Caytons
Changing Perceptions

Costs in the Solicitors Disciplinary Tribunal: Guidance from the Divisional Court

INTRODUCTION

We previously reported on the SRA's unsuccessful prosecution of Amie Tsang. It might be recalled that Ms Tsang acted as Buyers' conveyancing solicitor in certain failed buyer-funded development projects. The Solicitors Disciplinary Tribunal dismissed the allegation against her as bad in law. It also concluded that the circumstances of the case justified a departure from the presumption following *Law Society v Baxendale-Walker* [2007] EWCA Civ 233 that adverse costs will not be awarded against the SRA.

The SRA appealed against the award of costs alone. Ms Tsang retained us to act for her. The Administrative Court dismissed the appeal. This is now the leading case on the application of *Baxendale-Walker.*

This note reviews the decision.

A: THE SDT PROCEEDINGS

The SRA commenced a prosecution of Ms Tsang on 5 December 2022. This followed a leisurely investigation beginning in 2017 and the related civil proceedings in *Various NPPM Purchasers v 174 Law v Key Manchester* [2022] EWHC 4 (Ch) in which we also acted and have written about previously. In his judgment in that action, HHJ Hodge KC (sitting as a High Court Judge) found Ms Tsang to be "*a competent, thoughtful, open, careful and honest solicitor".*

In line with the standard procedure, the Solicitors Disciplinary Tribunal certified the SRA's allegation as showing a case to answer. The matter came on for hearing before the Tribunal on 10 and 11 July 2023. Our earlier note looked in depth at the background facts, the arguments ventilated and the Tribunal's judgment. A brief recap will suffice.

The SRA alleged that Ms Tsang had given inadequate advice to buyer clients about the risks inherent in buyer-funded property development projects. It maintained that she owed an overarching duty to her clients collectively which was separate and distinct from duties owed under individual retainers. This duty was said to arise because she acted for a significant number of individuals who collectively paid a substantial sum into her client account. The tribunal dismissed this allegation as fundamentally flawed as a matter of law. It accepted submissions made on behalf of Ms Tsang that the true source of a solicitor's duty to give advice was the retainer. It was satisfied that she had discharged her duty.

It awarded her costs in full, subject only to the deduction of a refresher free to reflect the hearing going short. In doing so, the Tribunal commented that:

> *Whether or not this case could properly be characterised as having been a shambles from start to finish, it was questionable, whether it had been properly brought, given the body of caselaw to which the*

Tribunal's attention had been drawn by [Leading Counsel for Ms Tsang], *regarding a solicitor not being under a duty to step outside the bounds of their retainer and/or expertise.*

The language of a case being 'properly brought' or 'a shambles from start to finish' is taken from *Baxendale-Walker*, which we will look at in more detail in the next section. The Tribunal concluded that an essential mistake of law on the SRA's part undermined the presumption that the case was properly brought. It took account of the inadequacy of the evidence adduced in support of the prosecution. The substantial delays in progressing the matter were, it concluded, an aggravating factor. It indicated that this delay added to the anxiety and stress which Ms Tsang would have suffered, and to the damage to her reputation and practice.

B: THE LAW

Rule 43 of the Solicitors (Disciplinary Proceedings) Rules 2019 confers a wide but not unfettered discretion on the Tribunal to make an award of costs.

In *Baxendale-Walker v Law Society* [2007] EWCA Civ 233, the Court of Appeal confirmed that the rebuttable presumption in civil proceedings that costs will follow the event does not apply in the Tribunal. Sir Igor Judge P (with whom Laws and Scott Baker LJJ agreed) cited with approval a passage from the judgment of Moses LJ in the Divisional Court that (emphasis added):

> *Absent dishonesty or a lack of good faith, a costs order should not be made against such a regulator* ***unless there is good reason to do so****. That reason* ***must be more*** *than that the other party had succeeded. In considering an award of costs against a public regulator the court must consider on the one hand the financial prejudice to the particular complainant, weighed against the need to encourage public bodies to exercise their public function of making* ***reasonable and sound decisions*** *without fear of exposure to undue financial prejudice, if the decision is successfully challenged.*

He added (emphasis added) that:

> *Unless the complaint is improperly brought,* ***or, for example****, proceeds as it did in* [Gorlov v ICAEW *[2001] EWHC Admin 220*], *as a `shambles from start to finish', when the Law Society is discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs follow the event. The `event' is simply one factor for consideration. It is not a starting point. There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow. One crucial feature which should inform the tribunal's costs decision is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. For the Law Society[1] to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage. Accordingly, Moses LJ's approach to this issue did not go further than the principles described in this judgment.*

Baxendale-Walker was affirmed by the Supreme Court in *CMA v Flynn Pharma* [2022] UKSC 14.

It is well established that an appellate court should be slow to interfere with a finding of fact or an exercise of a discretion. In *GMC v Bawa-Garba* [2018] EWCA Civ 1879, the Court of Appeal added that:

> *That general caution applies with particular force in the case of a specialist adjudicative body, such as the Tribunal in the present case, which (depending on the matter in issue) usually has greater experience in the field in which it operates than the courts... An appeal court should only interfere with such an evaluative decision if (1) there was an error of principle in carrying out the evaluation, or (2) for any other reason, the evaluation was wrong, that is to say it was an evaluative decision which fell outside the bounds of what the adjudicative body could properly and reasonably decide.*

[1] Then responsible for the regulation of solicitors

C: THE APPEAL

The SRA appealed on four grounds:

Ground 1: The decision was wrong and perverse

The SRA contended that that no reasonable Tribunal in the proper exercise of its discretion could have reached the decision to award costs. This, it said, was because the prosecution was advanced reasonably, properly and in good faith. It maintained that there was no reasonable basis to find otherwise. It argued that the Tribunal only went as far as to say that it was "*questionable*" whether the case had been properly brought and did not reach a conclusion that it was not. It said that, while the Tribunal found that the prosecution had been based on an error of law, it did not identify what this error. In any event, it submitted, an error of law would not justify an award of costs. It sought to characterise this as a retreat to costs following the event.

Ground 2: The Tribunal took account of irrelevant factors

It was the SRA's case that the Tribunal should not have placed weight on any stress, reputational damage or harm to Ms Tsang's practice arising from the proceedings. It maintained that none of this had any relevance. It contended that delay could only be relevant insofar as it led to increased costs. It submitted that an absence of compelling evidence did not support a conclusion that the proceedings were improperly brought.

Ground 3: The Tribunal failed to take account of relevant factors

Conversely, the SRA maintained that the Tribunal had failed to attach weight to factors which were relevant. These were said to be admissions made in pre-action correspondence, previous Tribunal decisions made on agreed outcomes with other solicitors involved in the same projects, what it sought to characterise as findings of negligence by HHJ Hodge KC and additional factors which it said called for more extensive advice.

Ground 4:

Finally, the SRA asserted that the Tribunal had made no proper assessment of costs. It advanced the case that, if the Tribunal considered that the prosecution had acted improperly, it was incumbent upon it to identify the date on which it became improper and apportion costs accordingly. Similarly, if delay were deemed a relevant factor, the Tribunal should have identified the costs attributable to that delay.

D: THE JUDGMENT

(i) Appellate restraint

Eyre J adopted a carefully nuanced approach to the requirement for an appellate court to exercise restraint. He held that the question of whether the Tribunal applied the right test was one of law with no scope for deferring to the Tribunal's greater expertise. The same went for the issue of whether factors identified by the Tribunal as justifying its award of costs were individually or cumulatively capable of amounting to a good reason within the meaning of *Baxendale-Walker*.

Conversely, questions as to whether factors which are in principle capable of being a good reason existed and justified the award on the facts were matters of evaluation. Determining the quantum of a costs award also involved an exercise of judgment in circumstances where the Tribunal had a wide discretion.

(ii) Good reason in principle

The Judge did not accept the narrow interpretation of *Baxendale-Walker* urged on him by the SRA. He read Sir Igor Judge P's reference to a complaint which *"is improperly brought, or, for example, proceeds… as a `shambles from start to finish,'"* as an indication of the sort of things which would properly lead a Tribunal to the conclusion that there was good reason to award costs. He held that, for other matters to amount to a good reason, they must be of comparable gravity.

With that established, the Judge had no difficulty in holding that the Tribunal applied the right test. This then led to whether the factors identified by the Tribunal were capable of amounting to good reasons.

The first was delay. The Judge rejected the SRA's analysis that delay could only be relevant if it resulted in increased costs. That was to elide the different question of the quantification of costs if an award is to be made with the relevant question of whether an award should be made in the first place.

Before the Tribunal, the SRA's Counsel made vague reference to the recurring illness of the investigator, but as the Judge found, he was unable to provide a satisfactory explanation for why "*steps which should have been taken within 3-4 weeks took 2-3 months*", Drawing on the reference in *Baxendale-Walker* to proceedings which were a shambles from start to finish, he observed that it was clear that procedural failings by the SRA were capable of being a good reason. Delay is a procedural failing. It follows, he held, that delay could in principle justify an award of costs. To cross the threshold, the delays would have to be outside the norm and to be the SRA's fault. Beyond that, it is a matter of degree whether they constitute a good reason in any given case.

It was common ground that a costs award could be made where proceedings were not properly brought. The SRA contended for a narrow interpretation of this. It submitted that it could not be right that an error of law could amount to a good reason. It maintained that this would leave the SRA liable for costs in every case which did not turn on disputed facts. That, it said, would be an unprincipled return to costs following the event.

The Judge rejected this analysis. He accepted that the mere fact that a Tribunal takes a different view on the law from the SRA will not necessarily be enough but said that it was a matter of degree. He indicated that much would turn on the nature and effect of the mistake. One could illustrate this point by stepping away from the regulatory sphere to consider a hypothetical contractual dispute. It would be one thing for the parties to differ on the true construction of a poorly worded clause, but quite another for the claimant to proceed in the erroneous belief that there is a twelve-year limitation period in which to bring a claim.

Where, as here, the proceedings were found to have been fundamentally flawed, the Judge was satisfied that this could amount to a good reason. He observed that the protection provided by Baxendale-Walker existed so that the SRA would not be discouraged from advancing the public interest. Proceedings which are misconceived in law, he held, cannot properly be described as advancing the public interest.

(iii) Good reason on the facts

In line with *Bawa-Garba*, the Judge took account of the specialism and experience of the Tribunal. He considered that its members were to be regarded as having greater experience than the Administrative Court of the time which it ordinarily takes for a prosecution to be brought on for hearing. He observed that the SRA's Counsel accepted that it had failed to progress matters as quickly as it should have done. This, moreover, was not a case in which there had merely been one or two periods of delay.

He held that the Tribunal was entitled to conclude that the delays were inordinate and that the stress and reputational harm inherent in misconduct proceedings were unnecessarily exacerbated. He accepted that the Tribunal erred in suggesting that the delay had led to the closure of Ms Tsang's firm but held that this in no way vitiated its decision. He found it clear on a fair reading of the judgment that this was a material but not determinative factor.

Turning to error of law, the Judge began with a reminder that there was no appeal against the dismissal of the allegation. It followed that he had to proceed on the basis that the Tribunal was right to dismiss it. He rejected what he characterised as attempts by the SRA to tone down the Tribunal's conclusions. The SRA sought to make capital out of the Tribunal's statements that it was *"questionable"* whether the prosecution was properly brought and that the SRA's mistake of law "*undermined*" the presumption against an award of costs.

The Tribunal's judgment, he said, had to be read "*realistically and as a whole*". This led him to the conclusion that the Tribunal found the SRA's case to have been fundamentally flawed as a matter of law and, at its

highest, on the cusp of having been properly brought. The reference to undermining, he observed, was ultimately a metaphor. He held that the meaning was clear in context. This was that the SRA was not entitled to rely on a presumption that the proceedings were properly brought. One might add that the argument is itself undermined once the origins of the image are recalled. Forces laying siege to a castle would undermine its walls to make them collapse and render the castle indefensible.

(v) Relevant and irrelevant factors

Just as the Tribunal had done, the Judge rejected the SRA's argument that certification of a case to answer provided a strong indication that the proceedings were properly brought. He observed that this would mean that the scope for a costs award being made would be very limited indeed. One could go further. It is hard to see how the argument can be reconciled with *Baxendale-Walker.* Sir Igor Judge plainly anticipated that costs would properly be awarded against the SRA where proceedings were improperly brought. This presupposes that the Tribunal had certified a case to answer.

Similarly, the Judge was satisfied that there was little force in the argument that weight should have been placed on agreed outcomes with other solicitors involved in the same projects. As he observed, submissions were made to the Tribunal as to why the agreed outcomes should be distinguished. It accepted those submissions and was plainly entitled to do so. There was no appeal against that aspect of its decision.

He dismissed as an improper attempt to go behind the substantive decision any arguments predicated on alleged failings in Ms Tsang's advice.

The Judge also rejected the contention that the Tribunal ought to have taken into account a limited admission made by Ms Tsang. This was far narrower than the allegation advanced in the Tribunal. It might be added that it also spoke to duties owed under individual retainers which it was the SRA's case were not in issue.

It was mischievous to suggest that HHJ Hodge KC had made findings of negligence against Ms Tsang. In fact, Judge Hodge dismissed the main action against the Seller's solicitors for alleged breach of stakeholder agreements. The contribution claim against Ms Tsang's firm fell with it. He then turned *obiter* to consider what the position would have been if he had found that the Seller's solicitor had wrongly paid away monies with Ms Tsang's knowledge and approval. It is hardly surprising that, on that counterfactual, he would have made a finding of breach of duty.

In any event, Eyre J observed that this again did not concern the wider alleged duty to advise about risks on which the regulatory prosecution was founded. He did not put it like that, but it was not lost on him that the SRA was "*approbating and reprobating or blowing hot and cold*[2]". In the Tribunal, it downplayed the judgment in the civil action on the basis that it was concerned with different circumstances. It called into question whether it had any relevance at all. By contrast, in the appeal, it suggested that it was of central importance. The Judge concluded that it was not open to the SRA to criticise the Tribunal for not attaching more weight to the civil judgment when its own Counsel repeatedly invited it to view this as irrelevant.

As to the weight said by the SRA to have been placed on a lack of compelling evidence, the Judge commented that "*the construction of an appeal point on that basis involves an artificial and overly detailed reading of the judgment*". He found that, when the Tribunal's judgment is "[r]*ead fairly and in context*," it becomes clear that what it was saying was that there was no compelling evidence of special circumstances which required Ms Tsang to give advice beyond the scope of her retainer.

(vi) Quantum

There was a sense of *l'espirit d'escalier* about the SRA's argument that the Tribunal should have ordered detailed assessment. This is an argument which it could have mounted in the Tribunal. It did not. In fact, what its then Counsel submitted was that "*even if the Tribunal is minded to make an adverse costs order, it does not need to be 100% of reasonable costs*". This accepts by necessary implication that it was open to the Tribunal without further enquiry to award costs in full, as it did.

---

[2] *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] 1 Ch 112, per Evershed MR

The Judge identified the proper starting point as the wide discretion given to the Tribunal on costs. He added that he should remain mindful of the expertise and experience of the Tribunal in relation to costs in SDT proceedings. He was satisfied that the Tribunal had sufficient material to be able to form a view on the reasonableness and proportionality of the costs claimed.

He held that there was no substance in the SRA's argument that the Tribunal should have identified a date on which the proceedings became improperly brought and confined its award to costs incurred after that date. He noted that the Tribunal proceedings did not turn on disputed evidence, nor on fresh evidence emerging partway through. All that happened, he observed, was that Ms Tsang's case was more robustly articulated. It followed that either the SRA's case was fundamentally flawed from the outset or it abandoned its original case and adopted an approach which was fundamentally flawed. He held that, once this was recognised, it was irrelevant whether or not the SRA had acted in good faith or genuinely believed it had a case against Ms Tsang.

He also concluded that the argument that the Tribunal should have identified the costs attributable to delay was based on misconceptions as to the relevance of delay. It was not, as its Counsel submitted, that the Tribunal purported to award costs as compensation for delay. Rather, delay went to whether there was good reason to award costs.

E: DISCUSSION

Baxendale-Walker was an unfortunate decision for respondents. The authors of *Flenley & Leech on the Law of Solicitors' Liabilities* cast doubt on whether the threat of an adverse costs order really did have the perceived chilling effect on the SRA. But either way, there is reason to believe that the decision has had a chilling effect on respondents. Even if they are confident of winning in the Tribunal, it would be prudent for them to assume that they will likely have to bear their own costs. Difficult though it will inevitably be for solicitors to admit to professional failings which they consider unfounded, the commercial incentive to agree an outcome is powerful,

This can be seen by reference to the other two solicitors whose agreed outcomes were relied on. One ended up paying a fine of £8,000 and costs of £7,500, the other a fine of £10,000 and costs of £15,000. This compares with the costs of over £80,000 incurred by Ms Tsang up to the end of the Tribunal proceedings.

That said, the prudent assumption is not the same thing as the inevitable outcome. *Baxendale-Walker* goes no further than establishing that there needs to be a good reason for awarding costs against the SRA beyond its having lost.

As the Tribunal indicated when deciding to make an adverse costs order, there is a balance between the public interest and the financial prejudice, and one might add fairness, to the Respondent. Moses LJ made clear in the Divisional Court in *Baxendale-Walker* that the public interest is in the SRA making reasonable and sound decisions without fear of being penalised financially. It is hard to see a principled reason why it should be insulated from an adverse costs award if the decision to prosecute is neither reasonable nor sound. This case confirms that it will not be.

It is not surprising that the court was unwilling to gloss over the words "*for example*" in Sir Igor Judge's judgment. In speaking of a case which "*is improperly brought, or, for example, proceeds…as a `shambles from start to finish,"* he plainly did not mean to say that costs could <u>only</u> be awarded if the case was improperly brought or proceeded as a shambles from start to finish. The language of 'a shambles from start to finish' was a reference back to the *Gorlov* case which he had considered earlier in his judgment. The Jude gave guidance that other factors justifying an award of costs would need to be of similar gravity. This will require an exercise in judgment.

The Court of Appeal in *Baxendale-Walker* left open what was meant by proceedings being improperly brought. In this action, the SRA sought to set the bar so high that it would have been all but insurmountable. That this was unsuccessful is to be welcomed. Where, as here, a prosecution is found to have been fundamentally misconceived as a matter of law, it would be strange if it had to be deemed properly brought for the purposes of costs. The reliance on certification of a case to answer was unpersuasive. Once it is

accepted that certification is no bar to the Tribunal finding the prosecution to be bad in law, it is hard to see why it should preclude it from concluding that the prosecution was improperly brought.

The significance of a mistake of law is clear at the polar extremes. Where, as here, the prosecution was fundamentally flawed as a matter of law, this can be a good reason for awarding adverse costs. Conversely, it would not be a good reason simply because the Tribunal went the other way on a point on which practitioners could legitimately differ. The position may be less clear cut between these extremes. It will, as the Judge held, be a matter of degree. This will again call for an exercise in judgment.

Similar considerations apply to procedural failings. The occasional minor hiccups and isolated period of delays which are routine in contested proceedings will not without more constitute good reason but might if compounded over time. More serious and inexcusable failings may well. It is now clear that inordinate delay can be a good reason.

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

caytonslaw.com

Richard Senior
Partner
E: senior@caytonslaw.com