BEFORE THE SOLICITORS DISCIPLINARY TRIBUNAL

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

AND IN THE MATTER OF:

SOLICITORS REGULATION AUTHORITY LIMITED

Applicant

And

LEWIS BRADY

Respondent

RESPONSE STATEMENT PURSUANT TO RULE 12 (2) OF THE SOLICITORS (DISCIPLINARY PROCEEDINGS RULES) 2019

This response to the SRA's Rule 12 Statement is made on behalf of the Respondent, Lewis Brady.

Overview

1. The Applicant's allegations are fully contested by the Respondent and a number of core legal and factual matters relied on by the Applicant are disputed.

2. In addition, it is asserted that the matters complained of have insufficient nexus to his practice as a solicitor having regard to the facts and the decision in Beckwith [2020] EWHC 3231 (Admin). In particular, the matters complained of did not take place in a work setting, and he was not in a supervisory position or effectively senior role to either complainant. Furthermore, the Respondent had a reasonable belief that Person A and Person B were consenting in relation to any touching that occurred. Therefore, and on proper analysis, it cannot be said that the matters relate to his practice as a solicitor, or that he abused his professional position as a solicitor.

Appendices and documents

3. The following evidence is submitted in support of the Respondent's case alongside this response to the Applicant's Rule 12 Statement and is referred to throughout:

    a. Witness statement of Lewis Brady ("LB1")
    b. Character statements

Facts in dispute

4. Mr Brady takes the following factual issues with each of the SRA's allegations.

Allegation 1.1

5. Any suggestion that the Respondent deliberately and knowingly engaged in any non consensual sexual activity with Person A during any of the events described by Person A or at any other time is denied. Mr Brady believed that any touching which occurred was both consensual and mutual. Specifically, it is submitted in relation to the allegations:

    22 September 2021

6. It is disputed that any part of this evening amounted to a work event or stemmed from a work setting. In any event, it is entirely refuted that subsequently attending the London Cocktail Club could in any way be particularised as a work event.

7. The initial invite to Hijingo Bingo was exclusively sent to a select group of junior members of the firm by Person B. The evening was self-funded and not endorsed by Orrick. Mr Brady attended this evening in his personal capacity and free time, and not as a representative of the Firm.

8. Additionally, the decision to continue on to a night club that evening was unplanned and a decision taken at that time by the people in attendance. This was ~~not pre arranged and it~~ was unconnected to the workplace. There were no clients or prospective clients of the Firm in attendance, or any expectation of professional networking, and there was no other nexus to Mr Brady's employment with the Firm (i.e. none of the attendees were holding themselves out as members of the profession or of the Firm to others present, the evening being purely social in nature).

9. Furthermore, and importantly, it is disputed that Mr Brady touched Person A's breasts at any point on this date. He accepts dancing with Person A at the London Cocktail Club during which there was incidental (and potentially accidental) touching of the waist and bottom between them. As set out in Mr Brady's witness statement, this was mutual and Mr Brady believed it to be consensual in light of Person A conduct towards him.

14 October 2021

10. The Respondent disputes the Applicant's description of this evening as "*spontaneous after work team drinks*;" This is factually incorrect and misrepresented. Mr Brady and Person A had attended an informal dinner at Obica restaurant which was attended by non-Orrick employees immediately prior to going to Juno Rooms. (See Person B2 Para 12)

11. This was an informal event where Person B had invited a select few friends to meet her husband over dinner. This is an entirely social event and cannot reasonably be categorised as having any connection to Mr Brady's professional life.

12. In any event, Mr Brady does not believe that he touched Person A's leg, and certainly not in the way described by Person A. If any contact did occur this would have been purely accidental and non-sexual in nature.

20 October 2021

13. The Respondent disputes the account of this evening that is relied upon by the Applicant. The evening in question began with a wine tasting event in commemoration of Black History Month held in the Orrick office. The Respondent accepts that this part of the evening was a work event. However, the remainder of the evening after leaving the office had no connection, formal or otherwise, to the Firm, the Firm's clients, or the Respondent's work within the profession.

14. Mr Brady attended the Apulia restaurant that had been booked by Person B, the attendees were exclusively a group of friends who knew each other from Orrick. The meal was entirely self-funded by the attendees and not endorsed by Orrick. It did not

form part of the Firm's invite to the Black History Month event, nor did it have any nexus to the same. Instead, the evening was always understood to be a social (non-work related) gathering.

15. Following the meal, a smaller group, including Mr Brady, Person A and Person B decided to go to a karaoke bar, 'K-Box'. This was not pre-arranged, booked or endorsed by Orrick. Rather, it was a decision made by friends to continue a social night out together.

16. Person A states nothing happened in K-Box - this is not accepted. Person A touched Mr Brady and she placed his hands/arms on her chest area. This occurred repeatedly whilst in K-Box.

17. Following K-Box, and in the early hours of the following morning, an even smaller group, including Mr Brady and Person A, went to Beduin bar, a nightclub in Smithfields London. Again, It would be inaccurate, unreasonable and tenuous to suggest this evening had any connection to the wine tasting that finished in the early hours of the evening of the day before.

9 December 2021

18. It is accepted by the Respondent that the Christmas party at Clays was a work event as it had been organised, and paid for by the Firm, albeit not within working hours. However Mr Brady denies touching Person A at any point during the Christmas party and/or saying "I think you're fit", as alleged. The SRA's attention should be drawn to the Statement of Person D (See Person D1 para 59) which substantiates this position and states "*I was concerned that something would happen to Person A that evening so I was trying to watch that nothing happened. To my knowledge he never did anything to anyone at Clays*".

19. Moreover, Person A did not "confront" Mr Brady. Person A simply reiterated an earlier statement that Mr Brady didn't speak to her much in the office. In fact, evidence directly undermining Person A's account is provided in her own statement. In her evidence at Person A1 (para 214) she states that she never confronted Mr Brady about how she felt.

20. It is disputed that attending Beduin Bar after the Christmas party could be categorised as as a work event. This was again a small select group of friends that chose to go out after the party, in their personal time and capacity. This part of the evening was self-funded and not organised or endorsed by Orrick. In any event, Mr Brady denies that any touching occurred at Beduin outside of consensual dancing. It would appear in fact that Person B asked whether Person A wanted to "shag" Mr Brady (Witness statement of Person D Para 88). Mr Brady was not aware of this and had no input into this discussion.

16 December 2021

21. It is denied that this event was a work event, and it cannot properly be construed to have relation to Mr Brady's professional practice. The evening began with an invite being sent to a small group of Person B's friends to attend a curry house in the immediate vicinity of Person B's home (Travel Zone 3 of London). Additionally the meal was attended by non-Orrick staff further demonstrating it was a social occasion, and again was self-funded and attended exclusively by Person B's friends.

22. After the meal, Person B invited Mr Brady and Person A (along with others) to Person B's house to continue to drink alcohol and play drinking games together. This was followed by a further invite to watch a film in an upstairs bedroom under a number of duvets on a bed. It was clearly not a work event on any analysis. The suggestion by Person B that this was a sofa in a living room is denied (Person B2 Para 18). If it was in fact a sofa bed, it was at all times set up as a bed with blankets and pillows. In this regard, the witness statement of Person J is informative and corroborates the Respondent's account::

"*After a short while talking in Person B's kitchen, we went upstairs into a spare bedroom to watch "The Greatest Showman". There were maybe three or four people sitting up on a double bed watching the television.*"

23. It is further denied that any touching of Person A during the film was non-consensual. As explained further in Mr Brady's statement, Person A actively chose to lie next to Mr Brady, including returning to this position on multiple occasions (e.g.

after visits to the bathroom and for fresh drinks), put her arm around Mr Brady, and took steps to conceal advances she made towards Mr Brady from the rest of the guests.

24. In any event, following this, Person A freely chose to attend Mr Brady's flat with him. It is accepted that the Uber taxi was ordered by the respondent. It is further accepted that Person A's house was closer to Person B's house, but this was known by Person A when the decision was taken to go on towards the respondent's house. The respondent denies that Person A exhibited any signs of confusion or fear during the journey.

25. He did not try to "undress" Person A at any point, neither as suggested or otherwise. All touching which took place was above clothes and consensual (however, Mr Brady accepts such touching being under her winter coat, which was open at the time). It was in fact Person A who was, as per own account, "straddling" Mr Brady (Person A1 para 144). It is submitted that Person A was in control of the situation at all times and Mr Brady had a reasonable belief that any sexual touching which occurred was consensual.

26. When Person A decided that she wanted to leave she was able to do so freely and without any attempt by Mr Brady to prevent her doing so. In fact the opposite is the case, Mr Brady offered to order Person A a taxi home and provided assistance for her to navigate safely.

Reasonable belief in consent

27. It was Mr Brady's reasonably held belief at all material times that Person A was consenting to the touching which occurred between them. Mr Brady vehemently denies the SRA's statement that he engaged in a "*sustained course of conduct towards her [Person A] which was unwanted and sexual*" and avers that Person A 'conduct led him to reasonably form the view that all touching that did occur was consensual. Notably, Person A never once told Mr Brady to stop touching her on the occasions when this did occur, nor did she indicate in any way to Mr Brady that she felt uncomfortable in relation to any of the conduct that occurred between them. It is submitted that if she had wanted any of the touching that did occur between herself and the Respondent to stop, then she would have been able to say this and she had

multiple opportunities to do so, including in the presence of others who would have supported her.

28. Person A fails to mention a number of key events, notably the evening spent in a night club in Shoreditch on 15 September 2021, attending the dinner prior to Juno Rooms on 14 October 2021 and, perhaps, most notably, her own conduct towards Mr Brady in K-Box on 20 October 2021.

29. As explained in detail above, these evenings were not work events, or linked to the Respondent's practice as a solicitor. By attending these non-compulsory social events, Person A chose to regularly spend her free time in Mr Brady's company.

30. Mr Brady held a genuine belief that Person A liked him and was attracted to him. This was reinforced by Person B and Person C who asked Mr Brady whether he liked Person A and insinuated that she liked him on 14 October 2021. Further, although Mr Brady was not aware of this conversation, Person B asking Person A if she wanted "to shag" Mr Brady on 9 December 2021 is further evidence
that it was not only Mr Brady who believed Person A was attracted to him.

31. The alleged events happened between a close group of friends during their social life. In each event, alcohol was always a factor. By her own admission the memory of Person A is impacted by her drinking. Crucially at no point did she raise any issues with Mr Brady, she continued to socialise with Mr Brady and attend non-work related social events even after these alleged events occurred.

Allegation 1.2

32. Mr Brady takes the following factual issues with each of the SRA's allegations relating to Person B.

33. Any suggestion that Mr Brady deliberately and knowingly engaged in any non-consensual sexual activity with Person B is denied. Mr Brady had a reasonable belief that all touching which occurred was both consensual and mutual. In particular, it is submitted:

15 October 2021

34. The SRA do not make out their case in relation to this evening. In any event it is denied that the Respondent tried to kiss Person B on the evening in question. This accusation by Person B was only raised once the Respondent provided evidence that Person B had touched him sexually during that evening.

24 March 2022

35. At no point during the course of the evening did Person B indicate (verbally or otherwise) that any touching was uninvited and/or non consensual. In fact, Person B's conduct was indicative of the opposite.

36. Mr Brady avers that Person B verbally invited and encouraged touching from Mr Brady. There had been a number of previous similar interactions between Mr Brady and Person B throughout the evening and on previous evenings, including just prior to getting into the taxi where Mr Brady recalls Person B stating "*do not ignore my arse I work so hard on it and it doesn't get any attention*".

37. Person B's claim that there was silence after the alleged event in the taxi is also disputed. In fact, Person B phoned Mr Brady after leaving the taxi where the two spoke for approximately 30 minutes until she arrived home.

38. The messages sent the following morning from Person B to Mr Brady further undermine Person B's version of events. They clearly indicate that Person B had not previously raised any concerns with Mr Brady the night before and instead ask "*did I offend anyone… I feel like I did*". She continued to initiate conversation with Mr Brady.

39. It is further denied that this event could in any way be construed as a work event. The evening began with a dinner at Tayyabs organised and paid for by individuals who attended the event and was not encouraged or endorsed by the Firm. Person B spent the dinner administering "penalty shots" of alcohol to individuals at the table, behaviour which plainly wouldn't be expected at a work event.

40. The evening continued beyond this with a smaller group attending a bar called Blue's Kitchen and then Mr Brady, Person B and Person C further attending an additional cocktail bar. This was clearly an event far removed from Mr Brady's professional life.

41. Mr Brady submits that he and Person B shared a close personal relationship that was often sexualised. A better understanding of the relationship between Person B and Mr Brady can be gained from reading Mr Brady's statement and the WhatsApp messages exchanged between them. These messages clearly show that their relationship went beyond mere colleagues and in fact were very close friends that messaged each other daily, and across weekends and holidays.

42. Person B claims to have a moral aversion to extramarital affairs and claims that the Respondent was "*well aware of my views on extramarital affairs, in that I felt it was unacceptable*" (Person B2 Para 31). At no time was the Respondent aware Person B might have held such a view and she never actually communicated this to him. Furthermore her conduct gave the Respondent impressions to the contrary. For example Person B willingly went on a small group holiday of four, without her husband, where the other two attendees were having an affair. An affair of which she was fully aware.

43. There is a contradiction in the way Person B describes her own behaviour when compared with that of the Respondent. Person B describes herself as "*tactile*" and giving the defendant "*squeezy hugs*" (Person B2 Para 51). She additionally brushes off her own sexualised language directed towards the Respondent as "*Banter*" (Person B2 Para 40 & 42). However Person B describes the Respondent as being "*gropey*" (Person B2 Para 49) and making "inappropriate jokes" (Person B1 Para 17). These differing standards are exemplified by her conduct towards an unknown individual who "*who looked quite like the Respondent*" (Person B2 Para 53) who she accuses of making "*sexualised comments towards women, including myself"* (Person B2 Para 53). Person B proceeded to try and encourage the firm to fire this person for behaviour analogous to her own and which she has previously described as "banter".

<u>Regulatory and Legal Framework</u>

44. The SRA contends that Mr Brady has breached the following Standards and Regulations:

Rule 1.2 of the Code for Solicitors, RELs and RFLs which states "*You do not abuse your position by taking unfair advantage of clients or others.*"
Principle 5 - you act with Integrity;
Principle 2 - you act in a way that upholds public trust and confidence in the *solicitors*' profession and in legal services provided by *authorised persons*.

45. The High Court in *Beckwith v SRA* [2020] EWHC 3231 (Admin), held that for the SRA's regulatory framework to apply to the conduct of a solicitor, they must show that both limbs of the following test are met:

    a. the conduct must ***realistically*** touch on the solicitor's practice of the profession or the standing of the profession, in a way that is ***qualitatively relevant***; and

    b. the conduct must, ***in a way that is demonstrably relevant***, **engage a standard of behaviour** set out in or ***necessarily*** implicit from the Handbook/the Code for Solicitors.

46. With regards to the first limb the SRA must evidence that any alleged events had sufficient proximity to the Respondent's practice. With regards to the second limb the SRA must prove a breach of a Rule within the Code (i.e. a breach of a Principle alone is not sufficient).

47. It is submitted that the SRA failed to show that either limb of the Beckwith test is satisfied. Further, they have also failed to demonstrate a breach of either Principle 2 or Principle 5.

A) Limb A - Proximity to practise

47. The SRA seeks to rely on their own guidance documents to argue both that events that stem from work social events may still be subject to regulatory oversight and the assertion that non-consensual touching is so serious as to not require a nexus to a solicitors professional life. This is materially flawed for three distinct reasons:

    a. SRA guidance does not form part of the SRA's Standards and Regulations, and is not subject to any oversight or approval by the Legal Services Board (LSB) unless an application has been made to the LSB, by the SRA, to approve a change to its regulatory arrangements, or the alteration has otherwise been exempted by the LSB. Section 21(1) of the Act defines regulatory

arrangements broadly to include its rules, regulations and any other arrangements which apply to or in relation to regulated persons (emphasis added). Therefore, any attempt by the SRA to expand the application of its rules or impose additional, or new, requirements on regulated persons through guidance documents would amount to a change to its regulatory arrangements requiring an application to be made to the LSB for approval or its exemption before the SRA is able to rely on it. As relevant LSB statutory guidance states:

"*there may be circumstances where guidance or policy documents are so central to the proposals that they fall within the meaning of an alteration or alterations to regulatory arrangements requiring LSB approval. The focus ought to be on content and intent, rather than what a particular document might be labelled as. This is most often relevant in circumstances where an approved regulator proposes to issue guidance that impose obligations on or in relation to regulated persons that are not underpinned by existing regulatory arrangements – and therefore likely to require approval under the Act before they can have lawful effect*."

Through publishing the guidance in question, the SRA has sought to expand the application of its entire professional conduct regime so as to include social settings. This has not been considered or approved by the LSB and is not otherwise underpinned by its existing regulatory arrangements. It is, therefore, an unapproved alteration to its regulatory arrangements and is unable to be relied upon by the SRA. In these circumstances the Tribunal should not place weight on unapproved SRA guidance that amends the scope or the application of its rules outlined within the SRA's Standards and Regulations.

b. This guidance post-dates the alleged incidents. The SRA argues that this guidance *"is nonetheless applicable because guidance issued by the SRA is reiterating what expected standards are rather than introducing any new requirement or expectation"*. This assertion is rejected, solicitors cannot be expected to be aware of unpublished guidance to understand how the Regulator may consider matters and, as explained above, the guidance is changing the applicable scope of the SRA's rules in a way that a regulated person would not expect.

c. This guidance is titled "*A firm social event*". This guidance is specifically focused on events that follow an organised firm social event. It is therefore not applicable to the vast majority of these events which were unconnected social matters. In any event, the guidance states that the link to professional life is "not always broken". It must therefore follow that the link to professional life will be broken in the majority of social situations.

48. None of the alleged events took place within working hours and (with the exception of the 9 December 2021 in relation to which the alleged conduct is factually denied by the Respondent) none of the alleged events took place at official work events funded by the Firm or by any other commercial organisation. On multiple occasions, individuals who were not members of the Firm (or clients of the Firm), attended the events.

49. It is further denied that "t*he working relationship did indeed remain the origin and the context of the alleged conduct*" and "*would not have occurred had it not been for the fact that they were colleagues*". The fact that some employees including Person B, Person A and Mr Brady made the decision to go out socially after work events or office hours concluding, does not make those gatherings 'work-related 'and it is submitted that the fact such post-work/post-work-event gatherings took place so frequently, weakens rather than strengthens any consideration of nexus to the Respondent's practice. It would be more accurate to describe this as a social group of friends of similar ages and experience that worked in different teams at the same workplace (not dissimilar to the many peer groups who work at different firms across the country, and frequently socialise together in a non-work setting).

50. The working culture at the Firm meant that employees frequently spent more than 12 hours at work a day. Given that context, to suggest that drinking alcohol regularly with friends who were colleagues late at night outside of those hours is to practically suggest that everything in their life which occurred socially was within or linked to a practice context.

51. It is notable that Person B states (Person B2 Para 45) *"I have seen that the work/personal life boundaries are blurred or can be non-existent. This happens because of the nature of the job: we are required to be "on" 24 hours a day, and, speaking from my own*

experience, your support network becomes your colleagues as you end up spending most of your time at the office (or working, even if remotely)". It cannot be that because of the nature of the firm, individuals are subject to regulatory scrutiny 24 hours a day 7 days a week regardless of what they are doing or where they are. This would be unreasonable and an intrusion into an individual's private life.

52. Person B goes on to state (Person B2 Para 46 emphasis added) *"I feel like I exercised bad judgement letting the Respondent become one of my closest friends".* It cannot be the SRA's intention to suggest that any private social gathering between close friends who happen to share the same workplace is within the scope of, or linked to a solicitor's professional life.

53. The SRA additionally provides no authority for their claim that "*non-consensual touching, in this instance of colleagues, which is sexually motivated, is so serious that it raises a regulatory issue irrespective of whether or not it could be considered to have happened outside of the Respondent's practice.*". It is not accepted that the SRA can circumvent the first limb of the Beckwith test by merely claiming conduct is "serious". In fact Beckwith sought to specifically prohibit this approach. Para 34 Beckwith states:

"Looking to the rules and the interpretation of those rules is also necessary to ensure the requirements of legal certainty are met. The Tribunal cannot and does not have liberty to act outside the rules made under section 31 of the 1974 Act. Those rules must be construed coherently; the standards that emerge must be sufficiently predictable."

54. In any event the Respondent denies any non consensual touching occurred.

Limb B - Rule 1.2 SRA Code of conduct

55. The test established in Beckwith makes a clear distinction between the Code of Conduct and the Principles. What is initially relevant is whether the SRA can demonstrate a breach of the Code. Only once this has been established should the principles be engaged.

56. The SRA contends that Mr Brady has breached **Paragraph 1.2** of the Code for Solicitors, RELs and RFLs which states "*You do not abuse your position by taking unfair advantage of clients or others.*"

57. The High Court in Beckwith endorsed the position taken by the SDT that to evidence a breach of what is now Rule 1.2, the SRA must be able to demonstrate both of the following strands (See Beckwith Paras 37 and 38 (*Emphasis added*))

    a. a position of seniority or authority and;

    b. a subsequent abuse of that position.

    "The Appellant was senior to Person A. He was a partner in the Firm; she had recently resigned her position as an associate. Within the Firm the Appellant was in a position of authority over Person A. However, the Tribunal concluded that the events of that evening were not an abuse of that position of authority and seniority. The Tribunal's final reasoning in support of the conclusion that the Appellant had acted in breach of Principle 2, at paragraph 25.191 of the judgment, goes no further than that his conduct had "fallen below the standards expected of a partner at the Firm" and had "fallen below accepted standards".

    Given the detailed findings the Tribunal had made as to the events of the evening, we consider the Tribunal was clearly right to conclude that no abuse of authority had occurred."

58. Even when taking the SRA's case at its highest, it has failed to demonstrate that either strand of the relevant test has been met. The SRA must demonstrate that any perceived position of authority over the complaints was abused by Mr Brady (See Beckwith SDT hearing para 25.183, emphasis added)

    The Tribunal noted that during her cross-examination of the Respondent Ms Karmy-Jones QC specifically stated that it was not suggested that the Respondent had used his authority over Person A to convince or induce her to engage in sexual activity. Ms Karmy-Jones QC also specifically did not suggest that the Respondent had abused his authority or manipulated Person A by abusing his authority. It was also not Person A's evidence that she felt obliged to remain in the pub with the Respondent as he was

her boss, or that she had continued to drink as he was buying drinks for her as her boss. Nor was it her evidence that the sexual activity that had taken place was by virtue of that fact that the Respondent was her boss. In those circumstances, the Tribunal considered that the allegation that the Respondent's conduct was an abuse of his position of seniority or authority was not sustainable.

59. The SRA's evidence repeatedly refers to Mr Brady's supposed seniority compared to Person A. This is respectfully misguided. It is disputed that Mr Brady was senior to Person A in any material sense given that their work was within entirely different teams that did not overlap. Nor was he in a position where he could have had any influence over her career progression, prospects or day-to-day work at all. Mr Brady was a 3.5 year PQE lawyer at the time. In practice there is very little difference between the power of a junior associate and a paralegal within a large law firm.

60. The assertion that Person A was junior to Mr Brady because she occupied a "non lawyer" role ignores the many non-legal roles that exist in law firms with varying degrees of seniority. The suggestion that all lawyers are senior to all non-lawyers is denied, many office managers, finance teams and HR staff can often occupy more senior roles than even partners in law firms.

61. The additional suggestion by the SRA that Mr Brady took advantage of his "a*pparent popularity*" in a social group has no basis in law and further demonstrates how unconnected these accusations are to Mr Brady's professional life.

62. In addition, Person A is older than Mr Brady and has worked within the legal profession for a longer period of time than Mr Brady. She was not his junior in a non-professional context either. She was in reality simply a person with whom he interacted with on a social basis.

63. In any event, it is not suggested by Person A that any perceived authority was ever used to convince or induce her to engage in sexual activity or that she felt obliged to attend events due to Mr Brady's apparent seniority. In fact Person A claims that she attended events despite Mr Brady's presence.

64. In relation to Person B the SRA Rule 12 Notice states that Mr Brady abused their "Platonic Friendship". Platonic friendships are not a "position" that are subject to regulatory scrutiny and it is disingenuous of the SRA to argue this. Rule 1.2 of the Code of Conduct is specifically directed to abusing your professional position (see Beckwith Para 45) and is not appropriate to this social situation.

65. Mr Brady was the same grade as Person B within the Firm and had no working relationship with Person B. In fact it is submitted that Person B was in a much more influential position in the Firm given the closeness of her relationship to its Managing Partner.

66. Additionally there is no alleged abuse of this position, Person B does not suggest that Mr Brady tried to convince or induce Person B into sexual activity.

67. For the reasons set out above, even when taking the SRA's allegations at their highest and on the basis of the facts put forward by the SRA (which, for the avoidance of doubt are materially disputed), plainly this allegation is not made out in relation to either complainant. Mr Brady had no position as against either complainant, and there was no abuse of any such position. The SRA has therefore failed to prove the first limb of the Beckwith test.

Standards of behaviour necessarily implicit from the code

68. The SRA's proposition that paragraph 44 of Beckwith provides a gateway to interpret the code of conduct more broadly to include a requirement to treat others with respect, is misguided. Paragraph 44 of Beckwith merely explains that the SRA must interpret the Principles by reference to an underlying code violation (in this case Rule 1.2). It does not, as the SRA claim, expand the remit of the code to encapsulate broader conduct.

"44. The submission of the SRA in this appeal was that the standard to be derived from the Handbook relevant to the conduct alleged against the Appellant was that the public would have a "… legitimate concern and expectation that junior members [of the profession or of staff] should be treated with respect …" by other members of the profession. We accept that submission; in our view it is a reasonable formulation having regard to the "outcomes" and "indicative behaviours" set out in Chapter 11 of

the 2011 Code of Conduct. Seriously abusive conduct by one member of the profession against another, particularly by a more senior against a more junior member of the profession is clearly capable of damaging public trust in the provision of professional services by that more senior professional and even by the profession generally.

69. The fact that the SRA have subsequently added a requirement to the Code to treat colleagues with respect (now Rule 1.5) is further evidence that no such rule was previously implicit in the code. It is also notable that the SRA applied for LSB approval to make this amendment to the Code and they must have therefore concluded that it amounted to an alteration to its existing regulatory arrangements. As such, it follows that if the SRA considered that this rule already formed part of the Code prior to the insertion of Rule 1.5 and that this was merely a clarificatory or cosmetic change, it would not have made an application to the LSB in accordance with the procedure set out within the Legal Services Act 2007 (as it would not have amounted to an alteration to its existing regulatory arrangements). Furthermore, the SRA's application for alteration to its regulatory arrangements was considered and authorised by the LSB in its decision notice dated 4 April 2023. It is clear, therefore, that the LSB also considered the introduction of Rule 1.5 to amount to an alteration to the SRA's existing rules and that it did not form part of the Code prior to this point.

70. Paragraph 45 of Beckwith demonstrates that Principle 5 can only be engaged, by reference to an underlying code violation (emphasis added).

"What the Appellant did affected his own reputation; but there is a qualitative distinction between conduct of that order and conduct that affects either his own reputation as a provider of legal services or the reputation of his profession. The Tribunal asserted that the Appellant's behaviour crossed this line but provided no explanation. At paragraphs 25.189 – 25.190 the Tribunal stated that "Members of the public would not expect a solicitor to conduct himself in the way the [Appellant] had. Such conduct … would attract the [dis]approbation of the public". However, the Tribunal had already concluded that the Appellant's conduct did not amount to an abuse of his seniority or authority over Person A. On the application of Principle 6 to the facts of this case, that conclusion is a critical conclusion and, as we have already said, on the facts of this case it was a conclusion that was clearly correct. Conduct amounting to an abuse by

a solicitor of his professional position is clearly capable of engaging Principle 6. But, as the Tribunal concluded, that was not this case."

71. The assertion by the SRA that the Judge in Beckwith "*sought to make clear that it is not necessary for the SRA to identify specifically any express requirement of the Code*" (Rule 12 para 164) is not supported by Beckwith or any other authority. In fact Paragraph 34 of Beckwith makes the contrary argument, it explicitly states the Tribunal, and by extension the SRA, are bound by the rules of the code::

"Looking to the rules and the interpretation of those rules is also necessary to ensure the requirements of legal certainty are met. The Tribunal cannot and does not have liberty to act outside the rules made under section 31 of the 1974 Act. Those rules must be construed coherently; the standards that emerge must be sufficiently predictable."

72. Upon no proper interpretation of the Code can it be said there is an underlying rule to treat others with respect. This is not "necessarily implicit" from any rule in the Code. If this was the case it would not have been necessary for the SRA to subsequently expand the code, or make an application to the LSB to alter its regulatory arrangements. The High Court in Beckwith stated (Beckwith para 39):

"the approach we have taken in this case is not any form of permission to expand the scope of the obligation to act with integrity simply by making rules that extend ever further into personal life."

73. It is submitted that this is exactly what the SRA has attempted to do by interpreting the phrase "necessary implicit" so broadly as to cover all conduct that the SRA merely deems inappropriate.

74. The SRA goes on to state (Rule 12 Para 162) "*that a solicitor has an obligation to treat other solicitors or employees from the same firm with respect and to not engage in unwanted and/or inappropriate and/or sexually motivated conduct towards them."*

75. Whether the conduct was "unwanted" is factually disputed by the Respondent. Whether the conduct was "inappropriate" is in my submission irrelevant. Paragraph 43

of Beckwith demonstrates that "inappropriate" is not a suitable test by which the tribunal can assess conduct of a solicitor:

"There is a qualitative distinction between conduct that does or may tend to undermine public trust in the solicitor's profession and conduct that would be generally regarded as wrong, inappropriate or even for the person concerned, disgraceful."

76. The High Court in Beckwith stated the SRA cannot rely on nebulous "standards" that are not outlined in, and derived from, the underlying Code of Conduct. Paragraph 38 of Beckwith demonstrates that it is not for the SDT to set arbitrary standards for solicitors:

"*In the premises, the Tribunal's final statement that the Appellant had "fallen below accepted standards" is not coherent. Whatever "standards" the Tribunal was referring to as ones which identified what, in the circumstances of this case, the obligation to act with integrity required, were not ones properly derived from the Handbook*"

77. The SRA have therefore failed to demonstrate a direct breach of the Code. Even if the SDT accepts the SRA's assertion, which for the avoidance of doubt is disputed, that the Code contains additional implicit guidelines, they have further failed to demonstrate a breach of these. The SRA's case therefore fails to prove the second leg of the test established in Beckwith.

78. It therefore follows that any further analysis of the Principles is unnecessary as without an underlying code violation there cannot be any breach of the Principles. However for completeness these have also been analysed.

Principle 5

79. In respect of **Principle 5**' integrity', the SRA notice states the following:

"*As set out in Wingate, integrity connotes adherence to the ethical standards of one's own profession. A solicitor acting with integrity towards another solicitor, or towards a paralegal, at gatherings between colleagues – whether at a work event or socially, would not have behaved as the Respondent is alleged to have behaved.*"

80. In this regard, the SRA's alleged breaches of Principle 5 also relies upon reference to the undying standards of the profession. As Beckwith made clear, the only such standards are the Code of Conduct. (Beckwith Para 33)

"T*he standards that give substance to the obligation to act with integrity must themselves be drawn from some legitimate source – they must stem from legitimate construction of the rules made in exercise of the section 31 power*."

81. The only Rule the SRA makes reference to is Rule 1.2. In the absence of a finding of abuse of position the SDT cannot find a breach of the Integrity Principle. The Tribunal is not at liberty to extend the application of the Integrity principle outside the scope of the Code of Conduct. (Beckwith para 33)

"*the Tribunal is a body well-equipped to act in the manner of a professional jury to identify want of integrity. Yet when performing this task, the Tribunal cannot have carte blanche to decide what, for the purposes of the Handbook, the requirement to act with integrity means. The requirement to act with integrity must comprise identifiable standards. There is no free-standing legal notion of integrity in the manner of the received standard of dishonesty; no off-the-shelf standard that can be readily known by the profession and predictably applied by the Tribunal. In these circumstances, the standard of conduct required by the obligation to act with integrity must be drawn from and informed by appropriate construction of the contents of the Handbook, because that is the legally recognised source for regulation of the profession"*

82. Further Wingate (Para 102) limits the application of Integrity to "*the manner in which that particular profession professes to serve the public*". It cannot be said that whilst socialising in bars and clubs the Respondent is in any way "*serving the public"*.

"T*he 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"*

83. This attempt by the SRA to extend the principle of integrity to cover these matters is further evidence of the SRA extending their regulatory remit without seeking the appropriate authority under S31 of the 1974 Act.

84. In any event, the Respondent reasonably believed that any touching which did take place was consensual and so he did not act without integrity.

Principle 2

85. In appreciation of the above weaknesses highlighted in respect of Rule 2.1 and Principle 5, the SRA relies on what appears to be an alternative basis by alleging a breach of Principle 2 which states "You act in a way that upholds public trust and confidence in the solicitors 'profession and in legal services provided by authorised persons"

86. The notice states: "*it is submitted that, by virtue of the alleged matters having been non-consensual, that causes it to be so serious that it nonetheless raises a regulatory issue. Nonconsensual sexual touching of colleagues (or anyone) is so serious that it would offend public trust and confidence irrespective of context and so the issue of proximity to practice does not necessarily arise, or does not have so much bearing or weight on whether matters should be pursued and put before the Tribunal.*" (Rule 12 Para 157)

87. However it is submitted that the SRA has misapplied its application of Principle 2. It is important to note that following paragraph 42, 43 and 54 of Beckwith, the SRA must be able to demonstrate that a breach of Principle 5 or Principle 2 is based on a breach of the rules in the Handbook and attach to matters that touch upon professional practice as a solicitor: (emphasis added):

> 42: "…In the context of Principle 2 **what that ground is, is identified by construing the contents of the Handbook – i.e. the body of rules** made in exercise of the power at section 31 of the 1974 Act. See above at paragraphs 28 – 35. **Approaching Principle 2 in this way keeps it within foreseeable boundaries by attaching the obligation to act with integrity to matters that touch upon professional practise as a solicitor**.
>
> 43: **We consider the same general approach must also apply when determining the scope of Principle 6**. **The content of Principle 6 must be**

closely informed by careful and realistic consideration of the standards set out in the 2011 Code of Conduct. Otherwise Principle 6 is apt to become unruly. There is a qualitative distinction between conduct that does or may tend to undermine public trust in the solicitor's profession and conduct that would be generally regarded as wrong, inappropriate or even for the person concerned, disgraceful. …"

"Principle 2 [the Principle relating to integrity under the 2011 Code, now reflected in Principle 5 of the 2019 Code] or Principle 6 [the Principle relating to the trust the public places in the individual and the profession under the 2011 Code, now reflected in Principle 2 of the 2019 Code] **may reach into private life only when conduct that is part of a person's private life realistically touches on her practise of the profession (Principle 2) or the standing of the profession (Principle 6)**."

88. The High Court found that the SRA overreached in their case against Beckwith and it is submitted that it would apply the same reasoning to these matters.

89. In a great many respects the findings made by the SDT, and certainly the overall factual background in Beckwith, compare unfavourably to the allegations made in this matter. However, there the Respondent was accepted to have been in the same team as the complainant, being both her supervising and appraisal partner. The tribunal found that a 'sexual encounter 'had taken place in circumstances where that partner ought to have known that the complainant's judgment and decision-making ability was impaired through alcohol in circumstances where she had not allowed him into her home with a view to sexual activity taking place.

90. The High Court in overturning the ruling of the SDT, at paragraph 42 and 43 said the following about the necessity for integrity and standing of the profession to attach to matters that touch upon professional practice as a solicitor:

42: "…*In the context of Principle 2* ***what that ground is, is identified by construing the contents of the Handbook – i.e. the body of rules*** *made in exercise of the power at section 31 of the 1974 Act. See above at paragraphs 28 – 35.* ***Approaching Principle 2 in this way keeps it within foreseeable boundaries by attaching the obligation to act with integrity to matters that touch upon professional practise***

as a solicitor.

43: ***We consider the same general approach must also apply when determining the scope of Principle 6. The content of Principle 6 must be closely informed by careful and realistic consideration of the standards set out in the 2011 Code of Conduct. Otherwise Principle 6 is apt to become unruly****. There is a qualitative distinction between conduct that does or may tend to undermine public trust in the solicitor's profession and conduct that would be generally regarded as wrong, inappropriate or even for the person concerned, disgraceful. …"*

91. The High Court at paragraph 39 also stressed that their judgment was not to be taken as an invitation or permission to simply make new rules:

"…***Our analysis is premised on the need to define the content of the obligation to act with integrity****, which might otherwise be an obligation at large,* ***by reference to the standards set out in the Handbook****.* ***Confining the obligation in this way preserves the legitimacy of the regulatory process*** *by maintaining the necessary and direct connection between the obligation to act with integrity and rules made in exercise of the power at section 31 of the 1974 Act.* ***Yet the approach we have taken in this case is not any form of permission to expand the scope of the obligation to act with integrity simply by making rules that extend ever further into personal life****.* ***Rules*** *made in exercise of the power at section 31 of the 1974 Act (in the language of the Handbook, the "outcomes" and the "indicative behaviours")* ***cannot extend beyond what is necessary to regulate professional conduct and fitness to practise and maintain discipline*** *within the profession*."

92. It is submitted, therefore, that the SRA's attempts, yet again, to bring matters such as this under Rule 1.2 – without any evidence of abuse of position – have no prospect of success.

<u>Human Rights</u>

93. [redacted] the effect that the length of the investigation has taken upon the Respondent.

94. The impact upon him has been financial, [redacted]. Circumstances in his private life have exacerbated this as his statement attests.

95. It is our submission that this amounts to an unlawful interference with our clients right to peaceful enjoyment of possessions (Article 1, Protocol 1) and an unlawful interference with the Respondents private life (Article 8). The SRA's unjustified delays have caused unquantifiable harm to Mr Brady's career based on unsubstantiated, improperly brought and misconstrued allegations.

96. In terms of the financial effects, this too impacts his ability to meet these allegations. He no longer has the assistance of solicitors and now relies on junior counsel on a direct public access basis for representation.

97. It is our submission that this is a breach of Mr Brady's right to a fair trial (Article 6). The SRA through their actions have knowingly put Mr Brady in a position where he cannot obtain comprehensive legal representation. The financial implications of their investigations were communicated by Mr Brady and his representatives to the SRA on numerous occasions over an extended period of time.

98. Until November 2023 he did not even know the basis of the allegations. He was never asked for any response or comment until that time, nor asked to provide any corroborative evidence.

99. The SRA have made no attempt to seek evidence that might support the Respondent's position. They have not made any attempt to contact the individuals Mr Brady worked with or reported to. They have simply taken the complainant's testimonies and submitted them as fact.

100. The Respondent is expected to now recall events from 2-3 years previous, and should he call any witnesses in his defence, such witnesses will be placed with the same burden. In terms of witnesses, the delay in this case also means it will be much more difficult for Mr Brady to realistically obtain the support of defence witnesses, especially when considering the period of time he has spent out of the legal profession, and the fact that he would be asking people he last worked with 2-3 years ago to both remember events and involve themselves in these proceedings (where these potential defence witnesses may still be employed by the Firm, work with the SRA's witnesses and/or have been exposed to the complainants versions of events over the extended period). It is noted that Person B states she has "*spoken extensively*" about these

events to employees of Orrick whilst the Respondent was forbidden from making contact with previous colleagues.

101. Had Mr Brady known the detail of the allegation by Person B he could have asked the SRA to obtain the evidence of the phone call from his phone company which corroborates his account, additionally the SRA could have sought CCTV evidence from numerous places that would have provided critical evidence for this investigation. It is unknown whether the opportunity for the SRA to obtain the relevant materials has now been lost, however the passage of time makes it highly unlikely that this vital evidence will still be available, causing unfair detriment to Mr Brady's position.

Conclusion

102. For the reasons set out herein, the allegations are not accepted by the Respondent.

Nicholas Whitehorn,
Barrister at 25 Bedford Row, on behalf of Lewis Brady 3rd October 2024