The Honourable Society of the Inn of Court of Northern Ireland

<u>Disciplinary Appeal Committee hearing on 1st September 2022 in the Judicial Assembly Rooms, Royal Courts of Justice, Belfast.</u>

In the matter of the Professional Conduct Committee of the Bar of Northern Ireland v Mr Gavyn Cairns, Barrister at Law.

The Disciplinary Appeal Committee constituted by the Benchers of the Inn of Court of Northern Ireland has heard and determined an appeal by Mr Cairns from a decision of a Disciplinary Committee whereby he was found guilty on three charges of professional misconduct having admitted two charges 1 and 2 set out hereinafter and contested charge 3.

For this hearing Mr Cairns has abandoned his appeal in relation to charge 3 and so we have only been asked to consider the penalties imposed.

The content of the charges may be summarised as follows:

1. Failing to maintain proper accounts and records between 28 October 2003 and 26 May 2010 in relation to cases he had been instructed to act in within the Magistrates Court jurisdiction contrary to section 6.3 (i) of the Code of Conduct of the Bar of Northern Ireland commencing 6 March 2003.
2. Failing to maintain proper accounts and records between 27 May 2010 and 26 March 2012 in relation to cases he had been instructed to act in within the Magistrates Court jurisdiction contrary to section 8.1 (i) of the Code of Conduct of the Bar of Northern Ireland commencing 27 May 2010.
3. Bringing the profession of a barrister into disrepute contrary to section 8 .1 (vi) of the Code of Conduct by failing to conduct oneself with honour and integrity as befits the high standing of the profession.

In accordance with the applicable rules the Disciplinary Appeal Committee proceeded by way of rehearing and heard submissions from Mr Connor QC on behalf of the Professional Conduct Committee and Mr Brian Fee QC on behalf of Mr Cairns.

This Committee sought assistance from counsel as to powers of the Committee as defined by the Constitution of the Inn of Court of Northern Ireland and the Disciplinary Appeal Rules specifically as regards Regulation 4 (b) (vii) and Regulation 13(xviii). Both sets of representatives have agreed an interpretation that allows the Committee to exercise a power to suspend by virtue of a delegation of power to the Disciplinary Appeal Committee- Regulation 4A of the Constitution. We proceed on that basis of delegation having confirmed the position with the Treasurer and Under Treasurer of the Inn.

The facts grounding these charges were agreed. The gravamen of the breaches of professional conduct were accepted to be extremely serious. All three complaints were made by Mr Paul Andrews, Chief Executive of the Legal Services Agency (LSA). They relate to 267 claims for payment submitted by Mr Cairns for criminal cases conducted mostly at the Magistrates Court over 9 years between 2003-2012. These historic claims had to be submitted to meet a deadline imposed by LSA to process outstanding claims under rules created in 1992 which were subsequently changed. Accordingly, Mr Cairns sent in his 267 forms between 2 November 2011 and 22 March 2012. A total of £568,000 was claimed.

A number of the forms submitted by Mr Cairns aroused suspicions due to the fact that there were multiple claims made for ancillary costs such as written work. As a result there was a fraud investigation initiated within LSA.

The said investigation highlighted grave concerns in relation not just to fees for written work but court attendances, consultation times, waiting times and travel. This led to a referral to the police. Mr Cairns was investigated for fraud but ultimately the outcome of this was no prosecution. Once that decision was reached the Professional Conduct Committee investigation began. This resulted in the disciplinary proceedings with which we are concerned. A summary of some of the material is sufficient to explain the nature of the misconduct case made against Mr Cairns as follows.

For example there were 51 separate dates when Mr Cairns claimed consultation in excess of 15 hours per day. In 31 of those the consultation and waiting was at its lowest 17 hours and at its highest 29.5 hours. On some days more than 24 hours work was alleged to have been carried out. Consultation times alone in cases exceeded 24 hours on some days. For one defendant over eight days of his case Mr Cairns claimed 94.5 hours of consultation. Travel claims were also a cause for concern as Mr Cairns frequently moved around courts and made duplicate claims. The time taken for travel when added to some of the claims of times spent in court would mean that Mr Cairns was working in excess of 24 hours a day which is obviously impossible. In addition, identical written paperwork was submitted setting out generic legal tests for multiple clients.

During the course of the Disciplinary Committee hearing, upon request of the committee, LSA confirmed that part of the £568,000 could be identified as legitimate and reasonable remuneration for work provided. This sum was a stripped down brief fee provided in each case without any of the contentious extras discussed above. The figure was subsequently agreed by Mr Cairns in the amount of £133,937.86 plus VAT. That amount was paid by LSA and remains held in an account by Mr Cairns. The Disciplinary Committee ordered that it should be paid back to LSA. In that context, Mr Fee strenuously argues that a suspension in addition to the loss of this significant amount of money and other unquantified valid expenses for work done, along with other mitigating factors, makes the original penalty disproportionate. That is the sole issue we are concerned with - whether the penalty was disproportionate and if so what the appropriate penalty should be.

In addition to Mr Fee's comprehensive submissions he provided an extract from the text *Beaumont on Barristers* to which we will refer. We record at this point that Mr Connor took no issue with any of Mr Fee's submission and effectively left the matter in our hands. The one point he made via his junior Ms Walsh was that the Northern Ireland system differs from that in England and Wales as it is obviously much bigger where Chambers provides some cushion to return after suspension. This we found a helpful contribution as it provides context to some lengthy suspensions ordered in England and Wales.

Mr Fee's submissions highlighted eight factors which he said we should take into account and should lead us to remove the suspension. First, that this case did not involve dishonesty and that distinguished it from other more serious cases. Second, albeit due to his own actions, Mr Cairns was losing a significant sum of legitimately earned monies. Third, that Mr Cairns would occasion additional financial hardship as some of the remaining monies were also legitimate within the remaining £435,000 approximately which could be a six figure sum. Fourth, Mr Cairns personal circumstances must be taken into account and provide some explanation for how he made these claims as he had illnesses during the relevant time. Fifth, that there was delay in bringing this matter to a conclusion in that it had hung over Mr Cairns for 10 years now. Sixth, that the effect of suspension of a self-employed barrister was profound given the loss of reputation and work, the ability to progress in career terms and to apply for silk and such like. Seventh, that Mr Cairns was remorseful and had cooperated with the investigation. Finally, Mr Fee relied on the fact that two senior barristers Mr Brian McCartney QC and Mr John Mc Crudden QC had vouched for him and that he had a clear professional record save for this issue.

There is no precedent in this jurisdiction from which we can derive assistance in settling on an appropriate sanction. Therefore we turn to first principles. We are not swayed by the argument that suspension has not been applied before for cases absent dishonesty. Each case

will depend on its own facts and be adjudicated when it arises. We derive some assistance from *Beaumont* para 7.27 and accept that a finding of lack of integrity usually carries a lower sanction than a finding of dishonesty. Also para 7.23 refers to how suspension is a particularly severe penalty for a barrister. The text continues by reference to the fact that "The Guidance advises that suspension should be reserved for cases where the barrister represents a risk to the public which requires that he/she be unable to practice for a period of time and or/the behaviour is so serious as to undermine public confidence in the profession and therefore a signal needs to be sent to the barrister, the profession and the public that the behaviour in question is unacceptable."

The fact that this case represents a serious breach of professional standards is not in dispute. The fact that this conduct also impacts on the reputation of the profession as a whole is rightly conceded. The fact that it involves multiple claims and large sums of money is also accepted. It was clearly not a one off lapse. Also, it is plain that if the over marking of fees had not been picked up by LSA Mr Cairns would have received more money that he was entitled to. This type of "chance your arm" approach is not acceptable on any reading. Counsel should only claim for work that represents a reasonable remuneration in any case and must keep accurate records in managing a self- employed practice. These are fundamentals that every barrister should know. Public funds are an important aspect of our system and must be protected. The misconduct at issue here is a personal failing but also affects the reputation of the Bar of NI as a whole which seeks to maintain high standards and public confidence in the provision of legal services.

Against all of the above we find some force in Mr Fee's submission that the penalty must reflect the absence of dishonesty. We agree with that submission because if dishonesty were in play the outcome would inevitably be significant suspension or disbarment. We do not think that a financial hardship claim is made out given that Mr Cairns continued to work and earn significant six figure sums in years during this period. We sympathise with the personal circumstances that have been raised however they were not so acute to affect Mr Cairns day to day work so far as we can tell without any confirmatory reports. We cannot accept the tentative suggestion that inexperience in some way accounts for Mr Cairns conduct as he was barrister of 8 years standing when he made the claims in 2011. We also treat the suggestion made at one stage by Mr Cairns that LSA should simply check and disallow fees where appropriate as misplaced. Finally we do make some allowance for delay although no culpability is levelled against the various bodies who had to investigate a serious and complicated case. All of these considerations we apply to the penalty imposed in order to reach our conclusion as follows.

There was no issue with the fact that the Disciplinary Committee applied separate penalties to each charge and we follow that methodology.

The course taken by the Disciplinary Committee was to order repayment of the £133,937.96 amount legitimately earned and already paid by LSA as part of the sanction. We are not convinced that it is proportionate to order repayment of fees which have been vouched and are legitimate. That was the outcome in a recent Supreme Court case of *R v Andrewes* [2022] UKSC 24 dealing with proceeds of crime.

Obviously the other monies cannot be claimed as they are tainted. Although the rules allow for fees to be repaid such an order is more easily applied when there has been misconduct in the conduct of a case. Here the misconduct is in relation to the extent of the claim made subsequently. We will therefore replace the sanction on charges 1 and 2 with a total fine of £50,000. This is as we understand it double the highest fine ever applied in this jurisdiction.

On charge 3 which is the most serious offence of bringing the profession into disrepute, a fine is not enough. Both sides agreed that a separate penalty could be imposed. A suspension is clearly merited in addition to the fine imposed on the other charges. This is not because Mr Cairns is a risk to the public but to signal disapproval of this type of conduct. This will be the first occasion when a suspension has been ordered in our jurisdiction for such misconduct. Flowing from this the message should be clear how seriously this case and any future cases will be dealt with and that it will act as a deterrent.

In our view the maximum suspension that could be applied is around six months before applying mitigation. We do not see any need to increase the length of suspension and then suspend part of it where there is no indication that Mr Cairns will repeat the misconduct. Taking into account the points raised in mitigation particularly the length of time this case has been hanging over Mr Cairns and the effect of a suspension in a small jurisdiction highlighted by counsel for the Professional Conduct Committee, we will reduce the length of suspension to two months. We consider that the overall penalty of a fine and suspension for two months is proportionate.

We propose, subject to any submissions which counsel may wish to make, to allow Mr Cairns a number of days to make arrangements and so order the suspension from practice to run from 11/10-6/12.

The Disciplinary Appeal Committee accordingly allows the appeal in part and imposes the following penalties:

1. On charge 1 and 2 Mr Cairns is fined a total of £50,000 to be paid by 11/10

2. Mr Cairns is suspended from practice for 2 months effective from 11/10 -6/12 inclusive on charge 3.
3. Mr Cairns is to pay the costs of the hearing before the Disciplinary Committee, we will hear from counsel as to the costs of the appeal.

The parties may raise any ancillary issues by 4pm today after which this ruling will be made public

Dated this 4th day of October 2022

And approved by the Chair of the Appeal Committee