged against persons sitting in a judicial capacity at various levels. The judgment of the Court (to which all three members of the Court contributed) made clear that a judge's previous employment history is not ordinarily relevant to the question of apparent bias. At paragraph 25 of its judgment, the Court considered what type of circumstances might give rise to an appearance of bias:

> "[25] It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers … By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with

> any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind … or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."

38. The ECHR expressed similar views in *Piersack v Belgium* [1983] 5 EHRR 169, in which it was held that the mere fact that a judge had once been a member of the public prosecutor's department was not a reason for fearing that he lacked impartiality. The Court recognised that, in several Contracting States, it is a frequent occurrence for individuals to transfer from a prosecutor's department to the Bench and did not wish to erect a barrier to such transfers. In the UK, of course, it is common for a judge sitting on criminal cases to be an individual who regularly acted as prosecuting counsel prior to his appointment to the judiciary.

39. However, in *Piersack,* the Court held that, where an individual had held a supervisory office in the prosecuting authority and that office had been such that he might have had to deal with a case in the course of his duties, he should not then sit as a judge in that case. If he did so, his impartiality would be open to doubt.

40. A continuing interest in an organisation with a wholly-owned subsidiary acting as its prosecuting body will disqualify an individual from acting as a decision maker in cases conducted by that prosecuting body: see *R (on the application of Kaur) v Institute of*

Legal Executives Appeal Tribunal and another [2012] 1 All ER 1435.

Discussion and conclusions: Ground i)

41. It is clear from the authorities that the mere fact that Mr Hegarty had previously held an appointment as an adjudicator for the respondent could not of itself give rise to actual or apparent bias. There are of course good reasons why an individual should not hold an appointment with the respondent at the same time as sitting on Tribunals hearing disciplinary cases since that would involve simultaneous involvement in both the investigatory/prosecutorial and decision-making arms of the disciplinary process. Simultaneous involvement of this kind was found objectionable by the Court of Appeal in *Kaur*. In this case, however, there is no question of Mr Hegarty having acted as an adjudicator for the respondent at the same time as sitting as a member of a Tribunal at a disciplinary hearing. At the time of the hearing in the appellant's case, Mr Hegarty had not carried out any work for the respondent for more than two years.

42. If the fact that Mr Hegarty had in the past acted as adjudicator for the respondent was not of itself sufficient to give rise to actual or apparent bias, on what additional factor(s) does the appellant rely? It is not suggested that Mr Hegarty played any role in the respondent's investigation of the appellant's case. Prior to the appeal hearing, it had not been suggested either that he had had any knowledge of the investigation. Mr Gill's suggestion, made for the first time at the appeal hearing, that Mr Hegarty might have used his access to the respondent's computer system in order to gain information about the respondent's investigation of the appellant appears to us fanciful, as well as entirely speculative. It seems highly unlikely that a solicitor in private practice whose role with the respondent was merely to carry out adjudicatory functions in specific cases as and when required, would - even if the respondent's computer system permitted him access to do so - have spent his time trawling through the respondent's electronic records in order to read about investigations in other cases with which he had no involvement.

43. What then of the failure by Mr Hegarty to disclose his previous work for the respondent prior to the Tribunal hearing? Guidance on the circumstances in which disclosure should be made was given in *Davidson*: see paragraph 35 of this judgment. It is clear that there is no requirement for an individual sitting in a judicial capacity to disclose every previous activity or association that he or she may have had, whether or not the activity or association is capable of forming the basis for a reasonable apprehension of bias. The duty extends only to activities or associations which would or might provide the basis for such a reasonable apprehension. Since, as we have said, it is well established that the mere fact that Mr Hegarty had previously held an appointment as an adjudicator for the respondent could not of itself give rise to a reasonable apprehension of bias, there can have been no general duty on him to disclose his previous appointment.

44. Mr Hegarty would, however, have had a duty to disclose any personal friendship or close association that had subsisted between himself and any of the witnesses in the appellant's case (in particular, Ms Guile) or any other matter that might have affected – or might reasonably have been perceived to affect – his impartiality. There was no evidence that any of these circumstances existed in his case. In particular, there was no evidence of any personal friendship or association with Ms Guile. It would be surprising if there had been, since Mr Hegarty was not an employee of the respondent and was not based at their premises. He would visit the premises to carry out his duties there as and when required. The evidence was that Ms Guile had joined the respondent in October 2007, less than two years before Mr Hegarty's appointment ended.

45. Given the fact that Mr Hegarty was a practising solicitor with considerable experience of matters relating to professional conduct and discipline, he would have been well aware of the duty of disclosure. It seems to us that the proper inference to be drawn from the fact that he made no such disclosure is that the circumstances that would have given rise to a duty to do so did not arise. A similar inference can be drawn from the fact that neither the respondent nor the Tribunal made any such disclosure to us at the appeal hearing.

46. That leaves the appellant's argument that the fact that Mr Hegarty has been named, along with the SRA, as a defendant in the Dean and Dean proceedings gives rise to a reasonable apprehension of bias. We are quite satisfied that the respondent is correct in saying that the first time the appellant sought to rely on this issue was the day before the appeal hearing. The attempt by his solicitors to suggest in their letter written on that day that they had raised the issue of Mr Hegarty's involvement in the Dean and Dean proceedings in correspondence in August 2012 was wholly disingenuous and reflected no credit on them. The letter of 10 August 2012 made no mention of the proceedings and was directed at a completely different point, namely that Mr Hegarty's involvement in the intervention in the practice of Dean and Dean demonstrated that he had in the past taken an active part in the respondent's regulatory procedures. If the appellant had been relying on Mr Hegarty's involvement in the Dean and Dean proceedings since August 2012, the omission of any mention of those proceedings from Mr Alomo's Revised Skeleton Argument, served only two days before the appeal hearing, would have been inexplicable.

47. We do not accept that paragraph 7 of the appellant's witness statement is in any way ambiguous. It is quite clear that he was saying that he had found out about Mr Hegarty's involvement in the Dean and Dean proceedings in August 2012 and that his solicitors had drawn that involvement to the attention of the respondent's solicitor in their letter of 10 August 2012. As we have said, that was not done. Whether or not the appellant did in fact learn about the Dean and Dean proceedings in August 2012 as he said in his witness statement, or later as he told Mr Gill during the appeal hearing, it is impossible to say. What is apparent is that, until 23 January 2013, it was not being suggested on the appellant's behalf that the fact that Mr Hegarty had been named as a defendant in the

Dean and Dean proceedings had any relevance to this appeal.

48. The Dean and Dean proceedings were not started until four months after the Tribunal heard the appellant's case. The suggestion that Mr Hegarty must have been aware at the time of the Tribunal hearing of the possibility that proceedings may be instituted against him in the future is mere speculation, as is the further assertion that he must have been involved in discussions with the respondent about the proceedings at that time. Even if he had been aware of the possibility of proceedings and had discussed that possibility with the respondent, however, we have difficulty in understanding how this can be said to have given rise to a reasonable apprehension of bias in a case which was wholly unconnected with the Dean and Dean proceedings. We are driven to the conclusion that, in raising this matter at the last moment, the appellant was 'clutching at straws' in an attempt to establish the existence of actual or apparent bias on the part of Mr Hegarty.

49. We are told that the respondent has drawn the existence of this appeal, and the allegations of apparent bias made in relation to Mr Hegarty, to the attention of the Tribunal. We have no information about any investigation that may have been carried out by the Tribunal. We do not consider that, whenever the question of bias is raised, there is an automatic duty on the relevant judicial authority to carry out an investigation as to whether there are any factors which might have formed the basis for a reasonable apprehension of bias and should therefore have been disclosed to the parties in advance. Such a duty would place a considerable burden on judicial authorities and may well lead to a proliferation of appeals amounting in reality to 'fishing expeditions' aimed at finding some material that might form the basis for a successful appeal. In a case such as this, where no evidence capable of forming the basis of an allegation of actual or apparent bias has been advanced by the party alleging such bias, it seems to us that a judicial authority would be entitled to decline to undertake any active investigations.

50. There is no reason to believe that Mr Hegarty was not fully able to bring objective judgment to bear on the appellant's case. We therefore dismiss the appeal on this Ground.

GROUND ii)

51. The appellant's second Ground of Appeal was that the Tribunal had erred in law in finding that he had acted dishonestly (a) in using the loan advanced by Abbey for a purpose unintended by Abbey and/or (b) by lying to Ms Guile at the meeting on 3 September 2008.

The transaction giving rise to the first allegation of dishonesty

52. In order to place in context the finding of dishonesty complained of, it is necessary to set

out in a little more detail the history of the transaction which formed the subject matter of the relevant allegations.

53. The appellant's private residence, 45 Albyfield, had been purchased with the aid of a loan from Bank of Scotland secured by a first legal charge over the property. In late 2007, the appellant wished to re-finance the loan. He applied for a loan from Abbey, which was intended to repay the original borrowing from Bank of Scotland and to redeem its first legal charge. The loan from Abbey was itself to be secured by a new first legal charge over the property.

54. The appellant's firm, First Solicitors LLP, was instructed by Abbey in relation to the remortgage transaction on 12 December 2007 in accordance with the terms of the Council of Mortgage Lenders ("CML") Handbook. The terms of the CML Handbook permitted the firm to act for Abbey, notwithstanding the appellant's personal interest, provided that another partner in the firm handled the matter. Rule 3.18 of the Solicitors' Code of Conduct 2007 required written disclosure to Abbey of the appellant's involvement in the transaction.

55. Notwithstanding the terms of the appellant's firm's instructions, the matter was dealt with for Abbey by an unadmitted conveyancing clerk who acted under the appellant's supervision. Abbey was not informed of the appellant's personal interest in writing, although the appellant later said that he "thought they knew".

56. The certificate of title required by Abbey was signed by the appellant's partner, who did not have any personal involvement in the transaction and who relied on the appellant to ensure that the matter was properly carried out. The mortgage advance was received into the firm's client account on 17 December 2007 pending draw down of the loan by the appellant. The Certificate of Title contained an assurance that the mortgage advance would be released by the appellant's firm only when the existing mortgage was discharged and that the mortgage would be completed within the protection period afforded by the conveyancing searches.

57. In breach of the conditions limiting the use of the loan monies advanced by Abbey, the appellant used the monies to pay off another debt, which he had incurred by giving a personal guarantee for the liabilities of a client. The original debt to Bank of Scotland and the legal charge securing that debt remained in place. Abbey did not obtain a legal charge over the property upon the disbursement of the loan funds.

58. The appellant did not repay the Bank of Scotland loan and redeem the legal charge until 2 July 2008, following which a new legal charge was registered in favour of Abbey. In the meantime, Abbey was without the protection of a first legal charge as security for its advance to the appellant.

The discussion on 3 September 2008 giving rise to the second allegation of dishonesty

59. Ms Guile's evidence was that, in the course of a discussion with the appellant in his office on 3 September 2008, she had asked him whether the ledger entry described as a "payment" made on 17 December 2007 related to the redemption of the mortgage with Bank of Scotland. She said that the appellant had replied that it did. That explanation was not true.

The interview on 6 November 2008

60. The appellant was interviewed by Ms Guile and Mr Parmar on 6 November 2008. In the course of that interview with, the appellant accepted that:

(1) he should have sent the monies advanced to him by Abbey for the purposes of a re-mortgage to Bank of Scotland;
(2) the monies were not his and he did not have permission to use them for his own purposes;
(3) he had misused client funds by using the advance to discharge his personal debt;
(4) he knew at the time that he used the funds to pay off his own debt that what he was doing was wrong;
(5) other solicitors would not say his actions had been right.

The appellant insisted at that interview that, given the pressures he had been under at the time, he had had no choice but to act as he did.

The relevant law on Ground ii)

61. The 'combined' test for dishonesty to be applied by the Tribunal was that set out by Lord Hutton in *Twinsectra Limited v Yardley and Others* [2002] 2 AC 164. At paragraph 27 of his judgment, he stated:

> "… Before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest."

And at paragraph 36, he went on:

> "… Dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he

> sets his own standards of honesty and does not regard as honest what he knows would offend the normally accepted standards of honest conduct."

The parties' cases at the Tribunal

The respondent's case

62. The respondent's case was that the appellant had deliberately used the monies advanced to him by Abbey for a different purpose from that for which it had been advanced to him. The respondent relied on the circumstances surrounding the re-mortgage, including the appellant's decision himself to conduct the transaction on behalf of Abbey rather than handing the matter over to a colleague as he should have done.

63. Referring to the test in *Twinsectra*, the respondent's solicitor submitted that, viewed objectively, it was clearly dishonest to misuse client money. Viewed subjectively, the appellant's answers in interview demonstrated that he had known at the time that what he was doing was dishonest.

64. As to the appellant's alleged assertion to Ms Guile at the discussion on 3 September 2008 that the "payment" recorded in the office ledger on 17 December 2007 had related to a payment made to Bank of Scotland, the respondent's case at the Tribunal hearing was that the appellant had given a deliberately false explanation in the hope of deflecting the investigation. Ms Guile produced her note of what had been said during the discussion. In oral evidence, she told the Tribunal that she had not made the note whilst the discussion was taking place but had done so immediately afterwards, whilst she was still at the appellant's office and after he had left the room. That evidence was not challenged by the appellant.

The appellant's case

65. In evidence-in-chief, the appellant told the Tribunal that he had believed the Abbey monies, when advanced, to be his property although, in cross-examination, he conceded that the fact that the monies had been advanced to him did not give him the freedom to use them in whatever way he wished. He also accepted that the money had been in his firm's client account and was held on trust for Abbey, who was his client. He did not accept that he had breached that trust, because the mortgage had ultimately been redeemed. He said that, in order to protect Abbey's interest, he had renewed the priority search and he had thought that was sufficient. His intention had always been to pay the money back in due course. At the time he had not thought he was acting dishonestly. He said that, when he was asked about the transaction on 6 November 2008, he realised that what he had done was wrong but he still did not think that he had acted dishonestly.

His evidence was that he did not believe that, if another had solicitor heard the full story of what had happened and the pressure he had been under, that other solicitor would have considered his actions to have been dishonest. He told the Tribunal that, if he had had "the luxury of time and space" to analyse what he was doing at the time, he would "maybe have reasoned differently".

66. The appellant's case was that he had not misled Ms Guile in their discussion on 3 September 2008. His account was that she had asked him what the "payment" had been for. He had indicated that he did not want to say anything about the matter until he had had an opportunity to examine his file. He gave that account at the interview with Ms Guile and Mr Parmar on 6 November 2008 and in evidence before the Tribunal.

67. The Tribunal summarised the appellant's evidence-in-chief in this way:

> "The appellant described the meeting with Ms Guile in some detail. … She referred to a complaint regarding his mortgage and asked what had happened. He said that he told her that they *[i.e. the firm]* were packing up and that he needed to locate the file and when he did so he would tell her. She asked for the ledger which he produced together with the cheque book. She asked about the cheque and in particular whether it was for the redemption of the mortgage. He did not wish to mislead her and asked again for the file, saying that he would write to her once he had it. Ms Guile asked whether the cheque could have been for the redemption, and he replied that he did not usually redeem with a cheque but there would be no problem doing so with the Bank of Scotland. The appellant's evidence was that Ms Guile accepted that he would get the file."

68. The summary of the relevant part of the appellant's cross-examination was:

> "He *[the appellant]* did not remember whether she *[Ms Guile]* asked what "payment" in the narrative of the ledger meant. She might have asked whether the cheque was for redemption of the mortgage, but he would have replied that he did not want to answer until he had looked at the file. She might have asked "could it have been" and again he would have said he did not want to answer until he had looked at the file. He stressed that he did not want to mislead Ms Guile. ...".

The Tribunal's findings

69. In its written decision, the Tribunal referred to the test in the *Twinsectra* case. Applying

that test to the facts it had found proved, the Tribunal concluded that it was satisfied beyond reasonable doubt that the appellant's conduct in not using Abbey's money advanced solely for the purpose of redeeming his Bank of Scotland mortgage, but instead using it to repay a debt secured by his personal guarantee was dishonest by the ordinary standards of reasonable and honest people. Having seen the appellant give evidence and heard his explanation for his conduct, and having read all the relevant papers, the Tribunal was also satisfied that he had not had an honest belief that he was entitled to use Abbey's money for the purpose of repaying the loan, and therefore that he knew that what he was doing was dishonest. When Abbey contacted him in mid-2008 to ask why its charge had not been registered, he had been well aware of the real reason for the non-registration but he did not tell Abbey, thus perpetuating the dishonesty.

70. The Tribunal found Ms Guile to be an impressive and persuasive witness. They rejected the respondent's evidence about what had happened at the meeting on 3 September 2008 and preferred the evidence of Mrs Guile in its entirety. The Tribunal expressed itself satisfied beyond reasonable doubt that the respondent had provided Ms Guile with a false explanation at the meeting, namely that the payment by cheque on 17 December 2007 was to redeem his mortgage to Bank of Scotland, when it had in fact been sent to a firm of solicitors in order to meet a debt secured by the appellant's personal guarantee. His attempt to mislead Ms Guile provided further confirmation that he was well aware that he had been acting dishonestly in using the monies advanced to him by Abbey to repay a debt. Applying the *Twinsectra* test, the Tribunal concluded that the appellant's conduct had been dishonest by the ordinary standards of reasonable and honest people and that the appellant had known that what he was doing was dishonest by those same standards. It was satisfied that the appellant had been intentionally trying to mislead Ms Guile in order to avoid disciplinary proceedings.

The parties' submissions on Ground ii)

71. The appellant's complaint was that, in considering whether his actions in using the monies advanced to him by Abbey to repay the debt were dishonest, the Tribunal had failed to have any or any proper regard for the fact that he had not benefited financially from the unauthorised use of the monies and that the monies were repaid without any loss accruing to Abbey.

72. As to the finding that the appellant had dishonestly attempted to mislead Ms Guile during the discussion on 3 September 2008, the appellant's case was that the Tribunal had erred in accepting Ms Guile's evidence in preference to that given by him.

73. The respondent's case was that the Tribunal had applied the correct test for dishonesty and that, having regard to the evidence relating to the appellant's use of the monies advanced by Abbey to settle a debt secured by guarantee and the admissions made by him in the interview of 6 November 2008, the Tribunal had been fully entitled to find

that both the objective and subjective elements of the test were satisfied. The respondent submitted that the Tribunal had been fully entitled to accept the evidence of Ms Guile about what had been said at the discussion on 3 September in preference to that of the appellant.

Discussion and conclusions on Ground ii)

74. The Tribunal made clear findings of fact and gave full reasons for those findings. It is clear from its written decision that it identified the correct test for dishonesty and that the test was applied. It is clear too that the Tribunal made findings on the basis of the criminal standard proof, as it was required to do. The fact that the appellant derived no personal financial benefit from the re-mortgage transaction and that the monies were eventually paid over to Bank of Scotland were only two of the factors to be considered in determining whether the *Twinsectra* test was satisfied. There were many other features, as identified by the Tribunal, which fully entitled it to reach the conclusions that it did and which justified its finding that the appellant's behaviour in dealing with the monies advanced to him by Abbey had been dishonest.

75. In his witness statement prepared for the appeal hearing, the appellant stated that he was "100% certain" that Ms Guile's note of the meeting of 3 September 2008 had not been prepared on the date she claimed, thereby suggesting she had lied about when she had compiled the note or had even fabricated it to support her account of her discussion with him. The appellant stated that he had made objections on this basis at the Tribunal hearing but that "regardless of what [he] was putting across on the day … the [Tribunal] had already concluded that they had to prefer her evidence". In fact, he had made no such objections. The solicitor advocate acting on his behalf at the Tribunal hearing asked Ms Guile in cross-examination when she had made the note. Her response was that she had done so immediately after her discussion with the appellant on 3 September 2008. That evidence was not challenged. In particular, it was not suggested to Ms Guile that she was not telling the truth. That being the case, we consider that it was wholly improper for the appellant to make such a serious and wholly unfounded allegation against Ms Guile before this Court and highly regrettable that the allegation was not expressly repudiated by Mr Gill in his oral submissions to us.

76. The Tribunal's finding was based on its assessment of the credibility of the evidence given by the two witnesses to the discussion on 3 September 2008, namely Ms Guile and the appellant. The Tribunal accepted the evidence of Ms Guile and rejected that of the appellant. The assessment of the witnesses was a matter for the Tribunal and it was fully entitled to reach the conclusion it did. There are no grounds for impugning the Tribunal's decision.

77. We therefore dismiss the appeal on this Ground also.