

Decision on the application for a judicial review in circumstances where the applicant considers that he has not received justice in relation to a complaint he made about the Interested Party on 1 April 2016. The original complaint was made in accordance with the provisions in the Guernsey Bar (Bailiwick of Guernsey) Law, 2007.

[2022]GRC044

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between	JOHN FRANCIS MERRIEN	Plaintiff
	and	
	THE REGISTRAR OF LA CHAMBRE DE DISCIPLINE	Defendant
	and	
	ADVOCATE X	Interested Party

Date of hearing: 14th January 2022

Judgment handed down: 11th July 2022

Before: Richard James McMahon, Esq., Bailiff

The Plaintiff represented himself

Advocate for the Defendant: Advocate A Horsbrugh-Porter

The Interested Party did not appear and was not represented

Cases and materials referred to:

The Guernsey Bar (Bailiwick of Guernsey) Law, 2007
The Rules of Professional Conduct of the Guernsey Advocate
The Registrar of Law Chambre de Discipline v An Advocate 2018 GLR 510
A v Guernsey Bar [2020] GRC 007
The Royal Court Civil Rules, 2007
Practice Direction No. 3 of 2004
Barton v Wright Hassall LLP [2018] 1 WLR 1119
XABC v Guernsey Financial Services Commission (unreported, 17 November 2016)
Litchfield v Director of Environmental Health and Pollution Regulation 2014 GLR 145
Bell v Judge of the Royal Court and Guernsey Border Agency 2016 GLR 77
R (Coke-Wallis) v Institute of Chartered Accountants in England and Wales [2011] UKSC 1
Virgin Atlantic Airways Limited v Zodiac Seats UK Limited [2013] UKSC 46
The Solicitors (Disciplinary Proceedings) Rules 2019
Adesemowo v Solicitors Regulation Authority [2013] EWHC 2020 (Admin)
Ivey v Genting Casinos Ltd [2018] AC 391
Wingate v The Solicitors Regulation Authority [2018] 1 WLR 3969
Masood, Newport Financial Holdings Limited and Ali v Zahoor 2007-08 GLR Note 18
R (Rosen) v Solicitors Disciplinary Tribunal [2002] EWHC 1323 (Admin)

Procedural background

1. As I will explain in greater detail, these proceedings have been procedurally lengthy and rather complicated. The Plaintiff, John Merrien, seeks a judicial review in circumstances where he considers that he has not received justice in relation to a complaint he made about the Interested Party, to whom I will refer as “Advocate X”, on 1 April 2016. His original complaint was made in accordance with the provisions in the Guernsey Bar (Bailiwick of Guernsey) Law, 2007. (I have chosen to refer to Mr Merrien as “the Plaintiff”, rather than as the Applicant, because these proceedings were commenced by tabling a Cause from which the use of Plaintiff and Defendant are used, and so the Registrar of La Chambre de Discipline will also be similarly styled.)
2. Of the four complaints raised by the Plaintiff, after consideration by the President and the Bâtonnier, only two of them were referred to the Registrar by the Bâtonnier, as set out in the letter sent by the President to the Plaintiff dated 8 June 2016, and only one was progressed to the Chambre de Discipline. The Plaintiff is aggrieved that what was considered by the Registrar had changed from the complaint he made in his letter. It was dealt with as an allegation of misleading the Court, contrary to rule 74 of the Rules of Professional Conduct of the Guernsey Advocate (“the Rules”), whereas the Plaintiff had alleged that Advocate X was dishonest and so had deceived the Court, the more serious aspect covered in rule 74, and where aspects of rule 1 might also be engaged. The letter sent to him dated 8 June 2016 referred to this complaint as being one of misleading the court. In short, the Plaintiff wishes to have his original complaint investigated and dealt with by a Chambre de Discipline, even many years after the events in question.
3. Following investigation, the complaint of misleading the Court was referred by the Registrar at the time to a Chambre de Discipline. The Chambre convened for this purpose found the complaint not proven. The Registrar appealed and I dealt with that appeal in 2018. The judgment delivered (*The Registrar of Law Chambre de Discipline v An Advocate* 2018 GLR 510) sets out much of the relevant background of that process. The Registrar’s appeal was dismissed. The Plaintiff has since taken steps seeking to re-open the complaint he made about Advocate X.
4. These proceedings were commenced in 2020. Between the 2018 judgment and commencing these proceedings, the Plaintiff had attempted to clarify matters by contacting the Law Officers and had commenced judicial review proceedings against the Guernsey Bar, which were dismissed in February 2020 (*A v Guernsey Bar* [2020] GRC 007). Throughout, the Plaintiff has represented himself because he has no trust at all in any member of the Guernsey Bar.
5. The Plaintiff originally sought relief against the President of the Chambre de Discipline and applied pursuant to rule 90 of the Royal Court Civil Rules, 2007 for permission to sign the Summons convening her. He prepared a Cause dated 19 February 2020, the relief being for permission to proceed and (at para. 103) that “*the decision of the Respondent of 2 December 2019 be set aside and the decision of Mr Green be reinstated so that the complaint made by the Plaintiff can be properly heard in accordance with the provisions of the Guernsey Bar (Bailiwick of Guernsey) Law, 2007*”.
6. In support of this Cause, the Plaintiff swore an Affidavit before me on 15 June 2020. I agreed to take his oath on the basis that he asserted that he was not prepared to attend before an

Advocate, including those who are Notaries Public, to do so. The Cause was then tabled on 10 July 2020. The Interested Party sought an order that the proceedings be heard in private. Because of the unredacted materials on which the Plaintiff was relying, I agreed to the case proceeding in private for the time being, but I expected that, once appropriate arrangements were made to ensure the privacy of those named, the hearing would then take place in public. I further directed that leave and the substantive case be dealt with at a “rolled-up” hearing.

7. A hearing involving the President took place on 11 November 2020. Advocate Davidson appeared on her behalf. During the discussions between the Court and the parties at that hearing, it became apparent that what aggrieves the Plaintiff is that his original complaint was re-cast by the Registrar. In other words, the wrong complaint was referred to the Chambre and its decision resulted from not being required to consider the Plaintiff’s complaint that Advocate X had deceived the Court and/or contravened rule 1(f) or (g) of the Rules. As a result, a period of four months, as suggested by him, was given to the Plaintiff so that he could consider applying to join the Registrar in place of the President. (In passing, it was acknowledged that the decision taken by the President to re-consider whether the Plaintiff’s original complaint was out of time, and which formed the basis of the Plaintiff’s claim at that time, was something that she was unable to re-open. As such, it was conceded that the decision being challenged by the Plaintiff was a nullity. The previous President’s decision bound her as much as it did the Plaintiff and the Interested Party, save to the extent that it might have been open to the Interested Party at the time to have challenged that decision.)
8. Accordingly, on 19 March 2021, both the Registrar and the Deputy Bâtonnier also appeared. (The Bâtonnier himself was conflicted, having represented the former Registrar at the 2018 appeal.) Neither opposed being joined to the proceedings, although the Deputy Bâtonnier’s need to be joined remained an open question, and the Plaintiff was given a further nine weeks, again as requested by him, to seek agreement with the various office-holders as to how to proceed or to enable him to apply for leave to amend his Cause to reflect his new approach.
9. On 21 May 2021, the Plaintiff was granted leave to discontinue against the President, with the costs reserved, and he was given a further four weeks in which to file an Amended Cause seeking relief against the Registrar only. Because the Plaintiff wished the proceedings to be heard in open court, the Interested Party was given an opportunity to make any representations about lifting the privacy order and, when no such representations were forthcoming, the proceedings have since been held in public, although I will continue to preserve the identities of those involved so far as it is appropriate to do so.
10. A Consent Order fixing a timetable for the materials relevant to the Amended Cause was made on 2 July 2021, and modified slightly on 1 October 2021. The hearing took place on 14 January 2022. The Interested Party did not attend and had not participated in these proceedings other than at the outset. At the end of the hearing, I reserved judgment. Once again, it has taken me longer than I would have liked to be able to prepare this judgment, for which I apologise to the parties.
11. In this judgment, I set out my reasons for refusing to grant the Plaintiff leave to proceed with his claim to set aside the former Registrar’s decision and, if I am wrong to have reached that conclusion, why I would still have declined the substantive relief being sought on the basis that the Court’s discretion should not be exercised if to do so would not serve any purpose.

Litigants in person

12. Before I deal with the issues raised by the Plaintiff’s Amended Cause, I think it appropriate to make some general comments about his decision to represent himself. The Plaintiff has always been unfailingly courteous in his submissions to the Court, but there have inevitably been limitations in his appreciation of the finer points of procedure. Access to justice is an important

concept for those who have business before this Court. There is, of course, no obligation on any potential litigant to utilise the services of an Advocate, but anyone who chooses not to do so must take steps to become familiar with the rules of procedure to follow. The principal rules are found in the 2007 Rules and they are publicly available on the Guernsey legal resources website, as are relevant Practice Directions. There is a specific Practice Direction dealing with judicial review proceedings (No. 3 of 2004). There are also reports of previous cases, reference to which may help anyone acting as a litigant in person to understand what needs to be done and when. The consequences of non-compliance are also identifiable from previous decisions.

13. The Court will give a degree of latitude to those who represent themselves. However, there have been many statements in other jurisdictions, which are equally applicable here, that this does not equate to applying differing standards when rules need to be complied with. I will refer to just one example of where these principles have been set out, which is para. 18 in Lord Sumption's judgment in Barton v Wright Hassall LLP [2018] 1 WLR 1119:

“Turning to the reasons for Mr Barton’s failure to serve in accordance with the rules, I start with Mr Barton’s status as a litigant in person. In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR rule 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him: R (Hysaj) v Secretary of State for the Home Department [2015] 1 WLR 2472, para 44 (Moore-Bick LJ); Nata Lee Ltd v Abid [2014] EWCA Civ 1652. At best, it may affect the issue “at the margin”, as Briggs LJ observed (para 53) in the latter case, which I take to mean that it may increase the weight to be given to some other, more directly relevant factor. It is fair to say that in applications for relief from sanctions, this is mainly because of what I have called the disciplinary factor, which is less significant in the case of applications to validate defective service of a claim form. There are, however, good reasons for applying the same policy to applications under CPR rule 6.15(2) simply as a matter of basic fairness. The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter’s legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take.”

14. In the context of the present case, the false steps that the Plaintiff has taken, when time has been running against him, cannot, in my judgment, simply be overlooked because he is a litigant in person. To the extent that something is marginal, then there might be scope to afford a litigant in person that degree of latitude to which I have referred but, if the time taken to get something done accurately is inordinate, then this will inevitably have an impact on whether the Court can permit it to pass uncritically. Fairness has to be accorded to everyone before the Court, whether they are represented or not and there would otherwise be a risk of a self-represented party being perceived to get away with conducting proceedings that would not be acceptable were an

Advocate acting, which in turn has an adverse impact on other parties to those proceedings. Accordingly, where something has happened before commencing proceedings that would, or should, not have occurred if the party were represented, this is a type of procedural matter that has to be considered in the same way as if the party had instructed an Advocate.

Plaintiff's case

15. Although it is not in a form that would be drafted by an Advocate, the Amended Cause on which the Plaintiff relies is found in the application dated 9 April 2021 by which he substituted the whole of his original Cause with a new document relating to the Registrar, with the relief being (para. 7.3) that the former Registrar's "*decision to re-cast the complaint into the lesser matter of misleading the court rather than the true complaint of dishonesty, lack of integrity and exposure to consequential loss should also be set aside since it was ultra vires to the powers of the Registrar and interferes with the complainant's inalienable right to make a complaint of the complainant's choosing.*"
16. Although the Amended Cause also refers to the involvement of the President and the Bâtonnier in 2019, there is no need to address those aspects further because the claim being made relates solely to the action of the former Registrar. As the Plaintiff has been told, the proceedings before the Chambre take place in private, as also explained in the 2018 judgment. Accordingly, at para. 28 of the Amended Cause, he explains:

"Concerning timings, the Applicant never knew that a decision had been taken to re-cast the complaint and remove the aspect of dishonesty. Following receipt of the Chambre findings on 15 March 2018, the Applicant sought to understand how the process had failed but received no further responses from the Registrar or from [the Advocate] who chaired the Chambre. Accordingly, this was a decision taken in secret which was not communicated and therefore there is no clear set date from which the chronology can be taken to run."

The Amended Cause then quotes from para. 95 of the 2018 judgment and contends that the matters about which he complained alleging dishonesty had not been investigated by the former Registrar, whose conduct is alleged to be "*entirely inadequate to protect the public from the wilful misconduct of Advocates and could not be said to be commensurate with an effective complaints procedure*" (para. 31). He contends that "*anything done (or not done) by the Registrar subsequent to his discision [sic] to re-cast the complaint without the knowledge and agreement of the Complainant to vary his complaint was ultra vires to the powers of the Registrar and should be set aside*" (para. 34). The Plaintiff seeks relief that will result in the Registrar being required to commence an investigation into the terms of his original complaint with a view to considering whether to refer that complaint to a Chambre de Discipline.

17. In his Affidavit evidence, the Plaintiff recites the chronology of events in 2019 following his correspondence with the Law Officers of the Crown. There were exchanges with the Bâtonnier at that time. That correspondence continued into early 2020. However, because the actions of the President, who was assisted by the Bâtonnier, consistent with the dual functions under the 2007 Law, are no longer in issue, I do not need to refer to any of this correspondence.
18. Instead, the relevant facts are as set out in the 2018 judgment. The Plaintiff wrote a letter dated 1 April 2016 to the then Bâtonnier containing four complaints. The President checked whether there was exceptional circumstances for the complaint that was subsequently referred to the President not being brought within the six-month time limit found in section 21(2) of the 2007 Law and explained in due course that he was satisfied it had been appropriate for the Plaintiff to wait until matters were concluded before bringing his complaint. The 2018 judgment sets out the detail of the correspondence passing at that time and the investigation undertaken by the

Registrar. I do not need to repeat what has been set out previously. Indeed, the chronology explained therein is not disputed.

19. In his Skeleton Argument dated 15 November 2021 the Plaintiff draws attention to the Registrar's duties under the 2007 Law and argues that there is no power for the Registrar to modify a complaint referred to him. He describes his original complaint as the "true complaint". The Plaintiff acknowledges (at para. 13) that "*it was only on 20 September 2018 and as a result of the Complainant's own enquiries [that] he discover[ed] the untrue oath and affidavit sworn by Advocate X which directly contracted Advocate X's knowledge of the true position as ... set out in the Directions' hearing of 9th July 2015 and within other correspondences both immediately before and after he elected to create and utter his dishonesties.*" The Plaintiff submits that the Registrar failed to investigate what had been set out by the Plaintiff in this complaint. The Plaintiff also contends (at para. 43) that it was "*wholly irrational and procedurally improper for the Registrar to have re-cast the complaint, particularly in view of the fact that he failed to communicate his intention in this regard to the Complainant.*" He suggests that the Guernsey Bar is unable to protect the public and to maintain an effective complaints process.
20. During the course of his oral submissions, the Plaintiff concentrated on unlawfulness and irrationality. He referred to matters being dealt with secretly. He suggested that the former Registrar had been too eager to dismiss the dishonesty complaint. Further, in support of the relief he sought, he submitted that the Interested Party should have the right to clear his name. Consistent with what might be described as his campaign to secure more effective regulation of the Bar, the Plaintiff suggested that it is not in the public interest for the Bar to self-regulate because that means that there is no effective regulator. He accepted that rule 74 had now fallen away, but that his complaint that rule 1(f) and (g) had been broken now needed to be investigated because the Interested Party had been acting dishonestly. In broad terms, he considered that there needs to be a higher standard of integrity amongst Advocates.

Defendant's case

21. The evidence on which the Defendant relies is his Affidavit sworn on 15 September 2021. He explained that he had reviewed the file and also held a meeting with the former Registrar, who at the time was suffering from ill-health. The matters discussed are set out by the Defendant in his Affidavit, including that the referral to the former Registrar related to an allegation that the Interested Party had misled the Court, although the former Registrar had had sight of the Plaintiff's original complaint letter and that he had progressed that matter after the investigation he undertook before referring it to the Chambre. At para. 15.6, the Affidavit states:

"Whilst the Former Registrar had considered broadening the complaint referred to La Chambre to include alleged breaches of Rules 1(f) and (g) of the Professional Conduct Rules, he considered that a complaint cast in that manner would have amounted to one of dishonesty or deceit against Advocate X and the Former Registrar had concluded that there was not a prima facie case for this."

The Defendant also refers to the correspondence passing between the former Registrar and the Plaintiff in 2016, during the course of which reference was made to the complaint under consideration being of misleading the court.

22. Advocate Horsburgh-Porter appears for the Defendant and his Skeleton Argument dated 15 October 2021 deals with the substance of the Plaintiff's claim. It does so by recognising that there is little to no authority domestically about challenging the decisions of the Registrar. Accordingly, by analogy with the approach taken in England and Wales about the regulation of solicitors, he refers to a number of authorities from which it is apparent that those investigating complaints are afforded a degree of deference and that the applicable test when a challenge to any such decision is made is one of rationality. The former Registrar's decision, after

investigation, that there was a *prima facie* case for alleging that the Interested Party had misled the Court cannot be said to be unreasonable and so the Plaintiff's challenge should be dismissed.

23. In his oral submissions, Advocate Horsbrugh-Porter argued that the Registrar enjoys wide powers, enabling him to exercise his discretion to progress a complaint which had the best chance to get a result, by which I understood him to mean securing a positive outcome. Because there had been no evidence that the Interested Party had misled the Court, it followed that there could be no deceit. He also raised the question as to whether the relief sought by the Plaintiff should be refused because a second process would inevitably amount to an abuse of process against the Interested Party. He invited the Court to refuse leave to the Plaintiff or, if granted, to dismiss the action.

Promptness

24. Although it has not featured particularly strongly in the submissions of Advocate Horsbrugh-Porter, I take the view that the question of whether leave to proceed should be granted has to be considered in light of the terms of Practice Direction No. 3 of 2004 and the cases that Advocate Davidson was going to rely upon On behalf of the President. It might be said that the decision to allow the Plaintiff to proceed against the Registrar rather than the President demonstrates that no issue was to be taken in respect of the timing of these proceedings, but the delay in commencing them must, in my judgment, be a relevant factor, if only to ensure that parties in other cases do not think that the absence of objection means that a claim is bound to be allowed to progress to a substantive decision.

25. Although there are no express rules of this Court relating to how to commence proceedings by way of judicial review, the Practice Direction sets out how to fit proceedings into the more general Civil Rules. Paragraph 6 of that Practice Direction is well-known and states:

“Claimants are reminded that they are under a duty to make full and frank disclosure of all material facts, that proceedings must be instituted promptly, and they must satisfy the Court that they have sufficient interest in the subject matter complained of.”

Although it is not explicitly stated, these are the considerations that were often relevant for whether or not leave would be granted. Indeed, in the context of how to deal with a judicial review claim, I take the view that it is open to the Court to determine leave on the papers, subject always to the ability of an applicant to seek to renew that request for leave at an oral hearing. An example of this happening is *XABC v Guernsey Financial Services Commission* (unreported, 17 November 2016).

26. The leading case on promptness is *Litchfield v Director of Environmental Health and Pollution Regulation* 2014 GLR 145. In the circumstances, I will quote a number of paragraphs because they set out the types of considerations to which this Court must have regard:

“50. Thus in England, the combined effect of the 1981 Act and the CPR (formerly the RSC), is that the criteria to be considered may include: promptness; undue delay; whether there are good reasons for any delay; hardship, prejudice or detriment to any third party; and the requirements of good administration.

51. In Guernsey, there are no statutory criteria and the only guidance that has been laid down is in the Practice Direction: “proceedings must be instituted promptly”. Judge Finch stated in his judgment, at para16: “In considering the overall question of delay it is necessary to have regard to the particular circumstances of this case”, a comment with which I respectfully agree.

52. Judicial Review is still a developing area of Guernsey law. Some might think it is developing slowly but that is because, as I have indicated, there have only been a small number of applications that have been brought. Neither the

legislature nor the rule makers of the Royal Court have sought to lay down any limitations or to specify any criteria that must be considered.

53. *The range of circumstances in which judicial review might be sought are so infinitely varied and the Guernsey case law to date has been so limited that it does not seem to me to be appropriate for this court to be laying down any general criteria. Each case must be reviewed in the light of its own particular circumstances and all the circumstances of the case must be considered. The approach of the Judge in the present case was correct: he looked to English case law for guidance but he remained mindful that those cases must be read in the context of the English statute and rules.*
54. *It would not be for this court to specify a time period within which an application must be brought (unless good reason can be shown for any delay beyond such period), whether three months or otherwise. I endorse the provisions of the Practice Direction that an application must be brought promptly. In my view, a period of three months may be considered an appropriate guide as to what is meant by “promptly”. However, there may be cases which are so urgent that even a delay of three months may be too long.*
55. *Where there has been delay, the court will have to examine the reasons for the delay and the burden will be on the applicant to show that it can be explained for good reasons. The prejudice or detriment to any third party if the relief is granted will be a factor to consider although the extent of prejudice or detriment may not be known at the leave stage and may have to be considered as part of the substantive decision.”*

27. The Court of Appeal again dealt with the issue in *Bell v Judge of the Royal Court and Guernsey Border Agency* 2016 GLR 77. I will again quote a number of paragraphs to explain how the principles have developed:

- “29. *This Court reaffirms the importance, reflected in Practice Direction No. 3 of 2004, of ensuring that judicial review proceedings are brought promptly. The strong public interest in the certainty of administrative decision-making explains why judicial review proceedings need to be brought within a timeframe considerably shorter than the limitation periods applicable to most civil actions.*
30. *As this Court said in Litchfield, the requirements of promptness will inevitably vary according to the particular circumstances of a case. These include the steps that may need to be taken in order to assemble a claim and accompanying evidence, the effects of prolonged uncertainty as to the finality of an administrative decision, specific prejudice that may be caused to individuals or groups, and the likelihood that the progress of a criminal investigation will be slowed. All these factors speak in favour of a flexible approach.*
31. *But to leave prospective applicants with no more precise guidance than the single word “promptly” would be unsatisfactory, for the reasons advanced by Lord Steyn in Burkett. Citizens need to know where they stand. This requires that deadlines for challenge be not only short but reasonably predictable. If it is to be a useful guide, the requirement of promptness must be accompanied by rules of thumb that assist applicants and respondents alike in predicting how the courts will interpret it.*
32. *It is such a rule of thumb that this Court sought to provide in the Litchfield case. We resist the label of “rebuttable presumption” that the Appellants*

sought to attach to that formulation, as having an excessively mechanistic feel. Prospective applicants should not consider themselves entitled save only in cases of urgency to the full three-month period. Where relatively little preparatory work is needed and where delay may have serious consequences for individuals or for the public interest, it may be incumbent on prospective applicants to proceed much more quickly, even in cases that might not be described as urgent. Challenges to search warrants and production orders are categories of case in which the courts in this jurisdiction, even in the absence of specific individual prejudice, are likely to expect proceedings to be prepared and lodged well within the three-month period referred to in Litchfield. We note that the Royal Court in Groucutt came to a similar conclusion in relation to the challenge to planning permission in that case.

33. *We are conscious, however, that a literal reading of Litchfield might have led persons in the position of the appellants to assume that in the absence of genuine urgency, they had acted promptly by commencing proceedings little more than half way into the three-month period referred to in that case. In the circumstances, and even allowing for the fact that the decision of the Bailiff was a discretionary one with which we would ordinarily be reluctant to interfere, we do not consider that it would be fair to endorse the conclusion that permission to apply for judicial review should be refused in this case for lack of promptness.”*
28. Given these two decisions of the Court of Appeal from some years ago noting that there is no absolute time-limit for bringing judicial review proceedings, but firmly endorsing that a three-month period should be regarded as something to aim for, adding that if there is good reason to proceed more quickly, then that will dictate when proceedings should be commenced, means that the legal position was sufficiently clear before the Plaintiff has gone down the route he has taken. Each case has to be decided in the light of its particular facts, but the time between the Plaintiff realising that he wanted to challenge the decision-making process that had followed the making of his complaint and commencing proceedings did not, in my judgment, meet the requirements of promptness. Accordingly, I will refuse him leave to pursue his application to set aside the decision of the Registrar to refer a complaint of misleading the court to the Chambre.
29. I realise that I could be criticised for having let the matter progress as far as it has. In para. 32 in Litchfield, there is the comment that “*It is highly unlikely that a Bailiff would grant leave to issue a summons seeking permission to apply for judicial review if the case was so defective that after service on the respondent it could be dismissed on the papers ex parte at the leave stage.*” When I granted permission to the Plaintiff pursuant to rule 90 of the 2007 Rules to proceed against the President, I did so because I felt he should have the opportunity to put a case forward against what had happened because otherwise he would always have the sense that he had not been permitted to be heard at all. He has now had his hearing and, although my principal decision is that it fails because he did not act promptly, I will address the substance of the arguments, especially as that is how Advocate Horsbrugh-Porter has dealt with the action, to explain why, even if leave had been granted, the relief sought would still have been dismissed.
30. One of the reasons for including the short section earlier in this judgment about litigants in person is to emphasise that unrepresented parties are still expected to adhere to the procedural steps that an Advocate would be aware of and would need to follow. In terms of when things ought to have been done, I do accept that the Plaintiff may not have realised fully the implications flowing from the correspondence he was receiving in 2016. That said, having seen what was sent to him in the 2018 appeal and again in this matter, it does strike me that it should have been clear to the Plaintiff that the complaint being referred to the Chambre was one of misleading the Court. The letters sent to him say as much and I take the view that he could and

should have checked the language used in the Rules to ensure that his complaint was being progressed as he thought it should be. However, allowing for any misunderstanding on his part, he was able to identify that the complaint he made was the subject of the Registrar's unsuccessful appeal in 2018. Before that, in accordance with section 27(3)(a) of the 2007 Law, he will have received a copy of the Chambre's reasoned decision, which also made clear what it had been considering and gave its reasons for dismissing the complaint that had been referred to it. I cannot ignore this chronology. I find that the Plaintiff knew that his complaint had been addressed differently from how he had advanced it at an early stage, following which he did not take any steps. Even if some delay in setting out what he wanted to achieve was warranted, his decision to correspond first with the Law Officers and thereafter with the President and Bâtonnier inevitably meant that he was already considerably past the three-month period before he even contemplated bringing any proceedings.

31. Had the Plaintiff worked out properly what he needed to do to try to get the relief he now seeks within a reasonable period following that decision, or later that judgment, coming to his attention, it is likely that I would not have felt compelled now to find that he had failed to act promptly. However, the time that he pursued the wrong parties has compounded his position rather than improved it. As a litigant in person, I do not think he analysed properly what the root of his concerns is. That is clear from his abortive attempt to engage with the President and Bâtonnier. He did not need to do so because he already had a valid referral of the complaint about which he is aggrieved to the Registrar. It was what happened at that stage that he should have been tackling at a much earlier time than he eventually did. Even if I take a generous view that the proceedings were commenced in early 2020, even though they were not properly commenced against the Registrar for almost another year, he had already gone way beyond the guideline period of three-months.
32. Because I find the delay in commencing the proceedings to be inordinate, rather than marginal, I necessarily have to consider what reasons have been advanced by the Plaintiff for this delay. Aside from the fact that the Plaintiff is not represented and has no faith in any Advocate to advise him, I am satisfied that the delay arises out of his inability to understand what was required. I am not persuaded that that is a good reason for this delay. If I accepted that it were, it would potentially be a charter to all litigants in person to claim ignorance of the law as a reason why greater latitude should be given. I think that is contrary to the public interest in the fair administration of justice.
33. I also have to consider the prejudice to third parties who are affected. This particularly relates to the Interested Party. There was initially finality for the Interested Party once the Chambre dismissed the complaint with which it dealt. Because of the Registrar's appeal, the prospect of that complaint being re-opened arose, but the dismissal of the appeal produced finality again. The Interested Party was directly a party to the appeal and was represented. As these proceedings began and have evolved with the change of parties, the Interested Party has not participated beyond the early stages, but would have been able to do so. Despite making no representations about the relief being sought, I think it is reasonable to infer that the prospect of having a further investigation of events that took place in the autumn of 2015 would not have been welcomed by the Interested Party.
34. I do not have to decide whether, as submitted by Advocate Horsbrugh-Porter, the Interested Party might be able to argue that any new referral of the Plaintiff's complaint to the Chambre would amount to an abuse of process, or otherwise could give rise to an argument that the previous determination makes this *res judicata* (in accordance with the cases to which Advocate Davidson was likely to refer, such as *R (Coke-Wallis) v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1 or *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46, especially paragraphs 17 to 26), but I do recognise that there is force in that submission and that a decision to grant leave would impact not only on the Interested Party, but also others. Weighing those considerations in the balance, for the reasons I have

given, I find that the prejudice, especially to the Interested Party, resulting from the Plaintiff's delay is an additional reason for refusing leave.

35. Although I am dismissing the application for leave to proceed for these reasons, I will still set out briefly my consideration of the substance of the action.

Merits

36. In order to consider the merits of the Plaintiff's claim, because he relies on unlawfulness, it is necessary to set out the functions of the Registrar under the 2007 Law.

37. Section 22 provides:

“(1) Upon receipt of a complaint referred to him by the Bâtonnier, the Registrar shall make such investigations in respect of that complaint as he thinks fit.

(2) Without prejudice to the generality of subsection (1), for the purpose of investigating a complaint, the Registrar may –

- (a) take statements from any witness as to fact (including the complainant, the respondent and any third party),*
- (b) gather any document or other evidence,*
- (c) instruct any expert witness, and*
- (d) request any legal advice,*

as he considers may bear upon the complaint.

(3) Without prejudice to the generality of subsection (2)(b), the Registrar may –

- (a) require the respondent –*
 - (i) to produce or deliver, or*
 - (ii) to cause to be produced or delivered*

to him any relevant documents in the custody or control of the respondent or his firm or institution, and

- (b) retain possession of those documents until his investigation and any disciplinary proceedings that arise from the investigation are completed.*

(4) Subsection (3) does not limit a right to decline to produce or deliver a document to the Registrar on the ground of –

- (a) legal professional privilege, or*
- (b) any rule against self-incrimination.*

(5) The Registrar may only use a document or information obtained by him under this section –

- (a) to investigate the complaint, or*

- (b) *to assist with any investigation for the purposes of proceedings in any jurisdiction which are –*
 - (i) *of a disciplinary, regulatory or criminal nature, and*
 - (ii) *related to the complaint.*

- (6) *If after the completion of his investigations the Registrar decides that a prima facie case is –*
 - (a) *disclosed, he shall –*
 - (i) *refer the complaint to the Chambre,*
 - (ii) *inform the complainant, the respondent, the President and Her Majesty’s Procureur of that referral, and*
 - (iii) *send a statement of facts to the respondent, the President and the Chambre, and*
 - (b) *not disclosed, he shall –*
 - (i) *refuse to refer the complaint to the Chambre, and*
 - (ii) *inform the complainant and the respondent of the fact of and reasons for that refusal.*

- (7) *For the purposes of subsection (6), a statement of facts shall include –*
 - (a) *the name of the complainant,*
 - (b) *the specific allegations in reasonable particularity, and*
 - (c) *a summary of the evidence in support of the complaint.*

- (8) *For the avoidance of doubt, the Registrar is not precluded from exercising any of his powers under this section on the ground that he has already referred the complaint to the Chambre.*

- (9) *For the purposes of subsections (2) to (4), “the Registrar” includes a reference to a person appointed to assist him when acting with his permission.”*

38. These functions following receipt of a complaint referred to the Registrar need to be put into context. Section 20(2) sets out the responsibilities of the Registrar:

- “The Registrar shall be responsible for –*
- (a) *the collection and presentation of evidence in respect of a complaint made against a member of the Bar,*
 - (b) *the organisation of hearings of the Chambre, and*
 - (c) *the provision of advice and assistance to –*

- (i) *the President (except in relation to the exercise of his powers under sections 16 and 21), and*
- (ii) *the Chambre.”*

Within the context of section 21(1), a complaint is received against an Advocate and subsection (6) specifies that:

“For the purposes of subsection (1), “complaint” means a written complaint and where the complaint is not initially made in writing, the Bâtonnier may –

- (a) *require the complainant to state the complaint in writing, or*
 - (b) *cause it to be stated in writing on the complainant’s behalf,*
- as he thinks fit in all the circumstances.”*

The complaint made by the Plaintiff was set out in writing from the outset. The scheme of these sections, as I pointed out in the 2018 judgment, is that what is submitted by a complainant is the complaint that is then dealt with by the various office-holders. The statutory scheme does not, save where there is no written complaint and the Bâtonnier acts in accordance with section 21(6)(b), enable the complaint to be turned into something else.

39. It may well be that the binary nature of what the Registrar is required to do found in section 22(6) is not exactly what the legislature had intended, but that is, in my view, the way this legislation falls to be construed. Consistently, there is reference throughout these provisions to the Registrar referring “*the complaint*” to the Chambre (or not doing so), which in turn also covers the complaint that was referred to the Registrar. This consistent reference to “*the complaint*” is one of the reasons why I have determined that what needs to be investigated, and then considered, is the complaint that was made in the first place. If the complaint is referred to the Chambre pursuant to section 22(6)(a), then the Registrar’s statement of facts must include “*the specific allegations in reasonable particularity*”. That is the aspect where there might be some licence to the Registrar to set out what is alleged in his own words. That is not, however, in my view, the same as what the Plaintiff has referred to as “*re-casting*” his complaint when deciding whether the complaint falling to be investigated by the Registrar is one where a *prima facie* case is disclosed.
40. The Plaintiff also complains that what happened was done secretly. I do not find that this argument has any merit. Section 25(1) of the 2007 Law provides that “*the Chambre shall hear any complaint in private*”. The following subsection enables the Chambre to hear a complaint in public if the respondent, being the Advocate subject to the complaint, so requests and it is satisfied that it would be in the interests of justice to do so. This shows that the legislative regime is intended that complaints made are not made public. It is only if the Chambre is satisfied that the complaint is proved and that it constitutes professional misconduct that reference to it may be made in the Register of Advocates maintained by Her Majesty’s Greffier under section 14 of the 2007 Law. Where a complaint is found not to be proved, it is consistent with this framework that no one outside of those to whom the outcome is provided under section 27(3) becomes aware of the complaint because of the default privacy position. As such, any reference the Plaintiff makes in his submission relating to the secret way in which the office-holders and the Chambre dealt with his complaint is, in my view, misconceived.
41. In relation to this issue, Advocate Horsbrugh-Porter’s submissions seek to draw an analogy with the role undertaken at the investigation stage in respect of solicitors in England and Wales. Section 22(1) of the 2007 Law provides that the Registrar has discretion to determine the extent of his own investigation into a complaint referred (“*Upon receipt of a complaint referred to him by the Bâtonnier, the Registrar shall make such investigations in respect of that complaint as*

he thinks fit.”). Advocate Horsbrugh-Porter suggests that this function, being in mind the requirement for the Registrar to decide if there is a *prima facie* case under section 22(6), is comparable to the review as to whether there is a case to answer set out in rule 13 of the Solicitors (Disciplinary Proceedings) Rules 2019:

“(1) *An application made in accordance with rule 12 must initially be considered by a solicitor member (“the initial solicitor member”) for consideration of the question of whether there is a case to answer in respect of the allegations made in the application.*

(2) *If the initial solicitor member considers that there is a case to answer in respect of all the allegations made and is not of the opinion that the question is one of doubt or difficulty then the initial solicitor member must certify that there is a case to answer.*

(3) *If the initial solicitor member is minded not to certify that there is a case to answer in respect of all or some of the allegations made or is of the opinion that the question is one of doubt or difficulty, the question must be considered by a panel of three members of the Tribunal, two of whom must be solicitor members and one of whom must be a lay member. The initial solicitor member may be a member of the panel. If the panel considers that there is a case to answer in respect of any of the allegations made then it must certify that there is a case to answer in respect of those allegations.*

(4) *If the panel decides that there is no case to answer in respect of any of the allegations made, it may refuse or dismiss the application, or part of it, without requiring the respondent to answer the allegations and without hearing the applicant. The applicant must be provided with written reasons explaining the decision.*

(5) *If a panel or solicitor member certifies that a case to answer is established in respect of all or any of the allegations made, a clerk must serve a copy of each of the documents referred to in rule 12(3) or (4), as the case may be, on each respondent.”*

42. He further relies on what was said about the process in *Adesemowo v Solicitors Regulation Authority* [2013] EWHC 2020 (Admin). It is apparent from what is set out in that decision that there is a Code for Referral to the Tribunal, which contains two tests: the evidential test and the public interest test. (This strikes me as being broadly comparable to the Code applied when considering whether to prosecute someone before the criminal courts.) As regards the evidential test, this Code states:

“The SRA must be satisfied that there is enough evidence to provide a ‘realistic prospect’ that the regulated person will be found guilty of misconduct, taking into account what the regulated person’s case in response may be and how that is likely to affect the SRA’s case. A realistic prospect of a finding of misconduct is an objective test. It means that the SDT, properly directed in accordance with the law, is more likely than not to make a finding of misconduct against the regulated person.”

It was conceded that the evidential test had been satisfied, but it was suggested that there had been a misdirection in deciding to refer because of the public interest test. Laing J rejected that argument, finding that the SRA’s decision was not “*unreasonable or inappropriate*” (para. 51).

43. Before leaving this decision, I can also mention two further paragraphs because they point to the type of issue that might have arisen for the Interested Party had there been a decision to challenge what was happening:

- “56. At the hearing before the Tribunal, and in the appeal before me, the Second Appellant faced the difficulty that he was seeking to establish abuse of process by the SRA. The threshold for establishing abuse of process is high: see Attorney General’s Reference No 2 of 2001 [2004] 2 AC 72 where Lord Bingham said such cases would be exceptional. Also Warren & Ors v Attorney General of the Bailiwick of Jersey (Court of Appeal of Jersey) [2012] 1 AC 22 where a stay was refused notwithstanding grave prosecutorial misconduct. Cases relied upon by the Second Appellant, such as R v Derby Crown Court ex p Brooks [1985] 80 Cr App R 164, are far removed from this case on the facts. In my judgment, the Tribunal was correct to conclude that there was no abuse of process on the part of the SRA. I reject the submission that the Tribunal failed properly to consider the relevant authorities relied upon by the Second Appellant.
57. Essentially, the Second Appellant was seeking to challenge the SRA’s exercise of its discretionary judgment to pursue the prosecution. The appropriate way in which to do that was to bring a judicial review claim against the SRA when the decision to refer was made in July 2011.”

44. I am not persuaded that the Adesemowo case is particularly helpful. Rule 13 of the 2019 Rules refers to allegations made and the manner in which they fall to be considered to ascertain if a *prima facie* case is made out. Whilst this may not be as prescriptive as the provisions in the 2007 Law relating to the complaint made and referred, the reference in rule 13(3) seems to me to be couched in broader language than our domestic provisions. The *prima facie* case is considered in the context of “*all or some of the allegations made*” and extends to a wider review if the initial solicitor member “*is of the opinion that the question is one of doubt or difficulty*”, in which case a three-person panel considers if there is a *prima facie* case “*answer in respect of any of the allegations made*”. Each of these allegations will relate to whether there is likely to be a finding of misconduct. Accordingly, to the extent that the regime in England and Wales gives those investigating scope to view any allegation broadly, in the manner suggested, I take the view that the legislation envisages those wider powers anyway, unlike in the 2007 Law, or it is possible that all that is being said in this case is that those investigating can decide that an allegation does not pass the threshold for a *prima facie* case, which is the same assessment that the Registrar is called upon to make. I do not find that this process supports the submission that the Registrar is empowered, as a result of his investigation, to change the complaint made into anything different.
45. I will deal with the Plaintiff’s submissions on dishonesty and integrity in the context of irrationality, where I consider they fit better. However, by not referring the complaint the Plaintiff made to the Chambre and re-casting it as misleading rather than deceit, I am persuaded that the former Registrar exercised his powers in a manner that was not open to him. I indicated as much at para. 95 of the 2018 judgment and I am satisfied that this is the proper construction to be given to the provisions in the 2007 Law. If greater flexibility were intended, then it should be explicit in the legislation. The Plaintiff has, therefore, persuaded me that the former Registrar acted unlawfully, in the sense of exercising powers beyond those conferred upon him by the 2007 Law.
46. Although I do not need to move on to consider irrationality, I will do so because this was the other principal argument on which the Plaintiff has relied. In particular, he has sought to argue that the test for dishonesty should reflect the current position in English law and he has cited authority relating to integrity.
47. There is no dispute that the law on dishonesty is that found in Ivey v Genting Casinos Ltd [2018] AC 391. Judgment was given on 25 October 2017, which precedes the decision of the Chambre, although it does post-date the decision of the former Registrar to refer the complaint to the Chambre. The Plaintiff has highlighted para. 62 of the Supreme Court’s judgment:

“Dishonesty is by no means confined to the criminal law. Civil actions may also frequently raise the question whether an action was honest or dishonest. The liability of an accessory to a breach of trust is, for example, not strict, as the liability of the trustee is, but (absent an exoneration clause) is fault-based. Negligence is not sufficient. Nothing less than dishonest assistance will suffice. Successive cases at the highest level have decided that the test of dishonesty is objective. After some hesitation in Twinsectra Ltd v Yardley [2002] UKHL 12; [2002] 2 AC 164, the law is settled on the objective test set out by Lord Nicholls in Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378: see Barlow Clowes International Ltd v Eurotrust International Ltd [2005] UKPC 37; [2006] 1 WLR 1476, Abou-Rahmah v Abacha [2006] EWCA Civ 1491; [2007] Bus LR 220; [2007] 1 Lloyd’s Rep 115 and Starglade Properties Ltd v Nash [2010] EWCA Civ 1314; [2011] Lloyd’s Rep FC 102. The test now clearly established was explained thus in Barlow Clowes by Lord Hoffmann, at pp 1479-1480, who had been a party also to Twinsectra:

“Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant’s mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree.”

The position is summarised in the latter part of para. 74 of that judgment:

“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 that 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.”

48. Whilst the principle set out would potentially be applicable to the Plaintiff’s original complaint, it was not really engaged in what took place. It is something that the former Registrar should have been considering as part of his investigation of the complaint the Plaintiff made. The discussion that the Defendant had with his predecessor in office shows that the former Registrar considered the complaint made by the Plaintiff broadly, because para. 15.6 of the Defendant’s Affidavit refers to the former Registrar’s decision not to refer anything relating to rule 1 because it would be tantamount to an allegation of dishonesty. These principles surrounding dishonesty, therefore, appear to me to have been considered and so it cannot be said that the former Registrar failed to turn his mind to them. The Plaintiff’s reference to irrationality in this context adds nothing to his reliance on the actions of the former Registrar being *ultra vires*.

49. The Plaintiff has also referred to Wingate v The Solicitors Regulation Authority [2018] 1 WLR 3969 as a means of differentiating between honesty and integrity. There are a number of paragraphs to which I can refer:

“96. Integrity is a more nebulous concept than honesty. Hence it is less easy to define, as a number of judges have noted.

97. In professional codes of conduct, the term “integrity” is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members. See the judgment of Sir Brian Leveson P in Williams at [130]. The underlying rationale is that

the professions have a privileged and trusted role in society. In return they are required to live up to their own professional standards.

98. *I agree with Davis LJ in Chan that it is not possible to formulate an all-purpose, comprehensive definition of integrity. On the other hand, it is a counsel of despair to say: “Well you can always recognise it, but you can never describe it.” ...*
100. *Integrity connotes adherence to the ethical standard’s of one’s own profession. That involves more than mere honesty. To take one example, a solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead. Such a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse. ...*
102. *Obviously, neither courts nor professional tribunals must set unrealistically high standards, as was observed during argument. The duty of integrity does not require professional people to be paragons of virtue. In every instance, professional integrity is linked to the manner in which that particular profession professes to serve the public.”*

50. In this regard, the Plaintiff has also drawn attention to what is noted from the decision of the Court in Masood, Newport Financial Holdings Limited and Ali v Zahoor 2007-08 GLR Note 18:

“It is incumbent on an advocate (a) not to make factual submissions without first personally checking as far as practicable that the submissions are based on the true facts; and (b) to ensure that affidavits of clients or other witnesses as far as practicable contain true and complete factual statements. Mere reliance on instructing solicitors from another jurisdiction (whether from England and Wales or elsewhere) will not suffice, since it is the duty of an advocate to take personal responsibility for what he or she places before the court, whether in pleadings, written oral submissions, affidavits or otherwise.”

I am satisfied that those principles remain sound some 15 years later. In any event, they are underpinned by the Advocate’s Oath and adherence to the Rules. The public is entitled to expect that Advocates comply with the high, but not unrealistically high, standards that should be expected of Guernsey’s legal profession.

51. The Plaintiff has also raised an issue as to whether the complaint should have been referred by the Registrar to the Chambre as a potential breach of rule 1(f) or (g). Rule 1 materially provides:

“An Advocate shall not do anything in the course of practising as an Advocate, or permit another person to do anything on his or her behalf, which breaches, compromises or impairs or is likely to breach, compromise or impair any of the following – ...

(f) *the good repute of the Advocate or the Guernsey Bar;*

(g) *the Advocate’s proper standards.”*

The express reference to “*integrity*” is found in rule 1(b). By comparison, in the SRA’s Code of Conduct, as mentioned in the Wingate case, the second of the Principles found at the front of that Code is to “*act with integrity*” and the sixth is to “*behave in a way that maintains the trust the public places in you and in the provision of legal services*”. In that case, the distinction between these two Principles is explained as follows:

“105. Principle 6 is aimed at a different target from that of Principle 2. Principle 6 is directed to preserving the reputation of, and public confidence in, the legal profession. It is possible to think of many forms of conduct which would undermine public confidence in the legal profession. Manifest incompetence is one example. A solicitor acting carelessly, but with integrity, will breach Principle 6 if his careless conduct goes beyond mere professional negligence and incompetence and constitutes “manifest incompetence”; see Iqbal and Libby.

106. In applying Principle 6 it is important not to characterise run of the mill professional negligence as manifest incompetence. All professional people are human and will from time to time make slips which a court would characterise as negligent. Fortunately, no loss results from most such slips. But acts of manifest incompetence engaging the Principles of professional conduct are of a different order.”

52. Although there is no direct corollary between rule 1 in the Rules on which the Plaintiff bases his challenge to the decision of the former Registrar and these Principles, I accept that they can be used as guidance. I recognise that the Plaintiff has subjectively lost all trust and confidence in the entirety of the Advocates who practise before this Court. I doubt that he is justified objectively in having done so and I expect that there are plenty of others who have experience of one or more Advocates who would give glowing testimonials as to how the legal services they needed were provided. The role of those receiving, considering and investigating complaints is to approach matters objectively. Through the Defendant’s Affidavit evidence, I accept that the former Registrar addressed his mind to the question of whether rule 1 was engaged in relation to what the Plaintiff had complained about. His conclusion that the repute of the Advocate, or the Bar more generally, or the Advocate’s proper standards would amount to an allegation of dishonesty seems to me not to have considered the distinction between dishonesty, for these purposes amounting to deceit in rule 74, and the broader concepts found in rule 1. Whilst there may be some overlap between the two rules, it does not inevitably follow that a decision not to find a prima facie case of deceit necessarily means that rule 1 should not be addressed independently. To that extent, the reasoning offered for not progressing the complaint under rule 1 can, in my view, be a form of irrationality and so is a further reason to consider whether the Plaintiff should be granted the relief he seeks.

53. Although the manner by which a decision of the Solicitors Disciplinary Tribunal is appealed means that it is not, as here, a proceeding by way of judicial review, the English courts have acknowledged similarities and so, on this issue, Advocate Horsbrugh-Porter has referred to a few additional cases to support his submission that the threshold for overturning the Registrar’s decision should be regarded as a high one and he accepts on the Defendant’s behalf the applicable test is indeed one of rationality. In R (Rosen) v Solicitors Disciplinary Tribunal [2002] EWHC 1323 (Admin), even though it was an interim decision, in judicial review proceedings it was stated that the reasoning of the SDT was so deficient that its decision had to be quashed. Although it follows from pursuing a judicial review that rationality is engaged, Advocate Horsbrugh-Porter has cited R (Solicitors Regulation Authority) v Solicitors Disciplinary Tribunal [2013] EWHC 2584 (Admin) as support. That case also refers to the “considerable respect to the findings and penalties imposed by the Tribunal, it being an expert and informed body” (quoting from The Law Society v Waddingham, Smith & Parsonage [2012] EWHC 1519 (Admin)). This latter point also arises in the Court of Appeal’s decision in Salsbury v Law Society [2009] 1 WLR 1286, where the SDT had struck off the solicitor, whose appeal to the Divisional Court resulted in it substituting a three-year suspension, but where the Court of Appeal found the original penalty should not have been modified. Advocate Horsbrugh-Porter refers to para. 38:

“In my view the Solicitors Disciplinary Tribunal’s decision was correct, both in law and on the facts. However, even if the case were regarded as being on the borderline,

the Divisional Court was not entitled to interfere with the sentence imposed. The court ought to have paid proper respect to the decision of the tribunal, which was an expert and informed body, particularly well placed to assess what measures were required to deal with Mr Salsbury and to protect the public interest. The Divisional Court could not be satisfied that the sentencing decision reached by the tribunal was clearly inappropriate. In my view the Solicitors Disciplinary Tribunal's decision was correct, both in law and on the facts. However, even if the case were regarded as being on the borderline, the Divisional Court was not entitled to interfere with the sentence imposed. The court ought to have paid proper respect to the decision of the tribunal, which was an expert and informed body, particularly well placed to assess what measures were required to deal with Mr Salsbury and to protect the public interest. The Divisional Court could not be satisfied that the sentencing decision reached by the tribunal was clearly inappropriate.”

54. Whilst none of these cases is of direct assistance, as a set of general principles I do not disagree with their relevance. There is a degree of deference to be afforded to a decision-maker and a court will be slow to interfere with any decision reached unless it is susceptible to challenge on any of the usual public law grounds. However, what matters in this case is how to construe the statutory regime found in the 2007 Law and whether it can be said that the former Registrar's decision not to refer the complaint made by the Plaintiff by reference to rule 1(f) and/or (g) was, as the Plaintiff submits, irrational
55. As I have already indicated, the views I expressed in the 2018 judgment remain unchanged and, adding to the principles I have just mentioned, I will explain in greater detail the reasons for that conclusion again. In my judgment, it is important to remember what the Plaintiff's complaint stated. His letter dated 1 April 2016, under the heading “*Inaccurate representations*” included:

“By letter dated 26th August my Advocate informed [Advocate X] that my appearance at the contested divorce hearing would be withdrawn subject to certain conditions being agreed. Those conditions were not agreed by [the Petitioner].

Nonetheless [Advocate X] on 27th August proceeded to lodge an application for a Provisional Order and indicated by letter on 28th August saying that my Advocate had confirmed that the matter could proceed on an uncontested basis. [Advocate X] tried to apply for Provisional Order on 3rd September but my Advocate explained to the Court that the withdrawal of the Application was conditional and the conditions were not agreed. I question [Advocate X's] professional conduct in this matter since [Advocate X] knew that my withdrawal was conditional and that those conditions had not been met, yet [Advocate X] chose to advise the court that I had withdrawn.

Subsequently, I took the view that the Appearance should be withdrawn reserving my position as to costs and the Provisional Order was granted. Notwithstanding the outcome, it is my belief that [Advocate X] knowingly made a representation to the Court which he knew to be false.”

There is no ambiguity in what was being alleged by the Plaintiff. The complaint he was advancing was that the Interested Party had “*knowingly made a representation to the Court which he knew to be false*”. In the context of rule 74, this is an allegation of deceit and not simply misleading the Court. The inclusion of “*knowingly*” and the reference to falsity is, in my view, clearly intended to assert that the Interested Party had acted with a mental element present, whereas misleading the court under the Rules does not extend to any mental element. In other words, the complaint submitted, and so the complaint referred to the Registrar, was one of deceit.

56. The reference to the Registrar was made by the Bâtonnier's letter dated 9 June 2016, which enclosed a copy of the letter sent to the Plaintiff the previous day containing the decision of the President and Bâtonnier. In relation to the complaint that had been made and which was subsequently referred to and dealt with by the Chambre, that letter set out:

- “6. *You allege that the Respondent misled the court by holding out that you had agreed a certain course of action when that was not in fact the case, in that he presented a provisional order to the court as if it had been agreed. This would indeed amount to professional misconduct if proved.*
7. *The Respondent forcefully denies the allegation.*
8. *We have had the benefit of seeing Randell & Loveridge's letter of 10th September 2015, in the second paragraph of which there appear to [be] concerns expressed regarding the Respondent's actions.*
9. *Bearing in mind that, as noted in A4 above, it is not our job to chase down evidence, or indeed weigh the evidence provided with regard to the substance of the allegations, we feel that this allegation can only be fully dealt with by investigation and further disclosure, and that can only be carried out by the Registrar. We shall therefore be referring this allegation accordingly.”*

The reference in para. 8 to a letter from Randell & Loveridge was made because that letter had been enclosed with the Plaintiff's response dated 14 May 2016, in which he referred to the Interested Party having “*knowingly attempted to mislead the court*”.

57. It is unfortunate that the Bâtonnier's letter to the Plaintiff, which was enclosed when referring the complaint to the Registrar, refers to an allegation of misleading the court. However, it is also clear on the evidence that the Registrar had sight of the Plaintiff's letter of complaint, which was the complaint he then needed to investigate. That is why I remain of the view that the complaint was a more serious one than of just misleading the court and the Registrar's investigation should have considered whether or not the evidential test to put it forward as deceit was met. As I pointed out towards the end of the 2018 judgment (para. 82), although leaving the question open, I take the view that a complaint of deceit can be put to the Chambre and, if the required mental element is not proved to the requisite standard, the Chambre could return a finding of guilty of professional misconduct through misleading the court. Unlike some other jurisdictions, there appears to be no requirement for any mental element in misleading. Whether that is the most appropriate way of dealing with such a complaint of professional misconduct is something the Bar Council might wish to consider further. Interestingly, despite the limited nature of what the Registrar investigated and referred to the Chambre, at para. 2 of its decision, it sets out what it had been determining:

“The allegation against [Advocate X] was that [the Advocate] deceived and/or misled the Matrimonial Interlocutory Court in breach of Rule 74 of the Rules of Professional Conduct and, as a consequence of such conduct, also breached Rule 1 of the Rules of Professional Conduct in that [the Advocate] breached, compromised or impaired [the Advocate's] integrity, [the Advocate's] duty to the court, [the Advocate's] own good repute and that of the Guernsey Bar and [the Advocate's] proper standards.”

58. Although the Defendant has deposed to what the former Registrar explained to him about why the complaint referred to the Chambre was cast as misleading, suggesting there was no *prima facie* case of dishonesty, it is difficult to assess from the investigation that appears to have been undertaken why the complaint that the Interested Party had knowingly made a representation that he knew was false should not have been considered by the Chambre (acknowledging that its summary of the position implies that it had done so anyway). I suspect it arises in part from the terms of the letter received by the Registrar when the complaint was referred to him, but

what matters is what was received from the Plaintiff as the complainant. In respect of deciding whether a *prima facie* case is disclosed for the purposes of section 22(6) of the 2007 Law, although it is not explicit, in my judgment it must follow from what precedes it that the investigations are in respect of the complaint referred. I think this is quite clear from the wording of subsections (1) and (2). Similarly, in subsection (6), the consequences of finding or not finding a *prima facie* case disclosed is that “*the complaint*” is referred or not referred to the Chambre. I repeat that consistently throughout the provisions, there is this reference to “*the complaint*”. Accordingly, I think there is some force in the Plaintiff’s submission that the former Registrar was too quick to reject any complaint involving dishonesty.

59. In relation to the suggestion that appears to have been made on behalf of the former Registrar that it was open to him to review all matters and decide what allegation of misconduct was appropriate to consider referring, I appreciate that that language is closer to what is found for solicitors in England and Wales under the 2019 Rules, but I am not persuaded that the statutory scheme for Advocates introduces that degree of flexibility. I think that the furthest it could go would be if the complaint made was one of deceit (as I consider the Plaintiff alleged here) and the Registrar concluded from his investigations that there was no *prima facie* case, perhaps because there was insufficient evidence of the requisite mental element, but concluded that a complaint of misleading the court could be pursued. On the basis that the greater encompasses the lesser alleged misconduct, in such a situation the complaint referred and investigated (deceit) would be dealt with under section 22(6)(b), but a lesser complaint of misleading the court would be disclosed on the facts investigated and so might be dealt with in accordance with section 22(6)(a).
60. Accordingly, if I had granted leave, I would be minded to conclude that the complaint that was originally referred by the Registrar did not arise from an investigation into the complaint that the Plaintiff made. Further, as I have also explained, subject always to the same comment about what the Chambre set out that it had considered, as already quoted, there is an argument that the decision not to refer to rule 1 arises from the former Registrar not taking into account that rule 1 would not have required him to want to refer a complaint of dishonesty, and so is irrational. That does not really matter, though, because the finding of unlawfulness suffices for me to go on to consider whether the relief the Plaintiff seeks should be granted.
61. Because the Court has a discretion to exercise as to whether to set aside that earlier decision, and possibly even whether to direct the Defendant to conduct a fresh investigation with a view to deciding whether to refer any complaint to the Chambre, there are various reasons why I am satisfied that it would be inappropriate to grant the Plaintiff the relief he seeks. I am satisfied that there is no utility in the Defendant having to take these steps and so, even if I had granted leave to proceed, I would still have dismissed this case under the Court’s discretion.
62. As I have already touched upon, it is important to bear in mind the consequences for the Interested Party if the Plaintiff were to be granted the relief he seeks. The Interested Party has already faced a Chambre, which found that it was not proved to the criminal standard that the court had been misled. The Interested Party would be entitled to pray in aid that finding in the event that there were a subsequent Chambre. Indeed, that finding has also been confirmed as one open to the Chambre to reach by the 2018 appeal judgment. I have necessarily had to consider, therefore, whether there would be scope for the Interested Party in those circumstances to argue that it would be abusive to bring a second complaint against him based on the same facts. This engages the principles derived from cases such as *Coke-Wallis* and *Virgin Atlantic*, and I take the view that it is important for me to think ahead as to what granting the relief the Plaintiff seeks would entail in order to assess what the outcomes could be.
63. Although it might not be the correct terminology, I consider that the Interested Party would be in a position to advance *autrefois acquit* on a complaint of deceit. Where it has already been found that the required standard of proof was not met for misleading the Court, it follows that a complaint of deceit would depend on finding that there had been misleading of the court, but

with the addition of the mental element of knowingly acting in that manner. In other words, the previous finding of not proven could be relied upon and would be something that the Defendant would be obliged to consider if a new investigation had to be undertaken. Further, if the analogy of a public interest test were applied by the Defendant in any new investigation, I suspect that what has already happened and the passage of time would militate against referring a complaint of deceit to the Chambre.

64. That reference to the passage of time is, in my view, an important one. The scheme of the 2007 Law is that complaints must relate to events that have recently occurred. That is the reason for the time limit of six months in section 21(2). The expectation, even if a longer time is permitted, is that the President and Bâtonnier will conclude their part in the process swiftly and, obviously depending on the complexity of the investigation needing to be undertaken by the Registrar, that step would also be concluded as speedily as possible. Progressing a complaint should be viewed as a criminal-type of proceeding and needs to be concluded as swiftly as reasonably possible. The Plaintiff's complaint of deceit is now a stale complaint. As I have noted, it was effectively dealt with, although re-cast as misleading the court, and the Interested Party should not now face a re-run of what took place more than six years after the complaint was made.
65. I further take into account the correspondence passing between the former Registrar and the Plaintiff in 2016 and into 2017. I am satisfied that there were several occasions on which the former Registrar spelt out to the Plaintiff that what was being considered was that the Interested Party has misled the court. Although I do not put the Plaintiff's position as high as him having waived the terms of his original complaint, I do think that it must be a further factor to take into account that the Plaintiff did not question the way in which the former Registrar was describing the approach he was taking. I also appreciate that there is a difference in what was provided to the Plaintiff (as the complainant) and what was provided to others in accordance with section 22(5)(a)(ii) and (iii). The Registrar's statement of case is not provided to a complainant, but the letter sent to the Plaintiff in January 2017 explained that the investigation had been completed and referred to how the complaint being referred to the Chambre was described in the first paragraph of the statement of case and that letter concluded:

"Your complaint is that [Advocate X] therefore misled the Court.

Having investigated the matter I have decided to refer this complaint to La Chambre de Discipline. The President of La Chambre will in due course give directions to all concerned in connection with the forthcoming hearing of the complaint."

The absence of any reference to making a false statement knowingly should have put the Plaintiff on notice that what was being referred by the Registrar did not correspond to the complaint he had made. Even if it is a technical issue, I am satisfied that someone with the industry of the Plaintiff, which has been apparent from the manner in which he has conducted these proceedings, would have found it simple enough to look at the Rules and establish where misleading the court is found and would have spotted the alternative of deceit. Because he did nothing at that time, the opportunity to redress his concerns was lost. Attempting to recover the position after so much time has passed is not, in my view, warranted and this is a further reason why I would not have been minded to grant the relief he seeks.

66. I appreciate that the Plaintiff has acknowledged in his oral submissions that he recognises that returning to deceit in rule 74 is no longer available and that his principal complaint now relates to rule 1. However, the difficulty he faces in that respect is that the findings of the Chambre were that what the Interested Party did was part and parcel of the way that practice operates before the Matrimonial Interlocutory Court (as set out in the passage quoted in para. 29 of the 2018 judgment, referring to para. 23 of the Chambre's decision). Accordingly, the Interested Party would also be able to pray in aid that there is a previous finding that this was the usual practice of matrimonial practitioners. Whilst the Plaintiff might seek to argue that this reflects a poor standard, I do not think it can be said that the referral of the Plaintiff's original complaint

as a possible breach of rule 1(f) or (g) would have any prospect of success. The Interested Party would be found to have met the usual standards of practitioners before the Matrimonial Interlocutory Court, which I imagine means that the Interested Party's own repute and that more widely of the Bar cannot be brought into question. I have further taken into account the Chambre's summary of what it was considering, as already quoted, which indicates that rule 1 was also engaged and so must have been under consideration.

67. Therefore, although I have a degree of sympathy with the Plaintiff that his complaint was not handled in the manner in which it really should have been, and that the former Registrar might either have chosen not to refer the complaint made at all, in which case the Plaintiff could have considered instituting proceedings to challenge that decision, or the complaint of deceit, possibly also coupled with an allegation that rule 1(f) and/or (g) was also engaged, could have been referred and the former Registrar, or someone on his behalf, would then have presented the case against the Interested Party on that basis. The problem is that, having proceeded on the basis of misleading the court with the outcome being that that was not proven, I am satisfied that any new investigation conducted by the Defendant into what was referred flowing from the Plaintiff's original complaint would inevitably result in no referral to the Chambre for the reasons I have just explained. Alternatively, if referred, the Interested Party would most probably persuade the Chambre, or the Court is that decision were challenged, that the matter should not be allowed to progress as a result of the earlier hearing and findings. Accordingly, I would have refused to exercise the Court's discretion to set aside the previous decision of the former Registrar, which means there would be no requirement for the Defendant to investigate further.
68. Although the Plaintiff has not succeeded in having his original complaint progressed in the manner that he sought, he might take some satisfaction from the conclusion that what should have been investigated and decisions taken thereon under the 2007 Law was his complaint that the Interested Party had "*knowingly made a representation to the Court which he knew to be false*". Unless the former Registrar considered this aspect of dishonesty and rejected it, which should have been spelt out expressly to those to whom his decision needed to be relayed, that is the allegation that the Interested Party should have faced. As a result, a different approach would inevitably have had to be taken before the Chambre, although the core finding that what happened was consistent with the approach of practitioners before the Matrimonial Interlocutory Court may well have followed. It is that finding that the Plaintiff cannot now displace. At least if his original complaint had been dealt with in the way I consider it should have been, none of this further steps would have been necessary. To that extent, the Plaintiff has been vindicated, although his pursuit of the matter will not result in the Interested Party facing any further proceedings arising out of what took place in 2015.

Conclusion

69. For the reasons I have given, I will dismiss the Plaintiff's action. He is not being given leave to pursue his challenge to the former Registrar's decision as to what was referred to the Chambre, which, if successful, would have turned back the clock to the point where the Registrar would investigate the complaint referred to him. However, even if I should in the circumstances of this case have granted that leave, I would have dismissed the action because to grant the order setting aside that decision would serve no useful purpose. In doing so, I would have agreed with the Plaintiff that the former Registrar acted beyond the powers conferred on him by the 2007 Law, which may be worth some re-consideration by the legislature to ensure that they work as intended, and possibly also that the decision as to what to refer was irrational, but the Plaintiff would have been refused relief through the exercise of the Court's discretion.
70. As regards the costs of these proceedings, I will formally reserve them. The Plaintiff will realise that costs normally follow the event, meaning that the successful party, here the Defendant, could seek an order that the Plaintiff pay his costs. There are also the reserved costs from when

the President was a party to the proceedings. For that reason, I consider the better option now is to reserve the costs and allow these parties to consider between themselves whether costs will be sought and, if so, whether they will be resisted by the Plaintiff. If there is no agreement as to what to do about the costs, it will be open to any party to seek an appropriate order through the usual Interlocutory Court process.