BEFORE THE SOLICITORS DISCIPLINARY TRIBUNAL **Case No.12612-2024**

IN THE MATTER OF THE SOLICITORS ACT 1974 (as amended)

BETWEEN:

SOLICITORS REGULATION AUTHORITY LIMITED

Applicant

-and-

ASHLEY SIMON HURST

Respondent

RESPONDENT'S OPENING SUBMISSIONS
Substantive Hearing: 16-20 December 2024

A. INTRODUCTION

1. The SRA summarises its case against Mr Hurst as being that he: "*sought to impose duties of confidence on Dan Neidle in relation to the threatened defamation claim without any properly arguable basis*"[1] for doing so. The allegation has evolved over time, but is now apparently pursued on the basis that: (a) Mr Hurst sought to impose duties of confidence on Mr Neidle that did not have a properly arguable legal basis; (b) he wrongfully threatened Mr Neidle with litigation if he did not respect that confidentiality; and (c) his actions were so contrary to common practice and standards that they constituted a breach of the Code and Principles even if he did have a properly arguable legal basis for doing so. Each element of this framework is wrong. Mr Hurst acted appropriately at all times.

2. The SRA's approach to Mr Hurst appears tied to the live debate around strategic lawsuits against public participation ("**SLAPPs**"). This is a significant distraction because the reality is that this is not a case that bears any of the hallmarks of a SLAPP. In particular: (a) it is not alleged that Mr Hurst's client's defamation claim did not have any merit; on the contrary the SRA accept that it did; (b) it is not alleged that Mr Hurst advanced any fact or argument in support of that defamation claim other than in accordance with his duties; and (c) these proceedings solely concern two pieces of correspondence which, on analysis, can be seen to have been moderate, polite and written in accordance with well-established (and well-justified) legal principles.

[1] Reply at §2, where this is described as "*the gravamen of the Application*" **[C1]**.

3. Central to the SRA's case is the first piece of correspondence – a without prejudice Email in which Mr Hurst stated that it would be a "serious matter" for Mr Neidle (an experienced solicitor) to publish or refer to it, other than for the purposes of obtaining legal advice. The SRA alleges that this wording amounted to an "implicit threat" to bring an action for breach of confidence. It is plain from the Email itself however that Mr Hurst's concern was to emphasise to Mr Neidle that publication of without prejudice correspondence by a solicitor would be a serious matter. He was right to do so.

4. A further unusual factor in the case concerns evidence of "practice" from specialists in the field. When it was suggested by Mr Hurst that such evidence should be in the form of expert evidence, the SRA contested that. This led to a hearing at which the Tribunal has ruled that such evidence can be factual. The SRA relies upon evidence from Ms Phillips, a former Head of Legal Services at the Guardian. Mr Hurst has adduced supportive evidence from pre-eminent practitioners in the field: Lord Garnier KC; Hugh Tomlinson KC; Adam Speker KC; Lorna Skinner KC and Mr Engel of Addleshaw Goddard.

B. RECOMMENDED PRE-READING

5. In addition to the parties' written Opening Submissions, the Tribunal is invited to pre-read the following documents, with a time-estimate of 6 hours:
   (1) **Pleadings**: (a) Rule 12 Statement [**A2**]; (b) Answer [**B1**] and Annex: Summary of Background Facts [**B44**] and (c) Reply [**C1**]
   (2) **Key Correspondence**: The Email of 16 July 2024 (the "**Email**") [**X58-9**] and the Letter of 19 July 2024 (the "**Letter**") [**X61-3**]
   (3) **Applicant's Evidence**: (a) Dan Neidle ("**Neidle 1**") [**D1**]; (b) Gill Phillips ("**Phillips 1**") [**D35**]; (c) Neidle 2 ("**Neidle 2**") [**D14**]
   (4) **Respondent's Evidence**: (a) Mr Hurst ("**Hurst 1**") [**D48**]; (b) David Engel [**D123**]; (c) Lord Garnier KC [**D130**]; (d) Hugh Tomlinson KC [**D138**]; (e) Lorna Skinner KC [**D143**]; (f) Adam Speker KC [**D149**]
   (5) **Further Documents**: (a) Agreed Cast List, and Respondent's Chronology (**attached**); (b) Notice of 31 January 2024 (the "**Notice**") [**X5-19**]; (c) Respondent's Representations (the "**Representations**") [**X125-177**]; and (d) ADM's Decision of 3 May 2024 [**X865-70**].

C. THE RESPONDENT

6. Mr Hurst has been a solicitor since 2004 and became a partner at Olswang LLP in 2012. He moved to Osborne Clarke LLP in 2016 and holds a range of leadership roles. He is currently head of the Media and Information law Disputes team; co-lead of the international Cyber and Contentious Data Protection team; and a member of the UK Management Board as Head of Client Strategy. He previously led the firm's Technology, Media and Communications sector team.

7. Mr Hurst is recommended in Chambers & Partners and the Legal 500 as a leading individual in the fields of (a) Defamation, Privacy and Reputation Management and (b) Crisis Management. He has many years of experience acting for both claimants and defendants in relation to defamation, confidentiality and privacy issues. On the defendant side, he has acted for media publishers, providing pre-and post-publication advice, and for companies facing claims from high-net-worth individuals.

D. KEY FACTUAL BACKGROUND

8. The factual background is set out in the Chronology, as well as the Annex to the Answer [**B44-67**] and Hurst 1 §§42-103 [**D58-71**]. In summary:

   (1) In July 2022 Mr Hurst was instructed to act for Mr Zahawi (the "**Client**"). Mr Hurst had not acted for the Client before. The Client was at this stage Chancellor of the Exchequer and until 13 July 2022 was a candidate to succeed Boris Johnson as Conservative Party leader and UK Prime Minister. He was the focus of extensive media reporting. Mr Hurst properly acknowledged that such reporting was generally on matters of public interest, given the context. Further privileged details relating to the instruction will be given in evidence.

   (2) On 12 July 2022 Mr Hurst sent letters to the Guardian [**B201**], the Independent [**B203**] and Associated Newspapers Limited (publishers of the Daily Mail) [**B205**] in relation to aspects of their reporting. Each of these letters referred to the general public interest but stated that any suggestion that the Client had engaged in tax evasion or tax avoidance would be "*false and defamatory*". Each of these letters was headed "*Private and Confidential*". No complaint was made about these letters by the respective media organisations. Nor were the letters or their contents referred to or published, despite the acknowledged public interest in the wider story. The SRA makes no complaint about these letters.

   (3) On 16 July 2022 Mr Neidle, former UK Head of Tax at Clifford Chance and a key source of media reporting, posted a thread of tweets (the "**Thread**") which included a serious allegation of dishonesty against the Client in relation to the Client's explanation to the media as to why shares were allocated to his father's company in 2000 ("*Turns out [the Client] was lying*"): [**X41-55**] (the "**Dishonesty Imputation**"). Mr Hurst sought to make contact with Mr Neidle offering to speak on a without prejudice ("**WP**") basis and will give evidence about why that was. Mr Neidle's replies to Mr Hurst's approaches included the following "*Please note I will not accept without prejudice correspondence*"[2] and "*I am afraid I will find it hard to take anything you send to me seriously*." [**X897**].

[2] For the avoidance of doubt, Mr Hurst's case is that it is not open to a party to "opt out" of without prejudice privilege: see Section I below.

(4) On 16 July 2022 (18:53), Mr Hurst sent Mr Neidle an email headed "*Confidential & Without Prejudice*" (the "**Email**") [**X58-9**]. The Email should be read as a whole but included the following:

> "*I have marked this email without prejudice because it is a confidential and genuine attempt to resolve a dispute with you before further damage is caused. Our client wants to give you the opportunity to retract your allegation of lies in relation to our client. That would not of course stop you from raising questions based on facts as you see them.*
> *You have said that you will "not accept" without prejudice correspondence. It is up to you whether you respond to this email, but you are not entitled to publish it or refer to it other than for the purpose of seeking legal advice. That would be a serious matter as you know. We recommend that you seek advice from libel lawyer if you have not done already.*
> *Should you not retract your allegation of lies today, we will write to you more fully on an open basis on Monday."*

(5) Having apparently liaised with counsel, Mr Neidle replied at 19:11 that "*I have already told you I am not interested in engaging in without prejudice correspondence. Kindly send me an open letter and I will in due course respond to that*." [**B220**] At 09:07 on 19 July 2024 Mr Neidle sent a further email to Mr Hurst headed "*Zahawi and nine outstanding questions*" stating that he was "*continuing to write about this story*" [**X60**].

(6) On 19 July 2024 Mr Hurst sent an open letter to Mr Neidle headed "Private and confidential – NOT FOR PUBLICATION" (the "**Letter**") [**X61-3**]. The Letter should also be read as a whole but included the following:

> "*1.3 You have said that you will not accept without prejudice correspondence and therefore we are writing to you on an open, but confidential basis. If your request for open correspondence is motivated by a desire to publish whatever you receive then that would be improper. Please note that this letter is headed as both private and confidential and not for publication. We therefore request that you do not make the letter, the fact of the letter or its contents public*."

(7) On 22 July 2022, without prior warning, Mr Neidle published both the Email and the Letter on his Tax Policy Associates website [**X75**]. Mr Neidle's justification for publishing the Email was that he regarded it as not protected by WP privilege. Indeed, he accepted that it would "*probably*" be "*improper*" for him to publish correspondence which was WP: [**X112**]. (Mr Hurst contends that Mr Neidle's analysis involved misstatements of law as to the WP doctrine, the law of confidentiality and the nature of a public interest "defence" to an action for breach of confidence: [**X115**].)

E. THE EVIDENCE

9. The Tribunal will hear evidence from Mr Neidle. The Tribunal will also hear evidence from Mr Hurst, the Respondent. The remaining evidence relates to "practice and usage". Such evidence falls into three categories, addressed in further detail in these submissions below:

(1) **Solicitor conduct evidence:** as set out in the Tribunal's Memo for the 18 October 2024 CMH, the SRA advance a case that "*in phrasing the correspondence in the way that he had, the Respondent had failed to adhere to the standards expected of him as a solicitor*": Memo §108 [**F53**]. As to "*solicitor conduct evidence*", the parties are therefore entitled to lead factual evidence as to "practice and

usage", and the basis thereof, where "*relevant to an issue to be determined at the substantive hearing*": §108,110.

(2) **Confidentiality practice evidence:** *Toulson & Phipps on Confidentiality (4th Edition)*, a leading textbook, specifies that "*reasonableness, usage, and practices in the relevant sector (for example, industrial or professional) are to be taken into account*" in determining whether a reasonable person in the position of the parties would regard information as confidential. The parties are therefore also entitled to lead evidence as to the practice, and the basis thereof, of how similar correspondence to the Email and Letter is phrased, marked and treated.

(3) **Discrete issues of alleged practice:** as asserted in the Reply at §6 and §11 have also been addressed in the "practice" evidence**.**

10. The Tribunal will hear evidence on practice from Ms Phillips, adduced by the SRA, and from Lord Garnier KC, Hugh Tomlinson KC, Adam Speker KC, Lorna Skinner KC and Mr Engel, adduced by Mr Hurst. Mr Hurst's witnesses are eminent, experienced and supportive of Mr Hurst's case.

F. SUMMARY OF THE SRA'S CASE

11. The SRA's case against Mr Hurst lacks cogency and consistency. To place that in context, it is necessary to appreciate how it has changed over time.

(1) The SRA's Original Case

12. The SRA's original allegations against Mr Hurst are set out in §11 of the Notice of 31 January 2024 [**X8**]. They are: (a) that Mr Hurst "*improperly labelled*" the Email as being "*Confidential & Without Prejudice*" and (b) that Mr Hurst "*improperly labelled*" the Letter as "*Private and Confidential"* and "*NOT FOR PUBLICATION*". The basis of the allegations was that the "*labels represented a statement and/or representation that was not properly arguable… These were improper assertions*" [**X13**] and see references in the Answer, §18 [**B13**]. The Representations of 28 March 2024 explained why the criticisms of Mr Hurst were wrong and enclosed an independent Opinion from Andrew Caldecott KC [**X157-177**]. Attention is drawn to §48, §67, §74, §76 and §78.[3]

(2) The Rule 12 Statement

13. The allegations set out in the Rule 12 Statement are that Mr Hurst "*improperly attempted to restrict Mr Neidle's right to publish [the Email/Letter] and/or discuss its contents*": §§1.1-1.2. The pleading in support is diffuse and somewhat difficult to follow. It does not assist that in correspondence the SRA has refused to clarify "*the extent to which any of the pleaded averments (or combination) is necessary to*

[3] The Caldecott Opinion is not relied upon as if expert evidence or for the truth of its contents. It is relied upon as part of the history in showing how and why the SRA's case has changed over time (and what contentions the SRA has been made aware of and when): see the Tribunal's Memo for the 19 September 2024 CMH at §34-36 **[F29]**.

establish a breach of the obligations under the Principles and Code of Conduct relied on": [**E296, 298**]. Two specific changes of case, in particular, can be identified from the Notice:

(1) The SRA set out no positive case that the Email was not protected by WP privilege: §50;

(2) The SRA did not pursue a case in respect of the "NOT FOR PUBLICATION" label on the Letter (the Authorised Decision Maker having disavowed such an allegation).

14. The specific ways in which Mr Hurst is alleged to have breached Paragraphs 1.2, 1.4 and 2.4 of the SRA Code of Conduct for Solicitors, RELs and RFLs 2019 (the "**Code**") and Principles 2 and 5 of the SRA Principles 2019 (the "**Principles**") are set out in the Rule 12 Statement at §§59-63. Each of these paragraphs is pleaded solely in respect of the Email. In respect of the Letter, the SRA alleges only that the same paragraphs of the Code and Principles are breached "*For the reasons set out in relation to Allegation 1.1*": §67. The SRA has never explained how its case on the Email applies to the Letter.

(3) **The Reply**

15. Aside from reiterating that its case is tied to the question of confidentiality of the correspondence, the Reply makes four significant changes to the SRA's case:

(1) The SRA reintroduces the allegation that there was no proper basis for the "without prejudice" labelling on the Email, albeit this is said not to be the SRA's "*primary submission*": §11.

(2) Contrary to its previous position, the SRA now "*accepts that it is possible for without prejudice communications to give rise to duties of confidence on the part of the recipient*" but maintains that it was not "*properly arguable*" that this principle extended to the Email: §10.

(3) The SRA sought to deconstruct the wording of the Email, identifying what is said to have been an alleged "*Implicit Threat*" that was said to be "*central*" to its case[4]: "*If a solicitor informs a potential defendant that they are not entitled to publish or refer to an email and that to do so would be a serious matter that plainly contains an implicit threat of legal action should they do so*": §§3-5.

(4) The SRA alleged for the first time that there were "*a number of highly unusual features*" about Mr Hurst's actions, introducing an argument that his conduct was somehow outside the ambit of accepted practice in the area of defamation: §6; §11.

16. In conclusion, the Reply asserted that, while reporting of the threatened defamation claim may well have been "*damaging*" to Mr Hurst's client, that damage "*was incapable of giving rise to a legal basis*" to keep it confidential: §16[5]. There is no separate consideration of the Letter in the Reply.

[4] Reply §9 states that "*The impropriety in the present case arises from the reliance on the "Without Prejudice" and "Private & Confidential" labelling to justify the Implicit Threat and to seek to prevent Mr Neidle from disclosing the threatened defamation claim*".

[5] The specific reason why this conclusion is wrong, and why it betrays a fundamental misunderstanding on the part of the SRA, is set out in §§59-61 below.

(4) **Subsequent Correspondence**

17. Although the SRA's solicitors have themselves stated that "*The issues for determination are defined by the averments in the pleadings, not statements in correspondence*" [**E296**], the SRA has sought to expand its case in two recent letters which post-date the Reply:
    (1) First, in a letter of 16 October 2024 **[M163]** the SRA stated that, notwithstanding §2 of the Reply, its case against Mr Hurst was not limited to circumstances in which it was established that Mr Hurst had "*sought to impose duties of confidence on Dan Neidle… without any properly arguable basis*". This is hard to follow as a contention, but the SRA refused to set out what its case was, stating: "*We do not propose to debate other scenarios in which our client may succeed notwithstanding that the Tribunal does not find that it was not properly arguable that all or some of the relevant information was confidential*".
    (2) Second, in its letter of 25 November 2024 **[M216]** the SRA sought to recast again what was pleaded in the Reply in relation to the alleged Implicit Threat. The alleged Implicit Threat is now said to "*have two linked elements*" one of which is defined as "*the Prohibition on Disclosure*". The SRA then isolated the sentence: "*That would be a serious matter as you know*" as the "Implicit Threat"). (That definition is pejorative; Mr Hurst will refer to the "Serious Matter Wording".)

(5) **Conclusion on SRA's Case**

18. The SRA's position has chopped and changed, including by the introduction of substantial new assertions and evidence. Aside from illustrating the SRA's problem in maintaining a coherent case against Mr Hurst, it is profoundly unfair on him to face such shifting allegations. The summary below sets out Mr Hurst's current understanding of the case against him in respect of the two allegations.

19. As to the **Letter (Allegation §1.2)**: Aside from the general proposition that Mr Hurst "*sought to impose duties of confidence… without any properly arguable basis*", the SRA's case in respect of the Letter is a mystery. The SRA has never pleaded proper particulars of its case in relation to the Letter, and each of the elements that are now emphasised as being "*central*" to the SRA's case – the alleged Implicit Threat and the alleged Prohibition on Disclosure – are absent from it. The most that the SRA has said is that the Letter "*must be read in the context of*" the Email[6]. What that means remains unclear.

20. As to the **Email (Allegation §1.1)**: So far as Mr Hurst can tell, the SRA's case can be summarised as:
    (1) Mr Hurst sought to impose a duty of confidence on Mr Neidle that had no properly arguable basis:
        i. While WP communications can give rise to duties of confidence on the part of the recipient:

[6]Applicant's Skeleton for the CMH on 18 October 2024 [**I35**].

1. that was not that case here because: (a) such duties could arise only from WP communications that both parties had expressly or impliedly agreed to; and (b) any such confidence could not extend to the fact of the claim advanced by the Client;
2. the Email was in any event not arguably protected by WP because: (a) Mr Hurst had some improper purpose which meant that WP protection could not apply; and/or (b) the conditions for WP were not satisfied (the Email allegedly contained no arguable concession, nor was there arguably genuine contemplation of litigation).

ii. It was not arguable that the Email was confidential on its own terms; or that such confidentiality restricted Mr Neidle in the way described in the Email.

(2) Mr Hurst's actions failed to adhere to the standards expected of him, in particular by making the alleged "Implicit Threat" and the "Prohibition on Disclosure".

(3) Even if Mr Hurst had a properly arguable basis for seeking to impose a duty of confidence on Mr Neidle, his actions in some way still amounted to a breach of the Code and Principles.

G. SUMMARY OF THE RESPONDENT'S CASE

21. In contrast, Mr Hurst's case is and always has been straightforward. His actions were justified and accorded with well-established legal principles. The propositions set out below: (a) are correct or at least arguably correct; (b) were regarded by Mr Hurst as properly arguable; and (c) would be regarded by a reasonably competent lawyer as properly arguable:

(1) The Email was sent on an occasion of WP privilege. That privilege extended to the fact of the communication.

(2) The Email was confidential, both because it was WP and on its own terms, and Mr Hurst correctly described what Mr Neidle could or could not do with it.

(3) There was no alleged "Implicit Threat" in the Email; in any event, any Implicit Threat would have been justified by the impropriety of intentional publication of WP privileged material by an experienced solicitor.

(4) The Letter was private and confidential, and Mr Hurst was entitled to request that such confidentiality be observed by Mr Neidle.

22. Mr Hurst was not acting so as to abuse the Court's process; his correspondence was reasonable; it was not intimidating or oppressive; he did not seek to mislead Mr Neidle; he acted at all times with integrity; and he did not act to diminish public trust[7]. To advance properly arguable contentions in defence of his client's interests cannot amount to a breach of the Code or the Principles.

[7] See generally Answer at 49(1) to (8): [**B28-30**]

H. ISSUE 1: MEANING OF "PROPERLY ARGUABLE"

23. The SRA contends that the propositions advanced by Mr Hurst by the Email and the Letter were not "*properly arguable*". In fact, Mr Hurst's stance was correct or, even if not correct, was plainly very strongly arguable. That said, it may assist the Tribunal to consider the authorities in relation to the meaning of "*properly arguable*" in order to appreciate the hurdle which the SRA must meet.

24. In Richard Buxton (Solicitors) v Mills-Owens & Anor [2010] EWCA Civ 122 the issue was whether solicitors were entitled to terminate their retainer in circumstances where a client insisted on advancing a case that they considered to be bound to fail. Dyson LJ (as he then was) held that the solicitors were so entitled. Referring to the duties set out in the version of the Bar Code of Conduct and 2007 Code of Conduct for Solicitors then in force at [43], he described arguments that were not properly arguable as being (at [46]):

> *"They were ones which they believed they could not properly articulate as legal arguments, and which were hopeless."*

25. A further strand of authority concerns decisions in respect of wasted costs applications against legal representatives. A summary of the general principles was set out by Jacobs J in King & Ors v Stiefel & Ors [2023] EWHC 453 (Comm) at [69] and includes at (iv):

> *"The mere fact that lawyers have pursued a hopeless case or hopeless defence does not mean that their conduct was improper, unreasonable or negligent. It is often the duty of lawyers to put forward a hopeless claim or hopeless defence..."*

26. The origin of this principle and its application was further considered at [75]-[79] by reference to Dempsey v Johnson [2003] EWCA 1134 and Ridehalgh v Horsefield [1994] Ch 205 which identified that it had to be shown that there was an abuse of process and "*no reasonably competent legal representative would have continued with the action.*"

27. Both strands of authority recognise that it can be "*difficult to draw the line*" (Buxton at [43]) and "*is not entirely easy to distinguish by definition*" cases which fall one side of the line or the other (Ridehalgh at 234F). In Ridehalgh Sir Thomas Bingham MR (as he then was) said expressly that "*if there is doubt the legal representative is entitled to the benefit of it.*"

28. The starting point, therefore, per Buxton, is that an issue is only not properly arguable where it: (a) cannot properly be articulated, and (b) is hopeless. On the basis of King v Stiefel, Mr Hurst could only be culpable of misconduct in advancing a contention that, on subsequent analysis, is objectively hopeless if both: (a) he did not subjectively believe that the contention was arguable, and (b) no reasonably competent legal representative could have regarded the contention as arguable.

29. Three further points can be made on the facts of this case:

(1) The SRA has not been able to point to a statute, or even authority, and then assert that what was said by Mr Hurst was unarguable as it was contrary that statute or authority. The only suggestion made by the SRA is that there is no authority which *supports* Mr Hurst's position[8]. This is straightforwardly wrong – as the analysis below demonstrates – but it is also the wrong question.

(2) In recent years the Courts have reached conclusions as to the width of privacy and confidentiality which many have considered surprising, including: (a) that information could be private even where very widely published online[9]; (b) that individuals normally have a right to privacy in the fact that they are under police investigation[10]; and (c) that information in relation to a public sporting event may be confidential[11].

(3) A reminder of the difficulty in establishing that a proposition in this field is not properly arguable arises from Mueen-Uddin v Secretary of State for the Home Departments [2024] UKSC 21. The Supreme Court reversed the decisions of the Court of Appeal and the first instance judge that a libel and data protection claim should be struck out as an abuse of process. At [66], Lord Reed (with whom Lord Sales, Lord Hamblen, Lord Burrows and Lord Richards agreed) stated:

> "*But for the fact that the courts below reached a different conclusion, I should have regarded the Secretary of State's submission that the claimant's action is an abuse of process because it is difficult for him to establish his proposed defence as unarguable.*"[12]

30. Finally, to address the SRA's contention that, even if Mr Hurst's contentions were legally arguable, they should somehow have been pursued in an even more circumspect manner, it is important to emphasise what was said about this in Buxton at [45]:

> *"In my judgment, if an advocate considers that a point is properly arguable, he should argue it without reservation. If he does not consider it to be properly arguable, he should refuse to argue it. He should not advance a submission but signal… that he thinks it is weak or hopeless by using… coded language…"*[13].

I. ISSUE 2: WITHOUT PREJUDICE PRIVILEGE

Importance of WP Privilege

31. WP privilege is founded on the public policy that parties should be encouraged to settle their differences rather than litigate to a finish. It serves that end by (a) enabling full and frank discussions, and (b) ensuring that negotiations can take place without a party being concerned that anything said may be

[8] Rule 12 at §52.
[9] See PJS v News Group Newspapers Ltd [2016] UKSC 26.
[10] See Bloomberg LP v ZXC [2022] UKSC 5.
[11] See The Racing Partnership Ltd & Ors v Sports Information Services Ltd [2020] EWCA Civ 1300.
[12] In other words, the Supreme Court regarded arguments accepted by the judge and Court of Appeal as unarguable.
[13] Dyson LJ referred specifically to advocates, but it is clear from his preceding analysis in [43] that the point applied to solicitors more generally. A solicitor must fearlessly advance their client's best interests.

used against them in any proceedings: Cutts v. Head [1984] Ch 290, 306. As was observed in Mionis v Democratic Press SA & Ors [2017] EWCA Civ 1194 at [88]-[89]:

> "*88. The law loves a compromise. It has good reason to do so, since a settlement agreement freely made between both parties to a dispute ordinarily commands a degree of willing acceptance denied to an order imposed on one party by a court decision ... …settlement does not only serve the private interests of the litigants, but the administration of justice and the public interest more generally, by freeing court resources for other cases*[14]*. The law therefore encourages and facilitates the mutual resolution of disputes by various means, for very sound reasons of public policy*"

32. In seeking to open a WP channel of communication with Mr Neidle, Mr Hurst was properly acting in accordance with this public policy. Conversely, to purport to refuse to accept WP communications is to act contrary to this public policy.

General Principles

33. The rule applies to "*all negotiations genuinely aimed at settlement whether oral or in writing*": Rush & Tompkins Ltd v Greater London Council [1989] AC 1280, per Lord Griffiths at 1300. It goes beyond communications aimed at resolving the substantive legal issues between the parties and will apply to any communication aimed at avoiding or reducing the scope of the litigation: "*the communication will be protected if there is an intention to speak without prejudice followed by a genuine proposal or genuine negotiations aimed at avoiding litigation*" (per Hoffman LJ in Forster v Freidland Unreported, CA, 10 November 1992 where the rule was held to apply to negotiations aimed at obtaining time)[15].

34. Robert Walker LJ observed in Unilever v Proctor and Gamble [2000] 1 WLR 2436, 2443: "*without in any way underestimating the need for proper analysis of the [WP] rule I have no doubt that busy practitioners are acting prudently in making the general working assumption that the rule, if not 'sacred' (*Hoghton v Hoghton *(1852) 15 Beav. 278, 321) has a wide and compelling effect*". Similarly, in Ofulue v Bossert [2009] UKHL 16 Lord Walker stated at [57]: "*I would not restrict the without prejudice rule unless justice clearly demands it*".

35. The rule presupposes the existence of an actual or potential "dispute". This does not require litigation to be on foot or to have been threatened. Such a restriction would run counter to public policy. As Auld LJ explained in Barnetson v Framlington Group Ltd [2007] 1 WLR 2443 (CA) at [32]:

> "*If the privilege were confined to settlement communications once litigation had been threatened or shortly before it is begun, there would be an incentive on both sides to escalate their dispute with threats of litigation and/or to move quickly to it, before they could safely start talking sensibly to each other. That would be a slippery slope to mutual hardening of positions and*

[14] The importance of resolving claims through negotiation is now reflected in the overriding objective of the CPR at 1.1(f) and CPR 1.4(2)(e).
[15] See also *Phipson* at §24-09 and *Passmore* at §10-02.

commencement of litigation -- hardly the encouragement to settle their disputes without resort to litigation that Oliver LJ had in mind in Cutts v Head [1984] Ch 290, 306."

36. Auld LJ stated at [34] that the "*crucial consideration*" is whether "*the parties contemplated or might reasonably have contemplated litigation if they could not agree*" (Barnetson [34]) which is an objective assessment of the contextual facts: Alam Ramsay Sales & Marketing Limited v Typhoo Tea Limited [2016] 4 WLR 59 per Flaux LJ at [23].

37. It is well-established that "opening shots" may be protected, even where they contain no offer and the party has formulated no open position: see e.g. Schering Corporation v Cipla Ltd [2004] FSR 25; Rochester Resources Limited v Lebedev [2014] EWHC 2185 (Comm); South Shropshire DC v Amos [1986] 1 WLR 1271, CA. As per *Phipson on Evidence, 20th edition* at §24-22, what is required is that: "*The opening shot must demonstrate objectively the existence of a bona fide dispute and the letter must evidence a bona fide attempt to resolve that.*" In Williams v Hull [2009] EWHC 2844 (Ch) Arnold J stated as follows at [40]:

> "*I do not agree that "without prejudice" means "without prejudice to my open position". In my view it means "without prejudice to my position in any subsequent proceedings". It is not necessary for a party to have formulated an open position for it to be able to invoke the without prejudice rule, which is why an "opening shot" in negotiations may be protected. Furthermore, imposing such a requirement would be contrary to the public policy behind the rule of encouraging settlement negotiations, since if parties had to state their open positions before they could claim the protection of the rule, that might inflame the negotiations*."

38. Nor does a communication have to include an offer in order for WP privilege to apply. In Pearson Education Ltd v Prentice Hall [2005] EWHC 636 (QB) it was stated that:

> "*It is clearly not necessary on the authorities that the communication should contain an offer and certainly it need not contain an offer of a kind that can be accepted in the legal sense as it stands. To be a negotiating document it is not necessary that it should be more than exploratory*."

39. As set out in *Thanki*, The Law of Privilege, 5th edition at §7.07: "*It is not necessary for a communication to constitute a negotiating document that it should contain a concession or offer of compromise: it is sufficient that the communication evinces a genuine desire to negotiate a settlement of an actual or potential dispute*".

40. The presence of a "without prejudice" marking is itself relevant to the determination of whether a document is properly WP. A document does not become subject to WP privilege merely by attaching the words "*without prejudice*", but the Courts have treated the label as having evidential value and as shifting the burden if written during negotiations with a view to compromise. As Lord Hope explained in Olufue at [2]:

> "*Where letters are not headed "without prejudice" unnecessarily or meaninglessly then: the Court should be very slow to lift the umbrella unless the case for doing so is absolutely plain. … Where a letter is written 'without prejudice' during negotiations with a view to a compromise, the*

protection that these words claim will be given to it unless the other party can show that there is a good reason for not doing so."

41. It has been recognised that WP communications may be revealed but only if their exclusion: "*would act as a cloak for perjury, blackmail or other 'unambiguous impropriety'*": Unilever. This is a very high hurdle restricted to "*only the very clearest of cases*": see Motorola Solutions, Inc & Anor v Hytera Communications Corporation Ltd & Anor (Rev 1) [2021] EWCA Civ 11 at [30]; "*the public interest in that rule [the WP rule] is very great and not to be sacrificed save in truly exceptional and needy circumstances*": Savings & Investment Bank Ltd v Fincken [2003] EWCA Civ 1630 at [57].

42. These are formidable authorities. It is easy to see why, in its Rule 12 Statement, the SRA abandoned any case that Mr Hurst had no proper basis for asserting that the Email was WP. All of the conditions for WP privilege applied: there was a serious dispute over Mr Neidle's publication of the Dishonesty Imputation; the Email indicated a willingness to negotiate; and, objectively construed, the Email contemplated an offer that no further action would be taken by the Client in the event Mr Neidle retracted his allegation of lying, coupled with an indication that an "open letter" would follow if the retraction was not made. The approach was a genuine attempt to explore settlement.

43. It is less easy to understand why the SRA's case was resurrected in the Reply. The SRA suggests both that there was no genuine contemplation of Mr Hurst's client suing Mr Neidle (at §11.3) and that the "without prejudice" label was used solely to attempt to keep the Client's threatened claim secret (at §11.1). It is not clear what the evidential basis is upon which the SRA considers itself able to plead such allegations. Certainly, in light of both the contemporaneous documents and Mr Hurst's witness statement, there does not appear to be any proper evidential basis for the SRA to maintain them.

44. The SRA also now alleges (at §11.2) that the Email did not contain any genuine concession or other material that could be prejudicial to the Client in subsequent litigation. This is apparently because "*Defamation letters of claim commonly state (on an open basis) that the claimant will not seek any damages if the defendant promptly retracts*" and that "*This is particularly so with wealthy public figures, where the expectation is that they should seek to avoid bringing a defamation claim unless strictly necessary and they do not need the money*". These assertions are wrong: to imply, as the Email did, that a retraction of the Dishonesty Imputation would be sufficient to resolve the dispute is a concession, and the SRA's apparent belief as to how wealthy public figures are expected to behave is neither of any relevance, nor supported by the evidence.

45. In summary, the SRA's case that it was not properly arguable that the Email was WP is hopeless.

Extent of Confidentiality

46. Having repeatedly asserted that it was not arguable that WP communications were not for that reason confidential, the SRA changed tack in the Reply: "*the Applicant accepts that it is possible for without prejudice communications to give rise to duties of confidence on the part of the recipient*": Reply §10. The SRA now assert instead that there are apparently two reasons why the Email did not even arguably give rise to duties of confidence (at §10.1-2):
    (1) Because such duties of confidence can only arguably arise where the communications are WP by virtue of express or implied agreement between the parties, and Mr Neidle had refused to accept WP correspondence; and
    (2) Because any duty of confidence would not even arguably have extended to "*the fact that the claimant was advancing a claim against the defendant. The words 'or refer to it' sought to prevent Mr Neidle even from referring to the fact of the claim*".

47. These are novel and surprising assertions, unsupported by authority. The general principle is addressed in *Passmore*, 5th edition[16], §10-112 to §10-122 which concludes as follows:

> "*In conclusion, it is submitted that without prejudice documents should be treated as confidential documents, a fortiori if they are also marked as being confidential, such that any attempt to share them with a third party in the absence of a legitimate litigation reason can be stopped via injunctive relief. It would follow that there can be no objection to marking such letters as confidential: while these are communications between parties in dispute, first they cannot be adduced in evidence by either party without the consent of the other, and secondly, the documents must be treated as confidential as against all third parties*."

48. As to the suggestion that confidentiality applies only where WP discussions have been agreed:
    (1) It is well settled that there is a broad public policy justification for the WP rule whether or not there is any contractual basis: see e.g.: Rush & Tompkins (1299D-H); Ofulue v Bossert ([85]). There is no principled basis for a distinction between different classes of WP communication.
    (2) Consistent with the rationale of Rush & Tompkins, in Holyoake v Candy [2016] EWHC 2119 (Ch) it was said at [14] that: "*If the application [to rely upon allegedly Without Prejudice material] fails, this material is all properly without prejudice and should be kept confidential*". In Briggs v Clay [2019] EWHC 102 (Ch) at [90] "*confidentiality*" was described as "*the very protection that the without prejudice rule is intended to confer on them*"[17].
    (3) Further if there had to be an agreement between the parties in order for the rule to apply then:

[16] Published on 25 October 2024.
[17] Similar broad statements have been made in, for example, Crane World Asia Pte Ltd v Hontrade Engineering Ltd [2016] HKCA 737; *Passmore* at §10-075 and *Gurry on Breach of Confidence, 2nd edition* at §9.145.

i. Opening shot communications would never be confidential; receiving parties would be able to refer to them and publish them freely. This is not the law. It would be a nonsense and would actively disincentivise parties from WP communications.

ii. Unless a party agreed in advance to receive an offer, all "*Without Prejudice Save As To Costs*" offers could be published freely. Again, this is not the law and would be a nonsense.

iii. The conclusion reached in the leading textbook *Passmore* at §10-122 would be wrong; indeed on the SRA's case it would not even be arguably correct.

(4) The apparent source for the SRA's latest contention is that, in *Toulson & Phipps*, the principle that "*A person participating in without prejudice negotiations… owes to his opponent a private law duty of confidentiality*" follows on from a statement that the WP rule can derive from agreement as well as from public policy (such explanation being given to explain why the WP privilege can survive a trial): §17-017. The SRA appears to interpret this as a statement that WP communications are not confidential unless they derive from agreement. That is not what the text says, and there is no support to be found for such a novel proposition anywhere in the authorities. Rather, the authorities are to the opposite effect (as above).

49. As to the SRA's second proposition, there is ample authority that WP privilege can protect the fact of WP communications. In Wildbur v MOD [2016] EWHC 821 the claimant sought to resist an application to strike out particulars of a reply on the basis that they only referred to the fact of settlement meetings and not their content: see [12]. That submission was rejected by Cranston J. He ordered that the passages be struck out, stating:

> "*14. It is not, of course, necessary that the without prejudice label should be applied specifically to settlement efforts for the privilege to attach. The rule is broad. As Oliver LJ stated in Cutts v Head, it applies as well to a failure to reply to an offer as much as to an actual reply. In my view, his Lordship's words cannot be read down, as Mr Mainwaring submitted, to cover specific offers for settlement. Instead they extend to the very fact of an offer of settlement negotiations*." (emphasis added)[18]

50. The SRA's contention is the same as that rejected in *Wildbur*. Further, as necessary, in relation to both propositions Mr Hurst will rely upon his own evidence and that of his witnesses on practice and usage.

J. ISSUE 3: CONFIDENTIALITY AND THE "PROHIBITION ON DISCLOSURE"

General Principles

[18] See also *Passmore* at §10-002 "*While the privilege is usually focused on the contents of the without prejudice communications and the manner in which the parties conduct themselves in those negotiations, it now seems that even the fact that such negotiations have occurred, unless that fact is relevant to an issue in the case, will be treated as within the scope of the privilege*." [emphasis added]

51. As regards *prima facie* confidentiality the starting point of the law of confidentiality remains the formulation in Coco v AN Clark (Engineers) Ltd [1968] FSR 415, 419:

> "*First, the information itself, in the words of Lord Greene, M.R. in the Saltman case … must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it*."

52. As explained in *Toulson & Phipps* at §4-001, the first and second points are "*closely linked*". Both are assessed from the viewpoint of a reasonable person; "*the circumstances in which information is received may be relevant to whether a reasonable person would regard the subject matter as confidential*".

53. It is well established that an obligation of confidence may arise in the absence of any pre-existing relationship or agreement[19]. In general, a recipient will be treated as having notice of the confidentiality where a reasonable person in the position of the recipient would know or ought to have known that the claimant would reasonably expect the information to be kept confidential[20].

Correspondence

54. As is stated in *The Law of Privacy and the Media*[21], *"The court has protected the confidentiality of private correspondence since at least the late 18th century. It is clearly established that, as a starting point, the contents of private letters are to be regarded as subject to a duty of confidentiality owed by the recipients to the writer*". *Gurry* cites Earl of Lytton v Devey[22] in which Bacon V-C stated:

> "*It would be strange, indeed, if, because a man writes to another a confidential communication, that other has a right to publish it to the world. It is a matter between themselves. It would be neither just, nor right, nor lawful, that any publication of these communications should be made*."

55. The modern approach is similar. Because "correspondence" is specifically referred to in Article 8 of the ECHR as a matter in which an individual has a right to privacy, the Court will often analyse the issues through the same prism, although information need not be private to be confidential[23]. In HRH The Duchess of Sussex v Associated Newspapers Ltd [2021] 4 WLR 35 at [74] Warby J rejected as being *"at odds with a large body of authority*" the proposition that "*as a general principle, a recipient of a letter is not obliged to keep its existence or contents private, unless there are special circumstances, such as a*

[19] AG v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, 281; Associated Newspapers Ltd v HRH Prince of Wales [2008] Ch 57.
[20] Imerman v Tchenguiz [2011] 2 WLR 592 [66]-[67]; Primary Group (UK) Ltd v Royal Bank of Scotland [2014] EWHC 1082 (Ch) [223]; Matalia v Warwickshire CC [2017] EWCA Civ 991 [46].
[21] *Ibid* at §5.92.
[22] Earl of Lytton v Devey (1884) 54 LJ Ch 293, 295-6; see *Gurry* at §2.106.
[23] See e.g. Prince of Wales v Associated Newspapers Ltd [2008] Ch 57 at [29] which also draws attention to the fact that *"Article 10.2 provides that the freedom to receive and impart information and ideas 'may be subject to such formalities, restrictions or penalties as are prescribed by law and necessary in a democratic society for preventing the disclosure of information received in confidence'"* (emphasis added).

mutual understanding between sender and recipient that the contents of a letter should be kept private"[24].

Toulson Definition

56. The authors of *Toulson & Phipps* summarise the position in relation to the first requirement as derived from Thomas Marshall Ltd v Guinle [1979] Ch 227[25], at §4-005:

> "*To adapt these principles for more general application, it is suggested that the following elements characterise information that is confidential:*
> *(a) There must be some value to the party claiming confidentiality (not necessarily commercial) in the information being treated as confidential;*
> *(b) The information must be such that a reasonable person in the position of the parties would regard it as confidential; and reasonableness, usage, and practices in the relevant sector (for example, industrial or professional) are to be taken into account*."[26]

Toulson Factor (a)

57. The SRA appears to have overlooked this issue. Mr Hurst has consistently explained that a significant factor underlying the confidentiality of the Email and Letter was that, if they were not treated confidentially, further damage could be caused to the Client by repetition of the Dishonesty Imputation. Mr Hurst was entitled to treat the Dishonesty Imputation as false and therefore seeking the restraint of the repetition of it was also legitimate. The SRA appears to accept this premise (that dissemination might be "*damaging*" to the Client), but such damage is said to be irrelevant and "*incapable of giving rise to a legal basis*" to confidentiality: §16. Indeed, this analysis appears to be central to the SRA's averment that Mr Hurst's actions were improper: Rule 12 Statement: §§59-63.

58. The SRA's approach is simply wrong. Avoiding damage to the Client (and, on the arguable basis that it was false, the public interest) from repetition of the Dishonesty Imputation would be a proper objective and could underlie an obligation of confidentiality: see e.g. Answer at §§3(4), 15(4), 43 [**B3-23**]. Mr Hurst's witnesses also speak to the importance of this issue.

59. The SRA has failed to engage with this issue and not adduced any evidence relevant to it, despite being on notice of it since service of the Representations: see the Caldecott Opinion at §13 and §73. Once it is recognised that seeking to limit damaging secondary publicity in respect of the Dishonesty Imputation would be a proper aim for Mr Hurst, it can be seen why letters of the sort sent by Mr Hurst are commonly

[24] In RH the Duchess of Sussex v Associated Newspapers Ltd [2021] EWCA Civ 1810 the Court of Appeal did not cast any doubt on this analysis, and at [106] confirmed the fact that the claimant "*realised that her father might leak its contents to the media*" did not prevent the letter in question from being private. See also Tchenguiz v Imerman, ibid at [76]-[77].
[25] The Vice Chancellor stated at 248 that "*as long as the owner believes it to be confidential I think he is entitled to try and protect it* ".
[26] At §4-005.

both marked and treated as confidential. It also explains and reinforces why the mere fact of a complaint is also regarded as confidential, in addition to the communication as a whole.

Toulson Factor (b): Practice and Usage

60. In light of Toulson factor (b), the Tribunal has determined that the parties are entitled to rely upon "practice and usage" in the relevant sector. In the SRA's Note for the CMH on 4 July 2024 **[I14]** the SRA stated that it intended:

> "*…to rely on the longstanding and consistent practice of potential defamation defendants informing others that they have been threatened with a claim and (relatedly) the absence of any recognition or understanding of an obligation keep that fact confidential (in the absence of anything confidential in the subject matter*"

61. The SRA expanded on this position in its letter of 1 October 2024 **[M133,138]**:

> "*4.6 …industry practice is relevant to the non-existence of any duty of confidentiality … and the highly unusual nature of your client's conduct is relevant to the Tribunal's assessment of (i) whether it was sufficiently serious to amount to a breach of the pleaded paragraphs of the Code and Principles; and/or (ii) whether it demonstrates a lack of integrity*."

62. The only evidence advanced by the SRA on industry practice is the statement of Ms Phillips. The evidence upon which Mr Hurst relies takes two forms:
    (1) First, the materials set out in Answer §44(1)-(6) **[B23]** including judgments and the leading practitioner textbook *Gatley on Libel & Slander, 13th edition*. *Gatley* advises that, if there is a risk a Letter of Claim (let alone a post-publication letter generally) will be published, it should be headed "*Private and Confidential – Not for Publication*" and that if it is so headed "*a responsible solicitor would certainly advise his client that [to publish] it would be inadvisable (as a potential breach of confidence, or as aggravating the situation and possibly the damages*)": §26-007[27].
    (2) Second, the evidence of Lord Garnier KC; Hugh Tomlinson KC; Adam Speker KC; Lorna Skinner KC and Mr Engel. They give relevant evidence as to practice and usage and helpfully explain something of the rationale behind such practice and usage.

63. Such evidence establishes that the approach Mr Hurst adopted in the Email and Letter was supported by a reasonable and responsible body of industry practice. That being so, the SRA could only succeed in its case against him if this is one of those rare cases that the industry practice can be rejected as it is incapable of withstanding logical analysis: McCulloch & Ors v Forth Valley Health Board (Scotland) [2023]

[27] The SRA seek to rely in the Reply upon the fact that the text states that the letter should not be headed "without prejudice", but that is because the text is referring to a *formal* letter before action, which patently should not be so headed (and in any event is not the case here). The principle addressed in the quoted text relied upon by Mr Hurst is obviously of more general application to letters referring to damaging defamatory allegations.

UKSC 26. This is plainly not such a situation. Even then, no case is made by the SRA that Mr Hurst knew of or should have been aware of any contrary industry practice.

Toulson factor (b): Confidentiality Markings

64. Because confidentiality may turn on how a document is reasonably to be viewed, confidentiality markings are themselves important. In addition to *Gatley*, the authors of *The Law of Privacy and the Media* cite the observation of Jacob J (as he then was) in Barrymore v News Group Newspapers Ltd [1997] FSR 600, 603 that "*if something is expressly said to be confidential, then it is much more likely to be so held by the Courts*" and conclude[28]:

> *"[a] non-contractual stipulation that information is, or is to be treated as, confidential will not be conclusive, but may be an important factor in determining whether the information is indeed confidential in nature*".

65. It follows that if a client wants a document to be treated confidentially, it may well be negligent for a solicitor not to stipulate that it should be treated as confidential, whether by suitable labelling or otherwise[29]. The starting point should thus be that it cannot be improper for a solicitor to make such an assertion of confidentiality when the assertion is itself material to the question of whether a document or piece of information is objectively confidential. That is particularly so in this case, where the SRA has acknowledged that it was proper for Mr Hurst to use the "Not for Publication" label on the Letter to indicate that the Client wanted it kept confidential and not to be published.

Defences

66. There are potential defences to a breach of confidence action. The SRA has not pleaded that any such defence would have applied, let alone that it would undoubtedly have succeeded. The SRA make general references to the existence of a "*public interest*", but they are meaningless in this context. There is a public interest in maintaining obligations of confidence. There is a public interest in ensuring that reputations are protected. There is a public interest in correcting false information.

67. A "defence" of public interest would require it to be alleged and proved that there was a public interest in breaching a duty of confidence[30]. The SRA does not seek to do this. More generally, the SRA recognises that the underlying defamation claim was arguable. This necessarily involves recognition that it was arguable that there was no defence of public interest[31] pursuant to section 4 of the Defamation Act 2013.

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[28] *The Law of Privacy and the Media, Tugendhat & Christie, 3rd edition, 2016, Oxford* at §4.69.
[29] See e.g. Tett Bros Ltd v Drake & Gordon (1934) [1928-35] MacG CC 492 (Clauson J) referred to in *Gurry* at §2.110 in which a claim for breach of confidence failed in part because "*The letter had not been marked private and confidential*".
[30] See Answer at §45(4).
[31] Section 4 of the Defamation Act 2013.

The Email and the Letter were confidential

68. The Email was private and confidential both because it was WP and in any event. The Letter was private and confidential. The specific information that was most private and confidential includes privileged information, but extended to the facts that[32]:
    (1) The Client had instructed libel solicitors to respond to a specific allegation of dishonesty (the Dishonesty Imputation) in relation to his personal tax affairs; and
    (2) In respect of the Letter, that the Client was not threatening legal action at this stage.

69. This information was not publicly known and the confidentiality in it was of value to the Client:
    (1) First, because its repetition would lead to damaging secondary publicity of the Dishonesty Imputation which in turn would likely result in further adverse publicity against the Client;
    (2) Second, because it would reveal the Client's negotiating position to third parties.

70. The SRA asserts that information relating to the shareholding of Balshore Investments in YouGov was in the public domain. But that misses the point. First, it is not clear that all information relating to the shareholding of Balshore Investments was in the public domain. The SRA has never pleaded a case as to what information was or was not public. Second, Mr Hurst could not reasonably be expected to have established the precise factual position in the pressured circumstances of Saturday 16 July 2022 when the Email was drafted, approved and sent. The SRA has never pleaded a case that he did or should have done. Third, and in any event, the confidentiality of the information as to Balshore Investments is irrelevant to the confidentiality of the information set out in the preceding paragraph.

Alleged Prohibition on Disclosure

71. The SRA's case appears to be that, even if there was an arguable duty of confidentiality in respect of the contents of the Email, the wording "*you are not entitled to publish it or refer to it other than for the purposes of seeking legal advice*" improperly overstated the nature of the confidentiality obligation owed by Mr Neidle. There are two answers to this:
    (1) First, any such contention is wrong in law. It is well-established that a breach of a duty of confidentiality can extend to any use of information[33]. The point was addressed authoritatively by the Court of Appeal in Tchenguiz, *ibid* at [69]:

> "*In our view, it would be a breach of confidence for a defendant, without the authority of the claimant, to examine, or to make, retain, or supply copies to a third party of, a document whose contents are, and were (or ought to have been) appreciated by the defendant to be, confidential to the claimant. It is of the essence of the claimant's right to confidentiality that he can choose*

[32] See Answer at §43.
[33] Hence, invocations of this sort are to be found as footers of countless emails sent by lawyers (see for example [**M278**].

whether, and, if so, to whom and in what circumstances and on what terms, to reveal the information which has the protection of the confidence. It seems to us, as a matter of principle, that, again in the absence of any defence on the particular facts, a claimant who establishes a right of confidence in certain information contained in a document should be able to restrain any threat by an unauthorised defendant to look at, copy, distribute any copies of, or to communicate, or utilise the contents of the document (or any copy), and also be able to enforce the return (or destruction) of any such document or copy. Without the court having the power to grant such relief, the information will, through the unauthorised act of the defendant, either lose its confidential character, or will at least be at risk of doing so. The claimant should not be at risk, through the unauthorised act of the defendant, of having the confidentiality of the information lost, or even potentially lost."[34]

(2) Second, Mr Hurst will give evidence as to his state of mind when drafting this part of the Letter, including that he had no intention to mislead or intimidate Mr Neidle.

K. ISSUE 4: THE ALLEGED "IMPLICIT THREAT": "*that would be a serious matter as you know*"

72. This is said to be a "central" part of the SRA's case against Mr Hurst. It is addressed in the evidence of Mr Hurst and in the "*practice and usage*" witness statements (because the SRA assert that "*A threat of this kind appears to be unprecedented*": Reply §6.1). Two preliminary points can be made.

73. First, care must be taken when deconstructing the text of the Email in the way the SRA seeks to do. The SRA's approach glosses over the fact that the words immediately following those repeatedly quoted by the SRA are: "*We recommend that you seek advice from libel lawyer if you have not done already.*" Second, the Serious Matter Wording specifically related to the Email itself (not to the Client's complaint). Third, it is inapt and loaded to characterise this sentence as a threat. Mr Hurst was simply pointing out, correctly, that it would be a serious matter for an experienced solicitor to publish or refer to a WP communication, thereby breaching the confidentiality in it. This is evident from the prior sentences in the Email. Mr Hurst was entitled to make that clear to Mr Neidle, who had just messaged Mr Hurst stating: "*I will not accept without prejudice correspondence*" and "*I am afraid I will find it hard to take anything you send me seriously*" **[X897]**. Fourth, in any event, whatever interpretation is placed on these words by the SRA results in a proposition that is still arguable as a matter of law.

74. It is common ground that the Letter did not contain any alleged Implicit Threat. It simply said: "*We therefore request that you do not make the letter, the fact of the letter or its contents public*". Despite this, the SRA continues to allege that the Letter was a breach of the Code and Principles on an identical basis to the Email: Rule 12 Statement: §67. This approach makes no sense at all.

L. ISSUE 5: THE SRA'S RESIDUAL CASE – MISCONDUCT EVEN IF PROPERLY ARGUABLE

[34] See to similar effect Lord Millett in Bolkiah v KPMG [1998] UKHL 52.

75. The SRA has not set out any reasoned basis upon which a party could be held to be in breach of regulatory obligations, despite pursuing arguments that were legally arguable. As explained above, the SRA has unilaterally refused to detail or "debate" scenarios: **[M163]**.

76. It is possible to envisage cases in which a party pursues a properly arguable contention, but does so in a manner that is so oppressive that it undermines public trust in the profession. Repeated offensive letters to a vulnerable individual might qualify. But that is not what it is alleged in this case, where each breach of the Code and Principles is tied to the case that Mr Hurst's stance was "*not properly arguable*"; "*misleading*" and "*not correctly based on legal principles*": Rule 12 at §§59-63 [**A19-21**].

77. The one "example" offered by the SRA in the letter of 16 October 2024 is a situation in which the Tribunal finds that it was ("*just about*") arguable that Mr Neidle owed a duty of confidence. The SRA state that if the Tribunal determined that there was in fact no duty of confidence (but such a contention was arguable), and that there was no prospect of the Client taking any action against Mr Neidle in relation to breach of such a duty, then apparently "*it would be open to the Tribunal to find our client's case had been established*": **[M163]**. Any such case, if pursued by the SRA, would be hopeless. If there was an arguable duty of confidence, the SRA's case fails. In such circumstances Mr Hurst would only have been doing what he was entitled, indeed obliged, to do, namely advancing his client's best interests - by measured correspondence sent to an experienced solicitor.

M. ISSUE 6: CODE AND PRINCIPLES CORE LEGAL TESTS

The Code

78. Paragraph 1.2 provides that a solicitor must not abuse their position by taking unfair advantage of clients or others. Mr Hurst did not abuse his position. He did not take advantage of Mr Neidle. He advanced contentions, on behalf of his Client, that were correct or arguably correct in law. Even though Mr Neidle was an experienced solicitor, Mr Hurst still recommended that Mr Neidle should take legal advice. Mr Hurst acted properly in the circumstances.

79. Paragraph 1.4 provides that a solicitor should not mislead or attempt to mislead others including by your own acts or omissions. Mr Hurst did not mislead or attempt to mislead Mr Neidle. Mr Hurst advanced contentions that were correct or arguably correct in law. He recommended that Mr Neidle take his own legal advice. Mr Hurst acted properly.

80. Paragraph 2.4 provides that a solicitor should not put forward statements to others which are not properly arguable (as addressed above). The contentions put forward by Mr Hurst were properly arguable. In summary, any allegation of breach of these paragraphs of the Code fails if the propositions

advanced by Mr Hurst in the Email and Letter were correct or arguably correct in law. Here, the propositions were (at least arguably) correct in law. In order to go further and find misconduct, the Tribunal would then have to find both that (a) Mr Hurst did not believe the contentions were properly arguable, and (b) no reasonable solicitor could have regarded such contentions as properly arguable. There is no evidence before the Tribunal to support such findings.

Principle 5 - Lack of Integrity

81. The leading case is Wingate & Evans v SRA [2018] 1 WLR 3969, CA. In [101] of Wingate the Court of Appeal listed previous Tribunal cases in which lack of integrity findings have been made. Each example includes an element of conscious wrongdoing. While lack of integrity is a more nebulous concept than dishonesty (which is not alleged), it requires a similar analytical process to identify. The first question for the Tribunal is what Mr Hurst knew, suspected or believed. Only when that question has been answered should the Tribunal then consider whether the solicitor with that knowledge, those suspicions or beliefs lacked integrity: see [116]-[119] of Wingate[35], which refer to the two-stage approach for considering dishonesty in Ivey v Genting Casinos [2018] AC 391[36].

82. The first question of what the solicitor knew, suspected or believed is a subjective one: see the example at [60] of Ivey of a naïve or ill-informed bus passenger who genuinely believed that public transport was free (e.g. because he or she came from a country where it was). Objectively judged that is not a sensible belief in the UK, but a person who genuinely held that belief would not be dishonest[37].

83. The first task for the Tribunal, therefore, is to determine what Mr Hurst knew, suspected or believed without overlaying the second test of what a hypothetical reasonable person would have made of those beliefs. Only then should the Tribunal turn to the second part of the *Ivey* test, namely the objective issue of whether Mr Hurst lacked integrity by the standards of reasonable people. It must be founded on a careful analysis of what Mr Hurst actually knew, thought or believed. As applied to this case, if the Tribunal is satisfied that Mr Hurst believed that he was acting appropriately, then he cannot have lacked integrity, even if some other solicitors might have had a different belief. Where a solicitor is unaware of risks and has acted unwittingly, he or she does not lack integrity.

84. This point was addressed by the judgment of the Divisional Court in SRA v Siaw [2019] EWHC 2737. A solicitor had paid money, relating to an immigrant he was helping, into his own bank account. The case

[35]This was applied by the SDT in SRA v Woolf (case No 12374-2022) at para 15.60. See also "*The Solicitors Disciplinary Tribunal*" by Nigel West and Susanna Heley, at para 11.6.2.

[36] Care needs to be taken when reviewing any pre-*Ivey* cases on want of integrity. Often parts of those cases discuss parts of the pre-*Ivey* tests for dishonesty.

[37] The Supreme Court makes a similar point about a person who innocently misreads a bus pass and fails to realise that it cannot be used before 10 am, or a child who does not know the rules.

involved conflicting findings of fact by the Tribunal. One the one hand the Tribunal had held that the solicitor had a "*deep and misguided belief*" that he was acting privately to help a friend. On the other it held that he that he knew he should be paying money into the firm. The Divisional Court pointed out the inconsistency between the two but made clear that if the solicitor had really had the "*deep and misguided belief*" he would not have been dishonest or lacked in integrity; see Flaux LJ:

> "*57 … It is difficult to see how, if the respondent had really had the mistaken belief found by the SDT that he was acting privately for a friend and that some of the money was his own, the SDT could have found lack of integrity proved against him to the requisite standard*."

85. Further support for this approach can be found in the Upper Tribunal's judgment in Seiler & Ors v FCA [2023] UKUT 00133 (TCC). This case concerned FCA Principle 1, namely that "*an approved person must act with integrity in carrying out his controlled function*". The Upper Tribunal noted that the examples given in APER.4.1 of lacking integrity are of deliberate conduct. At [40] the UTT stated that:

> "*Turning a blind eye to known risks can amount to deliberate behaviour and thus amount to acting without integrity but inadvertently failing to address risks which were not known to the person concerned cannot do so*."

86. At [42-49] the Upper Tribunal addressed the concepts of lack of integrity and recklessness (the FCA having founded its case on recklessness - which is not alleged against Mr Hurst). It is clear from Seiler that in order to make a finding of lack of integrity, the Tribunal would need to find one of the following (to the extent such a case has been properly advanced in the first place): (a) That Mr Hurst acted recklessly in a way that is incompatible with having integrity; (b) That Mr Hurst lacked a moral compass, in the sense that he recognised a risk of a morally objectionable action which would be unreasonable to take, and took that risk anyway; or (c) That Mr Hurst failed to appreciate the moral character of that risk (beyond merely lacking imagination or taking a negligent approach). No case has been advanced against Mr Hurst on any such basis.

87. The tests set out in the Seiler case reflect the approach by the Tribunal and the Courts to lack of integrity in solicitors' cases. The examples of lack of integrity in [101] of Wingate (as well as Wingate itself) are all conduct that was deliberate, reckless, involved turning a blind eye or having a defective moral compass[38]. There is simply no proper basis to allege that Mr Hurst acted in such a way.

Principle 2 – Public Trust

88. Principle 2 requires solicitors to act "*in a way that upholds public trust and confidence in the solicitors profession and in legal services provided by authorized persons".* Principle 2 is aimed at something different from lack of integrity. In Wingate at [105], Jackson LJ stated that "*a solicitor acting carelessly,*

[38] Note that all of these cases, barring Wingate, pre-date Ivey in the Supreme Court and therefore often discuss a superseded test for dishonesty.

but with integrity, will breach principle 6 [the forerunner to Principle 2] if his careless conduct goes beyond mere professional negligence and constitutes manifest incompetence". As to what is meant by "*manifest incompetence*", that is something worse than, and of a different order to *"run of the mill professional negligence*".

89. The nature of the "different order" is usefully illustrated by analogous reference to the Divisional Court's remarks on what type of conduct would engage Principle 5 in SRA v Day [2018] EWHC 2726 (Admin) at paras 156-157, which emphasised that in order to be a breach, conduct has to go beyond a mere error and to amount instead to something that is "*serious and reprehensible*" and would be regarded as such by "*competent and responsible solicitors*". Here, here was no conduct on the part of Mr Hurst that could be said to involve a serious and reprehensible breach of his regulatory obligations. On the contrary, Mr Hurst acted in accordance with his regulatory obligations.

N. CONCLUSIONS

90. The following conclusions can be drawn:
    (1) The contention that the Email was WP was correct, or at least arguably correct, in law.
    (2) The contention that the Email and Letter were confidential was correct, or at least arguably correct, in law.
    (3) The alleged Prohibition on Disclosure was a correct statement in respect of a confidential communication.
    (4) There was no "Implicit Threat". It was a serious matter for Mr Neidle, as an experienced solicitor, to publish the Email. In any event, publication could have resulted in serious adverse consequences, including aggravated damages had a defamation claim been pursued by the Client.
    (5) Not only were the contentions advanced by Mr Hurst correct, or arguably correct, in law, but at the time he believed that to be the case based on his clear privileged instructions and the due diligence he undertook. It cannot be said that no reasonably competent solicitor could have regarded the contentions as arguable.
91. That being so, both Allegations against Mr Hurst should be dismissed.

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9 December 2024