The First Respondent appealed to the High Court (Administrative Court) against the Tribunal's decision dated 2 September 2016 in respect of sanction. The appeal was heard by Mrs Justice Carr DBE on 27 July 2017 and Judgment handed down on 7 August 2017. The appeal was dismissed. Shaw v Solicitors Regulation Authority [2017] EWHC 2076 (Admin.)

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 — Case No. 10999-2012

BETWEEN:

SOLICITORS REGULATION AUTHORITY — Applicant

and

ANDREW WILLIAM SHAW, — First Respondent
CRAIG STEPHEN TURNBULL — Second Respondent

Before:

Mr J. C. Chesterton (in the chair)
Mr E. Nally
Mr G. Fisher

Date of Hearing:
9 & 10 August 2016 and 2 September 2016

Appearances

Mr Mark Cunningham QC of Maitland Chambers, 7 Stone Buildings, Lincoln's Inn, London WC2 3SZ instructed by the Solicitors Regulation Authority of The Cube, 199 Wharfside Street, Birmingham B1 1RN for the Applicant on 9 and 10 August 2016

Mr Sean O'Malley, Solicitor employed by the Solicitors Regulation Authority of The Cube, 199 Wharfside Street, Birmingham B1 1RN for the Applicant on 2 September 2016

Mr Timothy Dutton CBE QC of Fountain Court Chambers, Temple, London EC4Y 9DH instructed by Mayer Brown International LLP Solicitors 201 Bishopsgate, London EC2M 3AF for the First Respondent on 9 and 10 August 2016

Mr William Glassey, Solicitor, Mayer Brown International LLP Solicitors for the Second Respondent on 9 and 10 August 2016 and for both Respondents on 2 September 2016. The Second Respondent did not appear on 2 September 2016

JUDGMENT IN SANCTIONS HEARING IN RESPECT OF TRIBUNAL FINDINGS UPHELD BY THE HIGH COURT ON APPEAL

(N.B. THE HIGH COURT SET ASIDE AND REMITTED BACK FOR RE-HEARING OTHER TRIBUNAL FINDINGS IN THE SAME MATTER WHICH THE TRIBUNAL SUBSEQUENTLY DIRECTED TO BE DEALT WITH SEPARATELY AND WHICH AT THE DATE OF THIS JUDGMENT REMAINED OUTSTANDING)

Findings remitted by the High Court for sanction as set out by Mr Justice Jay at paragraph 1 of his order dated 13 January 2014

The findings of dishonesty and other misconduct made by the Solicitors Disciplinary Tribunal in its Judgment dated 29 April 2013 against each of the First and Second Respondents in so far as they related to:

"(a) The findings of dishonesty against each of the Appellants [the First and Second Respondents] in relation to the First Appellant's [First Respondent's] Eighth Affidavit dated 8 July 2010 made in paragraph 156.79 of the SDT judgment; and

(b) The finding of misconduct against the Appellants [the First and Second Respondents] in relation to the misuse of confidential information made in paragraph 156.77 of the SDT judgment.

((a) and (b) together, **"the Upheld Findings"**)."

Allegations to elements of which the remitted findings related

Allegation 4

[Allegation 4 is set out in full below so that the remitted parts may be read in context, but it should be noted that the reference in allegation 4.1 to Mr H did not form part of the Upheld Findings. The original wording of allegation 4.2 referred to a deliberate or dishonest intention on the part of both Respondents but the original Tribunal substituted a finding of reckless disregard by the First Respondent only. The entirety of allegation 4.3 did not form part of the Upheld Findings.

4. Use of confidential information regarding Mr L's assets

4.1 Did the transmission of information regarding Mr L's and/or H's assets (acquired in accordance with the disclosure requirements under the Freezing Order) to JD and/or Mr C/C Ltd (if and to the extent that this occurred) constitute:

4.1.1 A breach of an implied obligation of confidence and/or implied undertaking to the Court; or

4.1.2 A transmission other than for the purpose of the proceedings, such that there was a breach by [the First Respondent] and/or [the Second Respondent] of Civil Procedure Rule 31.22?

4.2 If so, was there a reckless disregard on the part of [the First Respondent] to breach an implied undertaking/obligation of confidence/CPR 31.22?

4.3 Was the application for the Freezing Order pursued with the avowed intention that the information as to Mr L's and/or H's assets should be passed to Mr C/C Ltd (as the Applicants asserts)? If so, was this an abuse of process?

4.4 To the extent that the Tribunal considers that there was any failing on the part of [the First Respondent] and/or [the Second Respondent], does this constitute a breach of Code of Conduct Rules 1.01, 1.02, 1.03, 1.06 or 10.05? *

(* See below for the extent to which the alleged Rule breaches were covered by Mr Justice Jay's order.)

Allegation 6

6. Disclosures regarding the New York Apartment subsequent to the Without Notice Hearing.

(Allegation 6 is set out in full below so that the remitted parts may be read in context, but it should be noted that paragraphs 6.1, 6.2 and 6.5 did not form part of the Upheld Findings. In paragraph 6.3, only the reference to Mr K fell to be considered by the Tribunal.)

6.1 Did [the First Respondent] and/or [the Second Respondent] provide misleading information to the Court (or allow misleading information to be provided to the Court) regarding Mr L's residency at the New York Apartment, subsequent to the Without Notice Hearing?

6.2 If so, did the statements made after Mr L had put his own evidence before the Court as to the position in respect of the New York Apartment, constitute a breach of the duty of full and frank disclosure or their duty not to mislead the Court?

6.3 Did [the First Respondent] and/or [the Second Respondent] provide misleading information to the Court (or allow misleading information to be provided to the Court): as to when they were made aware of evidence which suggested that Mr L no longer lived at the New York Apartment (including the information provided by Messrs K, UD and KN)?

6.4: If so, was this done deliberately and/or dishonestly?

6.5 To the extent that the SDT considers that there was any failing on the part of [the First Respondent] and/or [the Second Respondent], does this constitute a breach of Code of Conduct Rules 1.01, 1.02, 1.03, 1.06 or 11.01?

Documents

1. The Tribunal reviewed the documents concentrating on the remitted findings including:

Applicant

- Hearing bundle (including pages added during the hearing)
- Skeleton argument for the Applicant drafted by Mr Cunningham QC dated 1 August 2016
- Index of key documents in chronological order prepared by Mr Cunningham dated 8 August 2016
- Extract from Civil Procedure Rules Part 31 – Disclosure and inspection of documents

- Applicant's authorities bundle
- Applicant's letters to the First Respondent and to Mayer Brown LLP dated 1 August 2016 enclosing:
- Applicant's statement of costs for sanction hearing on 9 and 10 August 2016 dated 9 August 2016
- Applicant's statement of further costs for adjourned sanctions hearing on 2 September 2016

First and Second Respondents

- Joint Skeleton argument for sanctions hearing drafted by Mr Tim Dutton QC and Mr William Glassey dated 2 August 2016
- Chronology
- Respondents' authorities bundle
- Affidavit of the First Respondent in the Chancery Division proceedings dated 28 April 2010
- Respondents' supplemental note following sanctions hearing drafted by Mr Dutton and Mr Glassey dated 14 August 2016 which the Tribunal considered having first heard that the Applicant had no objection.

Preliminary and Other Issues

Confirmation by the advocates of the extent of the allegations upheld

2. There was a difference of opinion between the advocates as to the extent of the Upheld Finding in respect of the use of confidential information. Mr Dutton asked that sanction be imposed by reference to allegations 4.1.1 and 4.1.2 and not by reference to the breaches of the Rules alleged in respect of the Solicitors Code of Conduct 2007 ("the 2007 Code"). Mr Cunningham disagreed; he submitted that in paragraph 156.77 of its judgment the original Tribunal found allegation 4.4 substantiated and made no qualification regarding any part of it not being substantiated. He also submitted that Mr Justice Jay had no difficulty in setting aside huge numbers of findings but not this one. The Tribunal understood that allegation 4.4 was upheld and that it referred to breaches of five rules in the 2007 Code but noted the weight which Mr Justice Jay attached to the different rule breaches. (See also the Tribunal's determination of Sanction in respect of this allegation below).

3. The Tribunal invited clarification during the course of Mr Cunningham's substantive submissions of the extent of the Upheld Finding of dishonesty, as allegation 6.5 referred to breach of the 2007 Code Rules 1.01, 1.02, 1.03, 1.06 and 11.01. Mr Cunningham responded that the Applicant relied upon what Mr Justice Jay had remitted in paragraph 1(a) of his order; the finding of dishonesty had been further refined down so as to relate to the First Respondent's eighth affidavit in the Chancery Division proceedings. While it might be said that the Tribunal should treat allegations 6.5 as being before it, that was not how Mr Cunningham had read it or presented his case to the Tribunal. He limited himself to what was obvious in Mr Justice Jay's judgment. Mr Dutton submitted that there had been quite a lot of argument on appeal about what allegation 6.5 meant and Mr Justice Jay confined himself quite expressly.

Factual Background

4. The First Respondent was admitted as a solicitor in 1981 and between 2009 and until his striking off by the Tribunal was a partner in the commercial litigation department at Stewarts Law LLP ("the firm").

5. The Second Respondent was admitted as a solicitor in 2006 and in 2010 worked in the commercial litigation department at the firm, and in so far as was material to this case was under the direction of the First Respondent.

6. According to the judgment of Mr Justice Jay, Mr L was a businessman with international property interests. Between October 2002 and January 2005 he was involved with a number of companies incorporated in the USA. In January 2005 he and the CEO of those companies fell out and Mr L received a termination payment of $3.65 million. Litigation between the parties ensued in which Mr L and the CEO made serious allegations against one another. In September 2005, the litigation was compromised and further monetary consideration passed to one of Mr L's companies. In July 2006, the US companies filed for relief under Chapter 11 of the US Bankruptcy Code and in due course a Liquidating Trust was set up. The Trust issued complaints in the US Federal Bankruptcy Court against among others Mr L and one of his corporate entities alleging that there had been both fraudulent and preferential transfers in 2005.

7. The US proceedings were served on Mr L on 31 July 2008 by posting to his apartment in New York and then personally served on 23 December 2008 on the porter at the apartment building after the process server had been unable to contact Mr L. This was valid service in the US although it was always Mr L's position that he never received those documents. In July 2009, a "default" was entered in the Federal Court. After some procedural difficulties, on 5 April 2010 the Liquidating Trust issued a motion in the Federal Court for entry of a final judgment against Mr L quantifying damages with a request for a hearing. On about 7 April 2010, the Court ordered that the documents relied on to quantify the claim be served on Mr L personally by 29 April 2010 with a quantification hearing fixed for 5 May 2010. Efforts were then made to comply with the order by serving Mr L at the address where he had been validly served at the end of 2008, namely the New York apartment. These efforts were unsuccessful.

8. On 29 April 2010, the Liquidating Trust which the firm represented obtained on a without notice application, a worldwide freezing order against Mr L from Mr Justice Morgan in the Chancery division of the High Court. The order was subsequently discharged by Mr Justice Roth, on Mr L's application on 23 July 2010. Mr Justice Jay stated in his judgment that Mr Justice Roth:

> "was critical of the Liquidating Trust's failure to give full and frank disclosure at the without notice hearing."

9. As a Lay Applicant, Mr L commenced Tribunal proceedings against the First and Second Respondents on 25 May 2012. The Rule 5 Statement had not been prepared by the Applicant who did not have custody of the allegations at that time and it was therefore not in the conventional form. The original proceedings were heard in the

Tribunal on 4-8, 11 and 14 February 2013 which culminated in findings and orders striking both Respondents from the Roll. The Tribunal's judgment was signed on 29 April 2013.

10. The Respondents appealed and the appeal was heard before Mr Justice Jay on 10-13 December 2013. Mr Justice Jay's judgment was handed down on 13 January 2014, following further submissions concerning disposal, resulting in an order that the Respondents be restored to the Roll. The High Court set aside the findings of the Tribunal and ordered that they be reheard save for two findings against both Respondents (the "Upheld Findings"). On 31 January 2014, the Respondents sought permission from the Court of Appeal to appeal against Mr Justice Jay's decision to uphold the Upheld Findings and Mr L sought permission to appeal his decision that the Respondents be restored to the Roll. Lady Justice Rafferty refused the paper applications on 21 May 2014. Applications for permission to appeal by way of an oral hearing were filed by both sides in June 2014 and the Respondents sought to adduce further evidence relating to the facts surrounding the eighth affidavit of the First Respondent in July 2014. Neither side pursued these applications. A settlement agreement was reached between Mr L, the Respondents and the firm on 11 July 2014.

11. In his order dated 13 January 2014, Mr Justice Jay ordered that the matter should be remitted to the Tribunal for a rehearing before a differently constituted Tribunal in accordance with the terms of his judgment and that it would be for the Tribunal to determine the order in which it considered the Set Aside Findings and the question of sanction in relation to the Upheld Findings.

12. The costs of the original hearing before the Tribunal in February 2013 and the costs of the appeal were reserved to Mr Justice Jay, to be considered after the final determination of the further proceedings before the Tribunal. The parties informed the Tribunal during the course of this hearing that these costs had subsequently been settled with Mr L.

13. On 16 April 2015, in a decision made on the papers the Tribunal granted an application by the Solicitors Regulation Authority ("SRA") made in a letter dated 20 March 2015 to be substituted as the applicant in these remitted proceedings, in place of Mr L. The Tribunal was informed by Mr L's legal representatives that he did not object to the application provided neither the SRA nor the Respondents made any application for the costs of or arising from the substitution against him. The Tribunal also had information from Mr Glassey that the Respondents both consented to the application. The Tribunal granted the application to be substituted on the basis that it was in the public interest for the SRA to take over the prosecution particularly in light of the serious findings of dishonesty which the High Court had upheld.

14. A preliminary hearing was held on 23 February 2016 to consider a contested issue. The First Respondent sought to rely on further statements as evidence in support of his submissions on mitigation in relation to the Upheld Finding of dishonesty. The Second Respondent adopted his position. The documents in question were:

- An affidavit of Mr JW dated 6 July 2010
- Fifth witness statement and exhibits of the First Respondent dated 10 April 2015
- Third witness statement of the Second Respondent dated 14 April 2015; and

- Witness statement of Mr U of the firm dated 13 December 2013.

The Tribunal heard submissions for the parties and stated at paragraph 19 of the Memorandum of the hearing:

> "Having reviewed the documents and heard the submissions the Tribunal considered that the evidence in question might put the dishonesty of the Respondents in context, thus making it relevant evidence and therefore admissible. It was a matter for the sanctioning Tribunal to determine the relevance, context and weight to be placed on the evidence when determining sanction."

The Tribunal ordered that the sanction hearing should take place on the first available date after 28 days. Two members of the division of the Tribunal determining sanction were also members of the Tribunal at the Preliminary Hearing, the Chairman and the Lay Member.

Witnesses

15. **Mr Andrew Sutcliffe QC** gave character evidence for the First Respondent, having already provided a written testimonial. The witness had practised as a barrister since 1983 and taken silk in 2001. He had been a Recorder since 1999 and a Deputy High Court Judge since 2004. He was authorised to sit in the Chancery Court. He gave his written testimonial on 31 January 2013 two weeks before the original Tribunal hearing and said:

> "He [the First Respondent] takes his duty to the court extremely seriously and in that context it is unimaginable that he would ever seek to take advantage of an opponent by distorting evidence or presenting an unfair case. He is also very hands on which means that he is well acquainted with the details of a case and ensures the assistant solicitors working under his direction are well briefed and properly supervised."

The witness commented that it seemed that the Upheld Findings were concentrated in a very narrow period of time and he knew from his own experience that in dealing with litigation of this nature which was very fast moving mistakes could be made. The witness still found it very hard to believe that the First Respondent would do anything deliberately dishonest. From his knowledge of the First Respondent it was so totally out of character that the witness could not accept that he had acted in that way but obviously he was not the Tribunal and the Judge who heard the case. The findings had been so devastating for the First Respondent that he had given up his practice and his life at a stroke and from the witness's knowledge of the First Respondent all he did was work. The witness still held the same views about the First Respondent which he had held when he gave his testimonial. He gave as an example of his knowledge of the First Respondent litigation in which they were involved in 2009 with 132 claimants. This was a very significant case involving taking on a large American investment bank. The opponent was a partner from a well-known firm of solicitors undertaking international commercial work. The witness considered that the First Respondent had done an excellent job single-handedly negotiating the settlement. The witness had considerable contact with the First Respondent over the three years of

that litigation and had come to know him extremely well and so this matter about litigation with which the witness was not involved, had come to as a great shock and he was devastated on the First Respondent's behalf.

16. **Mr Giles Richardson of** Counsel gave character evidence for the First Respondent having already provided a written testimonial in May 2013 in connection with the appeal to the Administrative Court against the decision of the Tribunal. He had been called to the Bar in 1997 and practised in commercial matters in the Chancery Court. The witness's views of the First Respondent had not really changed; he was astonished by the original Tribunal decision when he learned of it. He remained of the view that the First Respondent was a person of deep professional integrity. The experiences he had of working with the First Respondent related to complex cases. He felt instinctively that the First Respondent was someone he could trust. He referred to examples he had given in his witness statement of working together with difficult clients. One example related to dealing with two high net worth individuals who had a complex relationship with a bank which they were suing. The First Respondent was emphatic about what they had to do in terms of showing their hand and throughout the witness felt that he was properly backed up in his role in the proceedings. The witness also gave an example relating to a client who wanted to argue for the highest conceivable quantum. In consultation with the witness the First Respondent made it clear to the client that unless the witness and the First Respondent received material that evidenced that to be the value of the claim they were not prepared to put it in those terms.

Previous Disciplinary Matters

17. None in respect of either the First or the Second Respondent.

Submissions for the Parties

(Submissions recorded below include those in the documents and those made orally at the hearing. In quotations paragraph numbering and cross references to other documents have been omitted unless they aid comprehension.)

Submissions for the Applicant

18. For the Applicant, Mr Cunningham submitted that this was an extremely unusual and atypical case as was the history of the prosecution of the matter. The facts and issues for the Tribunal covered quite a narrow ambit. In his Skeleton, Mr Cunningham had provided a recommended reading list for the Tribunal which highlighted only the relevant parts of both the original Tribunal and Mr Justice Jay' judgments and other documents. There was no dispute between the parties about the applicable principles which the Tribunal would employ in determining sanction in respect of the Upheld Findings but there was a degree of contention about how they would apply.

<u>The Upheld Finding of Dishonesty</u>

(In accordance with the Tribunal's practice, Mr Cunningham was permitted to make submissions on points of law towards the end of the hearing; unless they revisited his earlier submissions those points have generally been subsumed into his submissions below.)

19. Mr Cunningham referred to paragraph 156.79 of the original Tribunal's judgment which for the purposes of his submissions he broke down into seven separate sentences as set out below:

> "[1]. The Tribunal agreed that the Respondents had provided misleading information to the Court regarding the Applicant's [Mr L's] New York apartment after the Without Notice hearing and accordingly found allegations 6.1, 6.2 and 6.3 to be substantiated against both Respondents.
>
> [2]. [The] Tribunal had been asked to find that both Respondents had been dishonest.
>
> [3]. The First Respondent had provided a misleading explanation to the Court regarding his knowledge of the [K] e-mail in his… eighth affidavit.

[Sentence 3 originally included reference to the First Respondent's seventh affidavit but the dishonesty finding in respect of it was not upheld.]

> [4]. The Second Respondent had assisted in the drafting of the affidavit and the Respondents had discussed the fact that the [K] e-mail had been "overlooked."
>
> [5]. The Second Respondent would therefore have known that the explanation given by the First Respondent in his eighth affidavit was not true yet he had allowed it to be put before the Court.
>
> [6]. Accordingly the Tribunal found that the Respondents' conduct as set out in allegation 6.3 had been dishonest so that allegation 6.4 was substantiated against both Respondents.
>
> [7]. The Respondents' conduct amounted to a breach of the Code of Conduct [2007] and so the Tribunal found allegation 6.5 to be substantiated against both Respondents."

Mr Cunningham submitted that sentences 1 and 7 were of little relevance to the matters before the Tribunal. Sentence 2 was introductory explaining what the Tribunal was doing. Mr Cunningham submitted that the reference in sentence 3 to "his knowledge" referred to the First Respondent and was important. In sentence 4 regarding the Second Respondent there might be some significance in the fact that the word "overlooked" was in inverted commas. Sentence 5 contained the Tribunal's substantive findings. Sentences 3 and 4 were the meat of what was in front of the Tribunal. Sentence 6 contained the outcome - a finding of dishonesty. Those findings were set in stone and not to be controverted.

20. Mr Cunningham submitted that the Upheld Finding related to one document only, the First Respondent's eighth affidavit (in this judgment referred to as "S8" or "the eighth affidavit") sworn in proceedings in the Chancery Division on 8 July 2010 which was

the third and final day of the hearing before Mr Justice Roth. The dishonesty finding arose out of the wording of paragraph 15 of S8 which read as follows:

> "I understand from Mr [JW] that despite not receiving the fax on 17 April 2010, he was told by Mr [K] in mid-April 2010 of the facts set out in Mr [K's] affidavit dated 30 April 2010. I am told by Mr [JW] that the reason why he did not mention this in his First Affidavit is because he thought it was sufficient that the Court had been told that it was believed that Mr [L] was by then in London."

S8 contained nothing from the First Respondent or his firm about their knowledge of the existence of the K evidence. At the hearing, Mr Justice Roth placed heavy blame for this problem of nondisclosure on Mr JW and exonerated the First and Second Respondents.

21. Mr Cunningham submitted that the best exposition of how the present position had been reached was set out at the beginning of Mr Justice Jay's judgment and referred particularly to where the Judge at paragraph 11 of his judgment took up the story after the unsuccessful attempt to serve the US "justification" hearing papers on Mr L at the New York apartment:

> "In the meantime, the [First Respondent] had entered on the scene. The precise sequence of events is unclear, and does not matter for present purposes, but on 16th February 2010 [the First Respondent] e-mailed the Liquidating Trustee, Mr [E], out of the blue to explain that they had areas of mutual interest, and "we would like to discuss with you possible ways in which this property [in London] and [L's] other funds may be secured for the benefit any judgment you are ultimately able to secure against Mr [L]…."

Mr Justice Jay went on in the same paragraph to refer to the involvement of Mr C/C Ltd who are referred to incidentally in this Tribunal judgment. The words in square brackets are inserted by way of clarification:

> "In the same month [the First Respondent] was contacted by Mr [C], founder of [C Ltd], who had developed concerns about Mr [L's] interest in an apartment [in London]… In essence, the concern apparently was that although Mr [L] through a Lichtenstein [foundation] had paid four deposits for the apartment, the serious allegations being made in the US proceedings might mean that [P, another entity which was technically managing the project] could not legally accept the balance of the purchase price… [C/C Ltd] became the firm's client although [P] retained different solicitors…"

Mr Justice Jay continued in paragraphs 13 and 15-17:

> "Following his self-introductory e-mail, [the First Respondent] travelled to Boston to meet the Liquidating Trustee and at least two sets of lawyers working in that jurisdiction; the principal attorney was Mr [JW]… The precise sequence of events does not matter but in April 2010, in line with [the First Respondent's] first e-mail, the strategy was developed to apply for a worldwide Freezing Order in the UK under section 25 of the [Supreme Court]

> 1982 Act in aid of the US proceedings. Mr Dutton explained to me the essential ingredients of a successful application under this section, and one of these was the need to prove a real risk that the defendant might dissipate his assets.
>
> …
>
> …on 29th April 2010 the application was made without notice to Morgan J on the basis of affidavits sworn by Mr [E], Mr [JW] and the First Respondent, and written and oral submissions advanced by Leading Counsel. The material placed before Morgan J was substantial and it might give a misleading impression to place too much emphasis at this stage on matters which may only have acquired real significance later on, but in order to make sense of the story it is necessary to identify the three pieces of information which it was alleged were not placed before the Court at the without notice hearing.
>
> This information comprised an e-mail from a process server in New York, Mr [K] … dated 12th April 2010, an e-mail from private investigator in New York, Mr [UD], dated 14th of April 2010, and report given orally to [the firm] by a private investigator in London, Mr [KN], on 15th April 2010. Taken together, this material strongly suggested that Mr [L] was no longer residing at the [New York] apartment, and subsequent evidence indicates that he moved out in April 2009.
>
> This information was material for this reason. The evidence adduced before Morgan J suggested that Mr [L] was evading service of the bankruptcy proceedings in New York and for that reason, amongst others, there was a risk of dissipation of assets. If in fact [Mr L] was no longer living in New York but was dividing his time between London and Italy, as the non-disclosed material appeared to show, then an important element of the Liquidating Trustee's case on the risk of dissipation was removed from the picture…"

22. Mr Cunningham also referred to what he described as material facts in the Tribunal's judgment:

> "He [Mr W QC counsel for Mr L] told the Tribunal that [the First Respondent's] eighth affidavit had made no reference to the fact that [the firm] were aware of the contents of Mr [K's] affidavit by virtue of the fact that they had received the [K] e-mail containing the same information…"
>
> "The Tribunal was told that the Liquidating Trust had no intention of applying for a Freezing Order until they had been contacted by [the firm] and [C Ltd] and had been encouraged to make the application."

23. Mr Cunningham submitted that the First Respondent went out and solicited the Chancery Division claim. At the outset the Respondents knew what they had to establish; that the Defendant Mr L was likely to dissipate his assets and so warranted having his assets frozen. Mr Cunningham submitted that the piece of information which was central to this hearing was the missing information in the K e-mail dated 12 April 2010 which stated the following:

> "Fri evening around 7pm I spoke with the doorman who seemed sincere – no games said what's that name again and was not familiar with him. He asked for the apt number, which I gave him but after looking at his tenant said not know. Ive check (sic) the tel directory and called a number for him … but it is no longer in service…"

Mr Cunningham submitted that the e-mail was dated prior to the hearing before Mr Justice Morgan and so its deployment before him created a problem. It was difficult to make a case on evasion of service at the New York apartment if the person to be served had ceased to reside there. Mr K also swore an affidavit in the related US proceedings which was in the same terms as the e-mail. Mr Cunningham referred to the two pieces of evidence as the "K evidence". Taken together with the two other pieces of evidence from Mr UD and Mr KN it showed that Mr L was no longer residing in New York. Mr Cunningham submitted that the evidence of K was at the heart of the application in the Chancery Division to the effect that Mr L was a dissipater of assets and so his assets should be frozen and the evidence was that he was evading service. The K evidence would have been of huge significance if it had been submitted to Mr Justice Morgan but it was not and he made a freezing order which was served on 30 April 2010. Mr L did not take it "lying down" but as Mr Justice Jay said at paragraphs 20 and 22 made an application to discharge the order:

> "The third application came before Roth J on 6th July 2010. It was heard over three days and on 23rd July 2010 Roth J discharged the Freezing Order. At this stage all that need to be said is that the learned judge was critical of the Liquidating Trustee's failure to give full and frank disclosure at the without notice hearing."

and

> "As I have explained, the foregoing is an extremely abbreviated summary of the essential factual background to this litigation. At my request the parties have prepared a more detailed Chronology and this is to be found as an appendix to this Judgment – I have included the Respondent's [L's] suggested additions…"

24. Mr Cunningham submitted that to describe both Mr Justice Roth's comments as "critical" was a modest way of describing the attitude in his judgment:

> "The Draconian remedy of a freezing order, obtained at a "without notice" hearing where the Defendant subject to the order is not present to put his case, was described by Donaldson LJ as one of the laws two nuclear weapons… Subsequently, Jacob J referred to it as a "thermo-nuclear weapon"… It is in that context that the duty on the Applicant [the Liquidating Trust] to make full and fair disclosure assumes such importance."

Mr Justice Roth referred to the case of Siporex Trade SA v Comdel Commodities Ltd [1986] 2 Lloyd's Rep 428:

> "Such an Applicant must show the utmost good faith and disclose his case fully and fairly… He must identify the crucial points for and against the application, and not rely on general statements and the exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences…"

This placed a very high duty to disclose to the court what the absent Defendant might say on his own behalf. Under the heading "Evasion of Service" Mr Justice Roth said:

> "Mr [E], Mr [JW] and [the First Respondent] all stated that Mr [L] "is or was formerly a resident of the state of New York". [The First Respondent] further asserted that "there are good grounds to suppose that Mr [L] is seeking to evade service"… , on the basis, first, that documents served on Mr [L] in April 2010 at the … address in New York had been returned to the Liquidating Trust as undelivered…"

These statements regarding evasion of service were the foundation of the proposition that it was right to make a freezing order because of Mr L's propensity to dissipate assets. Mr Cunningham submitted that the First Respondent made the crucial contention in evidence. Mr Justice Roth was aware of the contents of the K evidence as shown by paragraphs 30 and 32 of his judgment:

> "… It has emerged that on 9 April 2010 a process server who attempted to carry out personal service on Mr [L] at…, New York, found that Mr [L] was unknown to the doorman and not listed in the resident directory there, and that the Manhattan telephone number listed for Mr [L] was no longer in service…"

> "That confirms, as I would expect, that the Liquidating Trust's US attorneys were aware of the way the case was being presented to the English court, and in his affidavit Mr [JW] stated expressly that he was made aware of the strict obligation of full and frank disclosure. I regret to say that his reason for not furnishing information about what occurred at the attempted service on 9 April 2010, which strongly indicated that Mr [L] had left New York, betrays a serious misunderstanding of what is required by full and fair disclosure in English proceedings when it is being alleged that the Defendant is attempting to evade service."

The First Respondent had apologised to the court and so Mr Justice Roth was told of the K evidence by way of e-mail and affidavit but there was no suggestion that the First Respondent himself was aware of that information as in paragraph 31:

> "By his 7th affidavit, [the First Respondent] has now apologised to the court for not making it aware of the contents of the US process server's affidavit at the "without notice" hearing. I was told that the Liquidating Trust's English solicitors were themselves unaware of those facts. I accept that, but that of course provides no excuse to the Liquidating Trust itself, which made the application, nor indeed to Mr [JW]…"

25. The First Respondent swore his seventh affidavit (also referred to in this judgment as "S7") on 6 July 2010 the first day of the discharge hearing. It included:

> "My firm was not aware of Mr [K's] affidavit or its contents but it is accepted that the Liquidating Trust should have had access to Mr [K's] affidavit prior to the ex-parte hearing. I apologise on behalf the Liquidating Trust for the fact that the court was not made aware of the contents of Mr [K's] affidavit."

Mr Justice Roth had read that affidavit and so he knew of the evidence of Mr K but he was not told that the First Respondent or his firm were aware of the K evidence. Mr Justice Jay set out at paragraph 161 what happened in the remainder of the hearing before Mr Justice Roth:

> "In the meantime, the proceedings before Roth J were going badly. The trial bundle only contains the transcript for 8th July and I have read that carefully. Unsurprisingly, the learned Judge was, as the Americans say, fully onto the case. Roth J was critical of Mr [JW] for not setting out in his first affidavit the recent attempts at service in New York. Specifically:
>
> > "MR JUSTICE ROTH: I know he does not say that he is evading service now. That is said by, I think, [the First Respondent]. It deals with specifically the service that is attempted in New York in 2008 and it does not deal with the later attempted service, but as an affidavit which expressly acknowledges the obligation of full and frank disclosure, I would have thought that any lawyer, albeit an American lawyer, would realise that this may be relevant."

Mr Justice Roth had indicated displeasure that the true position not been properly dealt with in JW's affidavit.

26. Mr Justice Jay described what then went on at paragraphs 162-165 of his judgment; the problem was becoming acute on 8 July 2010:

> "…although judicial concerns were directed at [JW], these were no doubt predicated on what had been in [the First Respondent's] seventh affidavit that his firm was not aware of the [K] affidavit or its contents. By 8th July [the Second Respondent] knew that to be incorrect, but he did nothing to correct, as opposed to perpetuate, that error in giving the instructions which he did to Leading Counsel.
>
> The need for urgent correction of the position ought to have become acutely obvious to [the Second Respondent] in the light of the following judicial observations:
>
> > "Clearly [the First Respondent] would not have done that [deposed to paragraph 47 (ii) of his first affidavit] if he had known, which I fully accept he did not because he was not told, about what had happened with service.
> >
> > …

> To rely on that as supporting the proposition that there are good grounds to suppose that Mr [L] is seeking to evade service without telling the Court that, on the other hand, what happened on the attempted service does seem to me to be withholding material evidence. I accept [the First Respondent] did not know that, but to say that it is not material and it therefore need not have been placed before the Court and it does not shed a different light upon what he has said about Mr [L's] attempts to evade service, I find that very hard to swallow"

> This ought to have set the alarm bells ringing very loudly indeed. Roth J, equipped only with [the First Respondent's] seventh affidavit, was expressly exonerating the English solicitors and heaping all the blame on Mr [JW], and [the Second Respondent] was in Court at all material times.
>
> [The First Respondent's] eighth affidavit was not sworn until after the hearing before Roth J had concluded and judgment was reserved. I have commented on the need for the urgent correction of the seventh affidavit, and in my view no satisfactory explanation has been given for the delay."

Mr Justice Jay also referred to the First Respondent's first witness statement (in paragraphs 75 and 79 respectively):

> "…Sub-paragraph (ii) is also misleading in suggesting that the return of mail from the New York address was in some way suspicious, and is premised on the basis that Mr [L] was still living at that address…
>
> …
>
> Standing back from all this material, it is clear to me that any reasonably competent and honest solicitor would and should have put the additional [K/UD/KN] material before the Court if he or she had known about it…"

27. Mr Cunningham submitted that Mr Justice Roth accepted the firm was unaware of Mr K's affidavit at the without notice hearing but then came S8 which on its face was sworn on 8 July 2010 and not until after Mr Justice Roth's hearing concluded and judgment was reserved. Mr Justice Jay commented that the need for urgent correction of the position ought to have become acutely obvious to the Second Respondent in the light of Mr Justice Roth's observations quoted at paragraph 163 of Mr Justice Jay's judgment above. The First Respondent was by then back in his office and S8 was produced and sent to Mr Justice Roth. He had it in mind when he wrote his judgment as shown at paragraph 32 of the Roth judgment quoted above. He accepted the denial of knowledge in S7 and its perpetuation in S8 and thought the blame should go to Mr JW, and he exonerated the First Respondent and the firm. This was a very serious situation; a freezing order had been obtained by, amongst other things, omission of evidence that contraverted the evasion of service proposition and the contention of dissipation. This could have been catastrophic for Mr L if he was not the person he proved to be. The original Tribunal referred in paragraph 156.14 of its judgment to his counsel's submissions about that:

> "In conclusion, Mr [W QC] explained that the Applicant [Mr L] had brought this case because he believed that the Respondents' conduct had involved persistent and wilful breaches of their obligations and he considered that they had been dishonest in certain key areas. He pointed out that if the Applicant had not been so well resourced then he could have lost a substantial proportion of his assets on the basis of a prejudicial and misleading case…"

28. Mr Cunningham's response to Mr Dutton's objection that he was straying into allegations which had not been upheld was that he was showing the Tribunal what was submitted to be the possible consequence of misleading the court. It could not be controversial that it was undesirable for the court to be misled and doing so had consequences. They did not materialise here as Mr L was well resourced.

29. By way of clarification of timescales regarding S8, Mr Cunningham explained that often when a Judge reserved judgment he/she was then bombarded with further material. There was no doubt that Mr Justice Jay was correct in recording that S8 was not sworn and produced to Mr Justice Roth until after the hearing and that during that afternoon (8 July 2010) or the next morning S8 was sent over to the Judge. The Tribunal noted that the stated purpose of S8 was:

> "…to explain the position in relation to the HM Land Registry Searches carried out in respect of apartments…. London…. I also provide further clarification in respect of Mr [K's] fax dated 30 April 2010…"

Mr Cunningham agreed with the Tribunal that S8 was clearly the product of the earlier two days of hearing and submitted that it was sworn because Mr Justice Roth had articulated his unhappiness about the way K's evidence was withheld.

30. Mr Dutton submitted that it was the First Respondent's understanding as best as he could recall that the affidavit was sent in shortly after the hearing on 8 July 2010. A number of matters had arisen regarding dates of Land Registry documents. There was also an issue of the apparent backdating of Mr K's affidavit which was resolved when it was made clear that K's fax machine gave a post date (see below in Mr Dutton's submissions) and there was the issue of the K Evidence. Mr O QC for the Liquidating Trustee advised that there should be a single affidavit (dealing with all these matters) rather than another affidavit from Mr JW.

31. Mr Cunningham submitted that there was no contention about the broad chronology of what happened on 8 July 2010. The Tribunal had to ask was it right for the First and Second Respondents to state in S7 and perpetuate by silence in S8 that they did not know about the K evidence. He referred the Tribunal to allegations 6.3 and 6.4. The essence of allegation 6.3 was when did the First and Second Respondents know that Mr L no longer lived at the New York apartment? This was the basis of the original Tribunal's Findings. Mr Cunningham submitted that there was a lot of evidence about when they became aware and not all of it was consistent. He referred to Mr Justice Jay's comment about the need for a chronology and to an entry in the chronology "12.04.10 Mr [JW] forwards Mr [K's] email to A1 [the First Respondent], A2 [the Second Respondent] Mr [E], Mr [M], Ms [O'N]…"

32. Mr Cunningham submitted that the First and Second Respondents received K's e-mail on 12 April 2010 well before the without notice hearing on 29 April 2010 and whether or not the Respondents received the e-mail on 12 April 2010 it was plain that they knew about it on 6 July 2010, the date of swearing of S7 and the first day of Mr Justice Roth's hearing. Mr Justice Jay pointed out at paragraph 153:

> "At 20:32 on 6th July 2010 (I believe that this must be UK not US Eastern Standard Time) Mr [JW] e-mailed [the Second Respondent] with the news that Mr [K] had solved the mystery of the fax dating issue: his fax machine produced a date 13 days behind. It followed that Mr [K]'s affidavit dated 30 April was indeed signed on that date, which was after the without notice hearing. [The Second Respondent] asked Mr [JW] to provide the firm with an affidavit explaining the position. He also said:
>
> > "Please also make the point that you had no prior conversations with Mr [K] about failed service."
>
> This request might be interpreted in one of two ways. Either in July 2010 [the Second Respondent] had genuinely forgotten about the earlier [K] (sic) or he was asking Mr [JW] to depose to a fact which he, [the Second Respondent], knew to be untrue. The latter appears implausible."

and at paragraphs 155-157 of his judgment:

> "[The Second Respondent's] reply timed at 21:19 states:
>
> > "Our concern is that this knowledge should have been disclosed to the Court. When did you speak with [K]? Did you discount the significance of what we told you because by the time of the conversation we already believed that [L] was in London? I do not recall instructing [KN] on the basis that there had been a failed service in NY."
>
> …
>
> At 21:50 on 6th July 2010 Mr [JW] replied:
>
> > "I received an e-mail from [K] on about April 12, I exchanged e-mails with you and [Ms O'N of JD one of the US law firms] (as well as phone calls with [O'N] around that time as to whether [L] had been served. Because [L] was no longer at his address we discussed hiring a skip tracer* and an investigator** to find him. I believe that everyone was aware at that time that [L] was no longer living at [the NY apartment], which is why we were having those conversations. At that point an investigator was already at work in England and we believed he would be served."
>
> Finally, at 22:22 on 6th July 2010, [the Second Respondent] reverted to Mr [JW] as follows:

> "… It looks like we have overlooked your e-mail on 12 April…"
>
> (* Mr UD, ** Mr KN)

Mr Cunningham submitted that Mr JW's e-mail at 21:50 indicated clearly that whether or not the First and Second Respondents had logged their receipt of the K evidence they were told again on 6 July 2010 that they had. It was corroborated by the Second Respondent's reply at 22:22 referring to having overlooked K's email.

33. Paragraph 157 of Mr Justice Jay's judgment concluded:

> "[The Second Respondent] confirmed in evidence that by the time he sent this e-mail he had reviewed his saved e-mails and had located the [K] e-mail of 12 April. My interpretation of the evidence is that he had also spoken to [the First Respondent]"

Mr Cunningham submitted that whatever had happened on 12 April 2010, after the first day of the hearing before Mr Justice Roth, on the evening of 6 July 2010 the Second Respondent at least, was aware of the K evidence before drafting and serving S8. He must also have been aware because Mr Justice Roth in the ongoing discharge proceedings at which the Second Respondent was present was working on the basis that the First Respondent did not know of the K evidence. Mr Justice Roth said it twice and said it in the judgment eventually handed down. The indication was that the K evidence was plainly known to the Respondents when the evidence of the First Respondent was produced on the evening of 8 July 2010. The above formed the background to the original Tribunal's findings at paragraph 156.79. Mr Cunningham submitted as follows:

- In respect of sentence 3 "The First Respondent had provided a misleading explanation to the Court regarding his knowledge of the K e-mail in his… eighth affidavit" the First Respondent had been misleading by silence or omission regarding his the First Respondent's knowledge of the K evidence.

- In respect of sentence 4: "The First Respondent had assisted in the drafting of the affidavit and the Respondents had discussed the fact that the [K] e-mail had been "overlooked"" Mr Cunningham submitted that the Second Respondent allowed the omission in S7 to be perpetuated by letting it go into S8.

- In respect of sentence 5: "The Second Respondent would therefore have known that the explanation given by the First Respondent in his eighth affidavit was not true yet he had allowed it to be put before the Court." This was an act of commission not omission; the Second Respondent knew that the explanation was not true and he let it be put before the court.

- One needed to differentiate between the omission findings at sentences 3 and 4 and the commission finding in sentence 5. Mr Dutton stated in the Skeleton at paragraph 64 (c):

> "In respect of both Respondents, the dishonesty found to have been proved was founded on omissions – i.e. [the First Respondent] failing to state that he was also aware of the [K] e-mail; and the Second Respondent failing to prevent [the First Respondent] from giving an incomplete explanation and permitting the affidavit to be sworn nevertheless. Whilst accepting that this is serious, the law in this area generally regards omissions as being less serious than commissions."

Mr Cunningham submitted in his final comments on points of law that Mr Dutton and Mr Glassey asserted that the original Tribunal finding that S8 was untrue was because it omitted to state the truth of the date when the Respondents came to have knowledge of the K evidence but Mr Cunningham submitted if one looked at the words of sentence 5 it dealt not with that but something affirmative in the explanation given and not what was omitted – it related to sentence 3 and sentence 4. The original Tribunal regarded the explanation given as being untrue.

34. Mr Cunningham also referred to the submissions of Mr W QC which were set out in the earlier Tribunal's judgment at paragraph 156.24 about this failure to correct:

> "…He [Mr W QC] told the Tribunal that by the time the First Respondent came to swear his eighth affidavit, he had known about the [K] e-mail in April because this had been the subject matter of his seventh affidavit and he could not have forgotten about the contents of an affidavit which had been sworn only two days earlier. Mr [W QC] said that, despite this, the First Respondent had failed to correct the Court's misapprehension… He claimed that it had been for the First Respondent to deal with the matter because the original omission had been in his evidence. Instead, he had continued to perpetuate the misunderstanding by putting in a false affidavit. Mr [W QC] said that the First Respondent must have known that he was being dishonest in not correcting the position. He told the Tribunal that he accepted that the Second Respondent had been junior and had deferred to the First Respondent but he should not have remained silent knowing that the Court was being seriously misled as to his firm's state of knowledge."

Mr Cunningham submitted that this was an accurate articulation of what the Applicant said were the vices attendant on the omissions in S8.

<u>Mr Cunningham's Submissions for the Applicant about the Respondents' new evidence of February 2016</u>

35. Mr Cunningham submitted that the new evidence in terms of Mr JW's affidavit did not go to the misleading omission described in sentences 3 and 4 in the Tribunal findings or to the misuse of confidential information. At best the JW affidavit went to sentence 5 which was a finding that the First Respondent untruthfully blamed Mr JW for non-disclosure of the K affidavit in order to exonerate himself and the Second Respondent. On its face it might be construed as Mr JW saying it was his fault. Mr Cunningham submitted that JW evidence should not be allowed to undo sentence 5. He submitted that Mr Justice Jay's findings (paragraph 279) constituted a

prohibition on the Respondents being allowed to deploy Mr JW's affidavit to undo the finding in sentence 5:

> "The consequence of remission is that the issue of sanction falls to be determined by the SDT on the basis of whatever available material the Appellants seek to adduce (plainly, the SDT approaches the matter *de novo,* and not as a reviewing body). That said, the Appellants cannot seek to adduce evidence whose purpose is to undermine the previous SDT's findings of fact on the anterior question of dishonesty."

In the Memorandum of the Preliminary Hearing the First Respondent was recorded as having:

> "… assured the Tribunal that the purpose of introducing the evidence was not to undermine the dishonesty finding, which he accepted was "set in stone"

Mr Cunningham submitted that in spite of that assurance, the only purpose of JW's affidavit was to undermine the finding; the Tribunal should take the Respondents' word in their witness statements for that. The First Respondent's fifth witness statement in these proceedings stated:

> "The gist of the Original Tribunal's finding – namely that [the Second Respondent] and I were seeking to shift the blame from [the firm] onto Mr [JW] – can be seen to be incorrect or at least very doubtful by the additional evidence coming from Mr [JW's] own signed affidavit which was not before the Original Tribunal or the Administrative Court on appeal;"

The Second Respondent made a very similar statement in his third witness statement.

36. Mr Dutton submitted that the Respondents accepted that sentence 5 was set in stone but it was dishonesty by omission and the implication and effect of sentence 5 was at issue.

37. Mr Cunningham also pointed to defects with the JW affidavit; it was not sworn; Mr JW had never been cross-examined upon it; and no evidence from him had been seen to corroborate his acceptance of the blame. Mr Cunningham submitted that in his fifth witness statement in the original Tribunal proceedings, the First Respondent explained how the JW evidence was deliberately held back to be deployed later which was not permitted:

> "In any event, it is clear from the [JW] Affidavit that Mr [JW] at least assented to the explanation which was subsequently given by me in the Eighth Affidavit. My best recollection is that the [JW] Affidavit was not ultimately sworn and served because it was decided by Counsel that it would be preferable for all outstanding matters to be dealt with in a single affidavit to be sworn by me…"

It was said that somehow or other privilege intervened:

> "…the basis of not adducing this evidence because of my and my former firm's professional duties to uphold our client's (i.e. the Liquidating Trust's) legal and professional privilege in those communications, in circumstances where Mr [L] was a Lay Applicant engaged in a private prosecution."

Mr Cunningham submitted that these two paragraphs were at odds with each other; the deliberate decision could not be reversed in front of the Tribunal. As Mr Justice Jay said in his judgment:

> "… the Appellants are not entitled to deliver a case on the evidence which was not advanced before the SDT."

Mr Cunningham referred again to Mr Justice Jay's comments about the privileged material:

> "Mr [W QC] points out that the Appellants [the First and Second Respondents] had been selective about the privileged material they sought to rely on, and I am inclined to agree…"

and

> "… I cannot place any weight on materials which were not sought to be placed before the SDT and whose contents cannot be speculated about."

38. Mr Cunningham also referred to an authority Sharab v Prince Al-Waheed [2009] EWCA Civ 355 which was a dispute about the payment of commission for the purchase of a jet aircraft:

> "In my judgment, the court should decline to accept any undertaking on behalf of the Prince at this late stage of the proceedings…
>
> The Prince had the clearest of opportunities to give or offer an undertaking at the time of the proceedings before the deputy judge. The explanation given by Mr Pymont shows that a considered decision was taken not to do so… It was open to the Prince to take that position… allowing the appeal to proceed on that basis until the conclusion of the hearing and seeking to change his position only after the hearing as a result of the exchanges that had taken place during the hearing. I do not think that the Prince should be permitted to reverse, so late in the day, a tactical position deliberately adopted for the purposes of the proceedings below and the appeal."

Mr Cunningham's Submissions for the Applicant in respect of exceptional circumstances

39. Mr Cunningham emphasised that the Upheld Finding of dishonesty could not be dismissed as relating to a mistake and the First Respondent had accepted that there had been dishonest errors that is something other than mistakes. Mr Cunningham referred the Tribunal to the case of Bolton v Law Society [1994] 1 WLR 512 where it was stated:

"It is required of lawyers practising in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness…

A solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors. Only infrequently, particularly in recent years, has it been willing to order the restoration to the Roll of a solicitor against whom serious dishonesty had been established, even after a passage of years, and even where the solicitor had made every effort to re-establish himself and redeem his reputation. If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of the profession whose reputation depends upon trust. A striking off order will not necessarily follow in such a case, but it may well. The decision whether to strike off or to suspend will often involve a fine and difficult exercise of judgment, to be made by the tribunal as an informed and expert body on all the facts of the case. Only in a very unusual and venial case of this kind would the tribunal be likely to regard as appropriate any order less severe than one of suspension.

It is important that there should be full understanding of the reasons why the tribunal makes orders which might otherwise seem harsh. There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention. Particularly is this so where a criminal penalty has been imposed and satisfied. The solicitor has paid his debt to society. There is no need, and it would be unjust, to punish him again. In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the

> solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires."

40. Mr Cunningham submitted that the Tribunal's starting point should be the second paragraph quoted above regarding strike off. He accepted that strike off was not inevitable if there were exceptional circumstances. In the case of Law Society v Salisbury [2008] EWCA Civ 1285, Lord Justice Jackson referred to "the very small residual category where striking off was not appropriate." More compelling was what Mr Justice Coulson said in the case of SRA v Sharma [2010] EWHC 2022 (Admin):

> "It seems to me, therefore, that looking at the authorities in the round, that the following impartial points of principle can be identified: (a) Save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the roll, see Bolton and Salisbury. That is the normal and necessary penalty in cases of dishonesty, see Bultitude. (b) There will be a small residual category where striking off will [be] a disproportionate sentence in all the circumstances, see Salisbury. (c) In deciding whether or not a particular case falls into that category, relevant factors will include the nature, scope and extent of the dishonesty itself; whether it was momentary, such as Burrowes, or [over] a lengthy period of time, such as Bultitude; whether it was a benefit to the solicitor (Burrowes), and whether it had an adverse effect on others."

Mr Cunningham then referred to the particular case references in the Sharma judgment. In Burrowes v Law Society [2002] EWHC 2900 (Admin) a solicitor attended upon clients to draw up a will where there were no witnesses and in what was subsequently described as a moment of madness he added to each will the details of two people who were not present. In Bultitude v Law Society [2204] EWCA Civ 1853 a solicitor devised a system of false debit notes in order to account for a long series of credit balances which had been the subject of concern on the part of the accountant appointed by the Law Society to look into his affairs. He was struck off but the Divisional Court substituted a penalty of suspension for two years. The order to strike off was reinstated by the Court Appeal where Lord Justice Kennedy said:

> "… we can and in my judgment should take [cognisance] of what the profession regards as the normal necessary penalty to be imposed upon those found to have acted dishonestly."

In Salisbury the allegation referred to the dishonest amendment of a cheque to which Mr Salisbury added £1,000 in circumstances where it was accepted that that money was due to him. The Divisional Court substituted an order for three years suspension in place of striking off but in the Court Appeal the original order was reinstated. In Sharma, Lord Justice Jackson stated:

> "Speaking for myself I am not persuaded that it is appropriate in these sorts of cases to embark upon a long trawl through the decisions of the tribunal, particularly given that so many of them are so obviously fact-sensitive…"

Mr Cunningham then dealt with the relevance of each factor of the Sharma guidance.

Benefit to the First and Second Respondents

41. Mr Cunningham submitted that if the affidavit S8 had been left unchallenged and Mr L had not been as well resourced and determined a person as he was, the Respondents would have been left in the position of being exonerated from any wrongdoing by the Roth judgment. The real benefit to the Respondents was that they would have got away with S8 if it had never been scrutinised as thoroughly as it was by the Tribunal and Mr Justice Jay. The latter alluded to possible further collateral advantages for the First Respondent and to a lesser extent for the firm:

> "…On the face of things the Appellants' instincts were to cover their own backs rather than to tell the Court the truth and apologise. Had they done so the discharge hearing might have been resolved more rapidly in Mr [L's] favour – with all the concomitant grief in relation to [the firm's] CFA and the potential exposure of [C/C Ltd] to an application under s. 51 – but these were all or ought to have been collateral considerations…"

Section 51 referred to a third or non-party costs order and Mr Cunningham submitted that if the Respondents had got away with S8 they might have protected themselves from the concomitant grief Mr Justice Jay referred to.

Burden

42. Mr Cunningham submitted that if Mr JW felt aggrieved then he was a victim of S8. Mr Cunningham submitted there could be no other purpose for S7 and S8 than to do what could be done to prevent discharge of the freezing order. The attempt failed; if the Respondents had succeeded the consequences for Mr L could have been serious as Mr W QC submitted to the original Tribunal.

Momentary Act

43. Mr Cunningham submitted that Mr Dutton in his Skeleton put this aspect very high and was wrong:

> "It is submitted that the dishonesty found against both the Respondents is at the lower end of the scale of seriousness such that it would be inappropriate and disproportionate to strike them off. The Respondents rely upon the following:
>
> a. The dishonest conduct in question was isolated and of very short duration. The analysis of the evidence by Jay J suggests that the dishonesty was centred upon a 32 minute period at approximately 10 p.m. at night after the first day of a stressful three day hearing in exceptionally combative litigation. On this view it can quite properly be described as a moment of madness."

No doubt it was possible the decision was made in a very short space of time to formulate S8 as it was and maybe the drafting did not take long but before and after 8 July 2010 S8 was the end game in 'a mistake'. Mr Cunningham referred the chronology attached to Mr Justice Jay's judgment beginning on 12 April 2010 when Mr JW forwarded K's e-mail to the First and Second Respondents. The problem became live because of the non-deployment of K's evidence at the without notice hearing on 29 April 2010 which enabled the First Respondent to say what he did in his first witness statement in support of the evasion contention which unravelled before Mr Justice Roth. K's evidence was plainly in play on 6 July 2010 with e-mails between Mr JW and the Second Respondent on the evening of that day. Mr Dutton said that it was a moment of madness on 6 July but there was the period from 6 July until after 8 July 2010 regarding whether it was right or wrong to deploy the JW affidavit. The problem was not addressed or dealt with in a 32 minute period. Both Respondents were implicated in what went on as shown in the original Tribunal's finding. Mr Cunningham rejected Mr Dutton's challenge that this did not arise from the Upheld Findings based on sentence 4 of the Tribunal's finding because that entire sentence had been upheld. It was inconceivable that the Second Respondent having sat in court on 8 July 2010 and heard what Mr Justice Roth said did not discuss the contents of S8 with the First Respondent before he signed it. S8 was the end game regarding misleading at the first hearing in April. It was never corrected before Mr Justice Roth and would have remained uncorrected if Mr L had not brought his Tribunal prosecution. The Respondents therefore remained culpable for that period. One could think that nothing happened between receipt of the e-mails on the evening of 6 July and the filing of the affidavit after the court hearing on 8 July 2010 but that would be wrong. There was also the prolonged period that elapsed between the e-mails on 6 July 2010 and 48-hours later when the affidavit was filed during which consideration should and could have been given as to how to deal with the information given in the affidavits. One needed to look at the filing of the affidavit through the prism of what happened before Mr Justice Roth as set out in Mr Justice Jay's judgment at paragraphs 161-165 already quoted. Notwithstanding what happened in court on the very day of its swearing, the Respondents still thought it appropriate to file that affidavit. Mr Cunningham submitted that the Respondents could have got away with it; it was madness but not momentary.

Nature, Scope and Extent of Dishonesty

44. Mr Cunningham submitted that Mr Dutton tried to diminish the significance of the Upheld Finding of dishonesty by inviting the Tribunal to consider that the misconduct was at the lower end of dishonesty; was small and inconsequential. The Tribunal should not look at dishonesty in those terms based on the following points:

45. Dishonesty had been displayed over a prolonged period of time as set out above. It was sworn for the benefit/protection of the Respondents; to lay blame on Mr JW; and to harm Mr L by retaining the injunction.

46. The overarching point was that the court was being misled. As Mr Justice Jay said there were very clear duties as to how solicitors conducted themselves towards the court:

> "Even more axiomatically, there is a separate duty arising at all times not to mislead the Court and, should the Court have been inadvertently misled, to correct that as soon as possible. These duties are prominent in the Solicitors Code of Conduct."

The obligations in respect of the court related to Rules 1.01 and 1.06 of the 2007 Code. Mr Justice Jay's comment that it was clear that any reasonably competent and honest solicitor would and should have put the additional K/UD/KN material before the court if he or she had known about it was also relevant. By far the most important authority was the observation of the Lord Chief Justice in the case of Brett v SRA [2014] EWHC 2974 (Admin):

> "In my judgment, the evidence, particularly of the contemporaneous correspondence and the lack of any response by Mr Brett to the demands contained in it, pointed inevitably to the conclusion that Mr Brett acted recklessly, as described above in allowing the court to be misled. On that basis it was inevitable that the SDT would, had it properly addressed the issues as it had defined them, have found him guilty of a breach of Rule 11.01 on the basis that he "recklessly" allowed the court to be misled."

Lord Justice Thomas added his own words to the principal judgment of Lord Justice Wilkie as follows:

> "111. The reason why that is so important is that misleading the court is regarded by the court and must be regarded by any disciplinary tribunal as one of the most serious offences that an advocate or litigator can commit. It is not simply a rule of a game, but a fundamental affront to a rule designed to safeguard the fairness and justice of proceedings. Such conduct will normally attract an exemplary and deterrent sentence. That is in part because our system for the administration of justice relies so heavily upon the integrity of the profession and the full discharge of the profession's duties and in part because the privilege of conducting litigation or appearing in court is granted on terms that the rules are observed not merely in their letter but in their spirit. Indeed, the reputation of the system of the administration of justice in England and Wales and the standing of the profession depends particularly upon the discharge of the duties owed to the court.
>
> 112. Where an advocate or other representative or a litigator puts before the court matters which he know not to be true or by omission leads the court to believe something he knows not to be true then as an advocate knows of these duties, the inference will be inevitable that he has deceived the court, acted dishonestly and is not fit to be a member of any part of the legal profession."

Mr Cunningham submitted that this was a stronger pronunciation than by Lord Bingham in Bolton. It removed the small residual category of exceptional circumstances in Sharma relating to dishonesty where this inevitable inference was drawn. The Lord Chief Justice said that if one misled the court one would inevitably be removed from the profession.

47. Mr Cunningham submitted that paragraph 112 above led to two final submissions:

- One did not detect the Lord Chief Justice identifying different sins of omission and commission. There were no authorities to support Mr Dutton's assertion that omission was less serious than commission and the Lord Chief Justice would disagree with it.

- In the light of Bolton and trusting a solicitor to the ends of the earth, Mr Cunningham rejected the assertion regarding the Brett judgment, in Mr Dutton's Skeleton:

> "The reputation of the profession is unlikely to be harmed in any material way as a result of the omissions."

The Lord Chief Justice reminded one that misleading the court was a fundamental affront; justice was dependent on the court not being misled. Mr Justice Roth was very cross about having been misled (as he thought) by the JW affidavit of an American lawyer. Here two English lawyers had been found dishonest in respect of the way they treated the court. The Upheld Finding related to misleading the court by omission and commission. Those findings were not subject to contraversion. Brett at paragraph 112 required the public to know how grave for solicitors were the consequences of misleading the court.

48. Mr Cunningham expanded on these submissions when commenting on points of law later in the hearing. He submitted that Mr Dutton sought to persuade the Tribunal that the facts were more serious in Brett than in this case but it was not so. It was stated in the Administrative Court judgment quoting the Tribunal judgment that it was not alleged that Mr Brett had been dishonest. The Administrative Court had determined that he had been reckless in allowing the court to be misled rather than that he had knowingly misled the court. This was considerably below the dishonest misleading found in this case. In Brett it was said:

> "Mr Dutton QC submits that the distinction between deceit and knowingly misleading the court is that the latter is apt to apply to a case where, as is alleged here, the solicitor permits the court to proceed on an incorrect assumption as to the facts, knowing that the court is so doing even though he may mistakenly believe that he has good reason for so doing, such as misguidedly wanting to protect a witness who has confided in him on an occasion attracting a duty of confidentiality."

This case was in the territory of knowingly failing to provide information due to the court in affidavit S8.

49. Mr Cunningham also submitted that paragraph 111 of Brett dealt with inadvertent misleading and paragraph 112 with advertent knowing or dishonest misleading. According to paragraph 111 inadvertent misleading was "one of the most serious offences that an advocate or litigator can commit" and "will normally attract an exemplary and deterrent sentence". Mr Cunningham submitted that the sanction for knowingly misleading would therefore be worse and that it was quite clear that the Lord Chief Justice was directing the Tribunal that such a person was not fit to be a

member of the profession. Mr Cunningham would be the first to acknowledge that such sanctions were very painful and might be very hard indeed on one or other of these Respondents but the Tribunal must bear in mind what the Lord Chief Justice said. Dishonestly misleading the court took the case out of the small residual category of exceptional circumstances. The Lord Chief Justice could have just agreed with his fellow Judge but he went out of his way to make observations for the proper administration of the courts. Everyone said this was a difficult case and it was difficult to get one's mind round it and the shackles imposed. However paragraph 112 of the Brett judgment removed the difficulty and told the Tribunal what to do.

50. Mr Cunningham set the Brett hearing in chronological context. The decision of Mr Justice Jay to remit this matter to the Tribunal because he could not be sure that the Respondents would be struck off was given on 13 January 2014 before the High Court determined Brett on 11 September 2014. If he had known what the Lord Chief Justice would say Mr Justice Jay would not have remitted the case to the Tribunal.

51. Mr Cunningham submitted that Lady Justice Rafferty when refusing permission on 21 May 2014 for the matter to go to the Court of Appeal on the basis strike off was not inevitable also made her determination before the Brett judgment. Mr Dutton took succour from Brett but the original Tribunal did not know what would emerge in paragraph 112 when it failed to sanction in the way set out by the Lord Chief Justice. The strongest shackle in this matter was paragraph 112 of Brett which did not give the Tribunal any room for manoeuvre at all in a case of (dishonestly) misleading the court.

<u>The History of the Disciplinary Proceedings</u>

52. The Tribunal reminded the parties that in Bolton the court had regard to the history of the proceedings; a point which was often overlooked. In response, Mr Cunningham referred to the relevant part of Bolton where the court said:

> "In the ordinary way I would without hesitation allow this appeal and restore the order of the disciplinary tribunal. In the present circumstances, however, a real question arises as to what should be done now, having regard to the time which has elapsed in the course of these proceedings, none of it due, I should say, to the disciplinary tribunal itself or to either of these parties. The fact, however, is that, as a result of the various stays that have been granted in the course of these proceedings, the order of suspension has never taken effect and it would, in my judgment, be oppressive to reinstate the tribunal's order 2½ years after the order was made and 16 months after the Divisional Court quashed it. The Law Society acknowledges the force of this contention…"

Mr Cunningham submitted that if the outcome of the case was strike off that distinguished it conclusively from what happened in Bolton; Lord Justice Bingham was aware of the distinction between strike off and suspension:

> "Quite apart from that it is, of course, clear that there is a substantial difference between these two forms of order. At the end of a period of suspension a solicitor is able to seek employment, or seek to re-establish himself in partnership, perhaps subject to such conditions as the Law Society

> see fit to attach to his practising certificate. But that puts him in quite a different position from a solicitor who has been struck off, who cannot practise at all as a solicitor unless or until he is restored to the Roll"

The fact that the Respondents had been relieved from strike off for a couple of years was not relevant if their conduct merited the permanent sanction and the Tribunal would not be wrong to impose it. This was a unique case regarding time but Mr Cunningham would resist any submissions of culpable delay against the Applicant. The Tribunal confirmed its view that there had been no procedural delay, save arising from the way the case had run through the various court hearings above detailed, which could not be attributed to either party.

Mr Dutton's Submissions for the First Respondent adopted by Mr Glassey for the Second Respondent

53. Mr Dutton submitted that there was an utterly compelling case for no sanction to be imposed beyond a suspension starting from 14 February 2014 the date that the original Tribunal made its findings, for an appropriate period of months thereafter. The First Respondent was a solicitor of 33 years standing. The Second Respondent was younger but of impeccable reputation. They had been struck off in respect of findings of dishonesty of which all bar one were overturned and for one finding of breach of the duty of confidentiality regarding an affidavit of means. They had been reinstated on 13 January 2014. The court did not order a stay as in Bolton where the suspensions were never activated. The largely successful appeal had left the First and Second Respondents with the question hanging over them of what would happen regarding the Upheld Findings. They took action to try and get the matter on to the Tribunal and it was coming on now three and a half years after the original strike off and two and a half years from the date the appeal was allowed. Neither the First nor the Second Respondents had felt able to apply for a practising certificate as the first question to be asked would be about any unresolved allegations against them. As a result they were in the position of people struck off or at least suspended for three and half years. The Tribunal should not just take into account culpable delay where it was on the part of the prosecution; there had been no such fault in Bolton. To go further than imposing the sanctions he suggested would, Mr Dutton submitted, have the effect of starting the clock running all over again after each Respondent had suffered strike off and where the dishonesty upheld was not at the most serious end of the scale and anything after 14 February 2013 would be a double sanction. An application to restore to the Roll would be perfectly properly brought in a matter of three years. The Respondents had already been struck off for 11 months and if they were struck off again they would not be able to practise for a very long time. The Bolton point relating to timing was of real importance in this matter. Mr Dutton submitted that the circumstances of the present case were utterly unusual. It was the first occasion in his 26 years before the Tribunal where the case involved such an intricate examination of the facts and matters by the Tribunal and an appellate court with the Respondents having allegations hanging over them unresolved for such a long time.

54. Mr Dutton submitted that the Respondents were two solicitors of unblemished character. Mr Dutton reminded the Tribunal of the witnesses for the First Respondent including Mr Sutcliffe who had come especially from Yorkshire to give evidence. This was not a case of brushes with the regulator or allegations of negligence finally

cumulating in findings at the end of a long process. Even without what the Tribunal had heard in oral evidence, the First Respondent had seven witnesses who spoke of him as an exceptional person. He worked unblemished to the age of 56 through difficult litigation without even an allegation of negligence where the day-to-day pressures would cause most people occasionally to make a mistake. He had been of exceptional service to the profession. The Second Respondent had three character witnesses (in the form of written testimonials).

The Events of 6 to 8 July 2010

55. Mr Dutton submitted that until the night of 6 July 2010 it was not appreciated by the Respondents that the K e-mail had been received. The Second Respondents said (in an e-mail) to Mr JW that night that they appeared to have overlooked the e-mail and the Second Respondent's email reply to Mr JW timed at 21:19 stated:

> "Our concern is that this knowledge should have been disclosed to the Court. When did you speak with [K]? Did you discount the significance of what we told you because by the time of the conversation we already believed that [L] was in London? I do not recall instructing [KN] on the basis that there had been a failed service in NY."

Mr Justice Jay said:

> "Again, the more plausible explanation for this e-mail is that in July 2010, the Second Respondent had honestly forgotten about exactly what had happened in April…"

56. Mr Dutton submitted that the Tribunal must not approach the question of sanction regarding the finding of dishonesty in respect of any matters prior to paragraph 15 of S8. The K e-mail was overlooked until it came to the attention of the Second Respondent on the night of 6 July 2010 when he was dealing with an affidavit on more substantial issues. The dishonest omission was that the Respondents did not then reveal that they knew about it. Mr Dutton then analysed in some detail the contents of the First Respondent's first affidavit in the Chancery proceedings dated 28 April 2010 and what the First Respondent said about Mr L's location. He submitted that it was accurate save for overlooking the K email. This was factually complicated and jurisdictionally and legally complicated litigation. There were 2,000 pages of exhibits to the Rule 5 Statement in the original Tribunal proceedings. Mr Dutton submitted that Mr L was a man of many parts and not necessarily willingly in communication. He suggested that the picture emerging was one of considerable complication regarding Mr L. The court was told that London was the place in which he resided and there were grounds for believing he was evading service although the K e-mail was overlooked. There were indications that Mr L had other addresses. Mr Cunningham asked that the following paragraph of the affidavit also be read:

> "I believe that I have fulfilled the obligation to give full and frank disclosure in the paragraphs set out above."

Mr Dutton submitted that what was set out in the first affidavit was the genuine honest belief of the Respondents. It could be deduced from the first affidavit that Mr L was in Europe in Italy or London and there had been a failed attempt service in New York and the focus of the legal team's attention was on what would happen going forward: service either in London or Italy or at the New York flat.

Affidavit S8

57. Mr Dutton submitted that in circumstances where the Tribunal which considered sanction was composed differently from the original Tribunal that made the Upheld S8 Finding, it was necessary to set out the background and explain S8 in some detail. One of the documents that Mr L obtained through disclosure in the US was the affidavit of service prepared by Mr K setting out details of his attempts to effect personal service upon Mr L at the New York apartment, which largely reflected the content of the K email. Although the K affidavit was dated in manuscript 30 April 2010, the fax markings along the foot of the document stated "04/17/2010", which on its face suggested that it had been prepared and sent some 13 days earlier on 17 April 2010. Mr L was deeply suspicious of the post dating of the affidavit and he went on the attack. In his third affidavit dated 25 June 2010, Mr L raised the non-disclosure of the K affidavit as a ground (amongst others) for seeking the discharge of the freezing order. The First Respondent initially responded to this allegation in his sixth affidavit dated 2 July 2010 indicating that he had asked Mr JW to speak to Mr K and investigate. In the meantime, at 15:32 on 5 July 2010, Mr JW sent an email to the Second Respondent containing a further update in relation to the alleged post-dating of the K affidavit:

> "I spoke to Mr [K]. I think he is a bit elderly (though I am not sure) and had no explanation for the backdating of the affidavit. He thought that it might have something to do with the date of the bill he sent, but that did not make any sense. I told him to think about it and if he figures it out to get back to me."

Mr Dutton submitted that the Respondents were addressing what seemed to be important to Mr L. The contents of this email were faithfully reproduced (and in fact largely paraphrased) in the First Respondent's S7 affidavit dated 6 July 2010 on the first day of the hearing before Mr Justice Roth. The First Respondent stated (under the heading "The affidavit of Mr [K]"):

> "I understand from Mr [JW] that he has now spoken to Mr [K] and Mr [K] is currently unable to provide an explanation for the apparent postdating of his affidavit other than it might have been to do with his invoice, which according to Mr [JW] does not make much sense. My firm was not aware of Mr [K's] affidavit or its contents but it is accepted that the Liquidating Trust should have had access to Mr [K's] affidavit prior to the ex-parte hearing. I apologise on behalf of the Liquidating Trust for the fact that the Court was not made aware of the contents of Mr [K's] affidavit."

S7 was served on the morning of 6 July 2010, before the commencement of the discharge hearing. It represented the current state of the Respondents' knowledge of the postdating issue and was the context for trying to get instructions. Subsequently,

at 20:32 on 6 July 2010, Mr JW sent the Respondents a further update as to the post-dating issue:

> "Mystery solved on the fax dating issue. I asked [Mr K] to send me a "Test Fax," and it confirmed that his machine produces a date 13 days behind – the fax he sent today is dated June 23 (See attached). The fax date on the affidavit of service is April 17, which is 13 days before April 30."

This led to the series of email exchanges between the Second Respondent and Mr JW starting at 20.53 on 6 July 2010 partly quoted by Mr Cunningham above.

58. At 20:53, the Second Respondent emailed Mr JW to request that he prepare an affidavit setting this explanation out and stating "Please also make the point that you had no prior conversations with [K] about the failed service." It became obvious at this point that the K email had been overlooked in the plethora of evidence and information flying around in the case. At 20:58, Mr JW replied:

> "I cannot say that I had no prior conversations with Mr [K] about the failed service. I knew that the service failed, which is why we went hunting for [L] in England. I am happy to do the rest."

This was an important email – Mr JW drew the link between the knowledge derived from Mr K and the belief that Mr L was now living in England. This knowledge had led to Mr KN being involved. At 21:19, the Second Respondent replied to Mr JW, stating his concern that the knowledge should have been disclosed to the court. The Second Respondent was therefore seeking an explanation so as to reconcile Mr JW's previous email with the failure to disclose Mr JW's communication with Mr K. At 21:50, Mr JW replied to the Second Respondent reminding him of the email from K on 12 April 2010 and his and JW's subsequent exchanges including with Ms O'N of JD. Mr JW's explanation was two-fold: JW believed that everyone was aware that Mr L was no longer living in the New York apartment; and JW believed that Mr L would be served in England. At 22:22 the Second Respondent replied to Mr JW stating as partly quoted by Mr Cunningham:

> "Thanks for the clarification. It looks like we have overlooked your email on 12 April and as a result need to deal with why this is not mentioned in your affidavit. In the circumstances, could you please provide us with an affidavit confirming that:
>
> 1. The alleged post-dating is wrong by reference to the test sheet.
>
> 2. You received an email on 12 April from [K] confirming the matters set out in the affidavit.
>
> 3. You did not refer to the email in your First Affidavit because by the time you swore your affidavit you believed as a result of information provided by Mr [KN] that [L] was in London rather than NY and that the Trust's belief that [L] was in London rather than New York had been communicated to the Court."

Mr Dutton submitted that accordingly, in this email, the Second Respondent had summarised the gist of Mr JW's explanation for not mentioning the K email for the purposes of inclusion within an affidavit intended to be sworn, at that stage, by Mr JW. Mr Dutton submitted that these contemporaneous email exchanges were important because they indicated the Respondents' state of mind and the picture that was emerging on the evening of 6 July 2010. The suggestion that the Second Respondent was in some way culpable before then was not supportable.

59. Mr Dutton submitted that Mr JW's affidavit to the court on 29 April 2010 dealing with the New York situation did not cover the service issue. The Second Respondent was summarising JW's explanation for this in his 22:22 email to JW above. The JW affidavit set out that JW was one of the attorneys responsible for the conduct of proceedings brought on behalf of the Trustee of the Liquidating Trust. He gave the explanation for the post dating issue in respect of Mr K's affidavit which was meeting what was in the Respondents' minds a fundamental criticism of K's evidence. At paragraph 6, Mr JW set out why there was no reference to K's email at the without notice stage of the proceedings:

> "Notwithstanding, on or about April 12, 2010, MR [K] informed me of the facts that are set out in his affidavit of service, I did not inform the court regarding this information in my first affidavit because by the time of my first affidavit it had become apparent from investigations carried out by Mr [KN] that Mr [L] was in London rather than New York and this had been communicated to the court."

60. Mr Dutton submitted that it was perfectly proper for there to be one affidavit by the First Respondent as recommended by Mr O QC covering a number of matters that needed factual correction. Accordingly, Mr JW's language was relocated from paragraph 6 of the JW Affidavit into an affidavit to be given by the First Respondent S8, which he swore on 8 July 2010. In paragraph 14 of S8 the First Respondent explained the reason for the apparent 'post-dating' of the K Affidavit (corresponding to paragraph 5 of the JW Affidavit) before stating in paragraph 15:

> "I understand from Mr [JW] that despite not receiving the fax on 17 April 2010, he was told by Mr [K] in mid-April 2010 of the facts set out in Mr [K]'s Affidavit dated 30 April 2010. I am told by Mr [JW] that the reason why he did not mention this in his First Affidavit is because he thought it was sufficient that the Court had been told that it was believed that Mr [L] was by then in London."

The language of paragraph 15 of S8 very closely tracked paragraph 6 of the JW Affidavit. Mr Dutton agreed as the Tribunal pointed out that it was not a perfect match particularly the words "rather than New York" were not included in S8. Mr Dutton submitted that Mr KN was searching in Europe at 29 April 2010 but it was known that Mr L had the New York address. It was a very complicated jigsaw regarding only one aspect of the case. It was important that solicitors should be honest and accurate with the court but this was looking through a magnifying glass of very significant proportions. Mr Dutton submitted that the only basis on which the Tribunal could now proceed to sanction for dishonesty was one paragraph of S8 with

its failure to explain and apologise for the oversight in respect of which there was the Upheld Finding regarding dishonesty.

61. Mr Dutton went on to consider the implications of the JW Affidavit. Mr Cunningham asserted that it was a tactical decision not to rely on the JW affidavit in the High Court since it was Leading Counsel's advice that there should be just one affidavit. Mr Dutton submitted that Mr Cunningham had fallen into error when examining the contents of the original Tribunal's finding of dishonesty by omission. The use of the JW affidavit was to show mitigation about the intent of the use of paragraph 6 which had been done on JW's instructions. Neither the High Court nor the original Tribunal knew of the JW affidavit on Leading Counsel's advice about what could be placed before the Tribunal. Unfortunately this case had been a private prosecution and the Respondents were bound to observe their duties to the Trust and to C/C Ltd and could not place privileged material before the Tribunal. They had put in some e-mails to demonstrate their innocent frame of mind albeit they were privileged communications.

62. Mr Dutton made submissions about the basis upon which the appeal to the Administrative Court had been conducted and about findings of fact made by Mr Justice Jay without the opportunity to see the JW affidavit and the difficulties which Mr Dutton submitted the Respondents had faced in dealing with the appeal without being able to rely on privileged material. The hearing was adjourned on 13 December 2013 and judgment was reserved. It was circulated in draft and the Judge made findings of act at paragraphs 256 and 258 of his judgment regarding the first JW affidavit which were not found by the original Tribunal:

> "256 …There was never any question of Mr [JW] overlooking or taking a deliberate decision not to mention the [K] e-mail; that never passed through his mind…
>
> 258. … There was no failure by Mr [JW] to mention the [K] e-mail in his first affidavit. Service in New York had been addressed by [the First Respondent] in his first affidavit. There is no evidence that Mr [JW] thought that it was sufficient that the Court had been told, or rather would be told, that Mr [L] was by then in London…"

Mr Dutton submitted that if the Respondents had pursued their appeal to the Court of Appeal there would have been a review of the evidence and the contents of paragraph 15 as a whole. Mr Dutton felt words were put into Mr JW's mouth. After the matter between Mr L and the Respondents was settled in 2014, Mayer Brown the Respondents' solicitors wrote to the Applicant on 30 July 2014 and pointed out how the JW affidavit came into existence and explained that there was further evidence which had not yet been considered relating to the Upheld Finding of dishonesty. The letter included:

> "The gist of the Tribunal's finding – namely that [the Respondents] were seeking to shift the blame from [the firm] onto [JW] – can be seen to be incorrect by the additional evidence coming from Mr [JW's] own signed affidavit which was not before the Tribunal or the Administrative Court. It is important to keep in mind that Leading Counsel for our clients made an

> application to adduce further evidence before Jay J, because during oral submissions the Judge had made a comment about what must have been in Mr [JW's] mind. Leading Counsel did not need to pursue the application because the Judge himself withdrew his comments and said that his plan was to decide the case without the Court rehearing matters and making a determination of its own (Plan A, as the Judge described it repeatedly during oral submissions). Over the Christmas vacation, the Judge appears to have forgotten this, because he proceeded to uphold the findings at paragraph 156.79 of the SDT's decision, making factual findings and giving reasons of his own, but without having the further material before him which is now provided to the Applicant."

The point was followed up in a letter dated 25 August 2015 from Mayer Brown to the Applicant when the question of admitting the JW affidavit was being dealt with. The parties were left with the Tribunal finding at paragraph 156.79. At a later point in the proceedings Mr Cunningham submitted that he did not rely on any of the findings of fact of Mr Justice Jay only upon the findings of the Tribunal. Mr Dutton asserted that the findings of fact remained relevant however because when Mr Justice Jay and Mrs Justice Rafferty in the Court of Appeal observed that strike off was not inevitable neither was apprised of the JW affidavit but accepted that it was at least appropriate for the Tribunal to consider the position even without JW's evidence.

63. Mr Dutton submitted regarding paragraph 156.79 that:

- Sentence 3 was a finding against the First Respondent
- Sentence 4 related to the Second Respondent who was found to have assisted and discussed the matter with the First Respondent
- Sentence 5 was a finding of omission by the Second Respondent

Mr Justice Jay said that it was plausible that the Respondents had overlooked the K e-mail. The Tribunal's found against the First Respondent that he provided a misleading explanation regarding "his" i.e. the First Respondent's knowledge of the K e-mail. However S8 addressed Mr JW's knowledge only and was silent as to the First Respondent's knowledge. It was therefore somewhat unclear as to what the Tribunal's finding against the First Respondent was, and in this respect it should be noted that Mr Justice Jay expressly recorded that he had reached his conclusion that the S8 finding against the First Respondent was adequately reasoned "with less firmness". The best that could be said was that the First Respondent's explanation was misleading as to his own knowledge by omission since it failed also to state that he too had received the K e-mail in April 2010. This appeared to be how Mr Justice Jay understood the finding; that it was misleading because it sought to place or shift the responsibility for failing to mention the K e-mail exclusively upon or to Mr JW. Mr Justice Jay seemed to have thought that the statement as to Mr JW's knowledge was also false because of his comments in paragraph 258 of his judgment. The Judge's qualification that this was "On the available evidence" was entirely apt since the JW affidavit which was not before Mr Justice Jay demonstrated that Mr JW had indeed entered into such a thought process and had indeed made such a statement in a signed affidavit. The dishonesty therefore consisted of the provision of a literally true, but partial and incomplete explanation.

64. Mr Dutton submitted that it was hard to go on and make a finding of dishonesty by commission regarding JW; it was not in the Tribunal judgment but in Mr Justice Jay's judgment at paragraphs 256 and 258. The problem was why the court was not told of the K affidavit at the 29 April 2010 hearing; Mr JW's explanation went into S8 because JW dealt with service at the 29 April 2010 hearing stage. The Respondents accepted dishonesty by omitting to explain their own knowledge. The First Respondent was not in the office and not privy to the e-mails during the evening of 6 July 2010 but because of the finding one had to assume that the First Respondent became aware at some point. The Second Respondent was in court while the First Respondent was managing the Department and dealing with other matters. S8 also explained what the First Respondent perceived to be more significant matters – relating to property and the dating of the K affidavit. Mr L was in Europe on 29 April 2010 and the First Respondent did not address his mind to the importance of the fact that failure to serve in New York had been relied on not just regarding service but also regarding dissipation of assets. He had no recollection of being told of the K e-mail. He had to live with the finding of dishonesty. It would have been challenged on appeal. Mr Dutton's concern was that the Tribunal should deal with this failure having regard to all the circumstances regarding a very unusual piece of dishonesty. Mr Justice Jay's findings of fact were prime facie but not conclusive evidence for the present Tribunal. Sanction was to be on the basis of the original Tribunal's finding of dishonesty by omission but dishonesty did not extend to shifting blame consciously to Mr JW when he was providing information in the e-mail to the Second Respondent which the latter was genuinely seeking to obtain. Mr Dutton submitted that misconduct and dishonesty came in all shapes and sizes; it could be detailed and complex and running for a long period of time. Mr Justice Jay found dishonesty related to the night of 6 July 2010 and placing an affidavit with the court on 8 July 2010 without including in paragraph 15 what it should have.

65. Mr Cunningham interposed to ask the Tribunal to re-read sentence 5 of paragraph 156.79, expressing concern that Mr Dutton was asking the Tribunal to disregard that finding. It became apparent that there was not common ground between the advocates in respect of sentence 5 and whether there was a finding of commission as well as omission. The Tribunal asked for clarification of their positions.

<u>Clarification concerning paragraph 156.79 of the original Tribunal's Findings</u>

66. Mr Dutton submitted that the advocates agreed that the finding at paragraph 156.79 carried with it a finding that there was a failure by the Respondents to bring their own knowledge of the K evidence to the attention of the court. They disagreed on whether there was dishonesty by commission in the finding in the sense that there was a dishonest representation about Mr JW's knowledge. Mr Glassey submitted that whether or not he was entitled to he did not intend to use the new JW evidence to try to undermine paragraph 156.79 of the original Tribunal judgment or sentence 5 of it.

67. Mr Cunningham submitted that the Applicant focused on sentence 5; it was a finding that paragraph 15 of S8 was untruthful on the basis of the evidence available to the Tribunal and to Mr Justice Jay. The Respondents now appeared to rely on the JW evidence to controvert that finding into one of truthfulness. Mr Cunningham repeated that there were obvious intrinsic inadequacies in the JW affidavit. Secondly there was

the ban at paragraph 279 of Mr Justice Jay's judgment on its use to controvert the previous Tribunal's findings of fact on the anterior question of dishonesty.

Mr Dutton's Submissions continued

68. Mr Dutton submitted that in cross-examination during the hearing before the original Tribunal, the First Respondent explained (without having refreshed his memory, not least because the JW affidavit was not before the Tribunal and there had been no relevant allegation in the Rule 5 statement) that he included paragraph 15 within S8 because: "I was told second hand by [the Second Respondent]" and:

> "he would have told me that that was the answer that Mr [JW] gave him, and so I accept it and I put it in the witness statement. I think it's correct".

Now, with the benefit of being able to review all of the documents (including the JW Affidavit), the First Respondent explained:

> "prior to signing the Eighth Affidavit I was either shown the [JW] Affidavit or told of its existence by [the Second Respondent]. This is confirmed by the Second Respondent in his witness statement in the present proceedings."

Mr Dutton submitted that there would have been a conversation of some sort between the Respondents about the e-mails of 6 July 2010 and then S8 was sworn. The Tribunal was provided with a copy of Mr K's e-mail. Mr JW sent it under cover of an e-mail of his own addressed to the legal team involved including the Respondents, Ms O'N of JD and Mr E the Liquidating Trustee. Mr JW stated:

> "I received the below e-mail from our process server. I suggest we quickly employ an investigator to find [L]. Does [JD] have someone? The process server provided a name. Do we have an address for [L] in England? Is it possible to have him served there…"

On the basis that the original Tribunal had found that the First Respondent had provided a misleading explanation to the court about his own knowledge of the K e-mail in S8, Mr Dutton submitted that when construing the findings in sentence 5 where it said that the Second Respondent would therefore have known that the First Respondent's explanation was untrue it related back to their overlooking the K e-mail.

Exceptional Circumstances

69. Mr Dutton submitted that "exceptional circumstances" was not a term of art; a respondent could be dishonest and it still be inappropriate to strike them off or even suspend them. Exceptional circumstances had to be looked at in the round by reference to the facts and circumstances; to look at a matter in any other way reduced the Tribunal to robots. All courts and tribunals looked at all the facts and circumstances and drew conclusions. Mr Dutton submitted that the dishonesty found against both of the Respondents was at the lower end of the scale of seriousness such that it would be inappropriate and disproportionate to strike them off. The Respondents relied upon the following:

70. The dishonest conduct in question was isolated and of very short duration. Mr Justice Jay's analysis of the evidence suggested that the dishonesty was centred upon a 32 minute period at approximately 10 p.m. at night after the first day of a stressful three day hearing in exceptionally combative litigation. On this view it could quite properly be described as a moment of madness. The additional evidence relating to the JW Affidavit and the circumstances in which paragraph 6 of it came be relocated into paragraph 15 of S8, if anything, suggested that the dishonesty might have been even more momentary in nature; it was just that S8 was drafted without reference to the K evidence.

71. The dishonesty related to the procedural conduct of the proceedings and not any underlying matters of substance. The only matter in respect of which the court might have had an inaccurate picture was the Respondents' relative level of culpability as compared with that of the firm's client, the Liquidating Trust, for failing to draw the information contained within the K email to the court's attention at the without notice hearing. The dishonesty was not intended to secure any advantage against Mr L and it did not affect the outcome of the discharge hearing. Indeed, as Mr Justice Jay recognised, regarding the substantive issues the court was concerned only with the position of the Liquidating Trust (and not that of its solicitors). The overall effect of paragraph 15 of S8 (in which it was expressly admitted that the Liquidating Trust had known the facts set out in the K email at the time of the without notice hearing) was to improve Mr L's prospects of successfully discharging the freezing order (which duly occurred as Mr Justice Roth relied on it). Mr L therefore benefited from the inclusion of paragraph 15 (which was included at the Respondents' urging).

72. The Respondents were not seeking to, and did not obtain a pecuniary benefit as a result of the dishonest conduct, either for themselves or for their client. In the absence of any findings of misconduct or dishonesty in relation to the non-disclosure of the K email at the without notice stage, the most that could presently be said against the Respondents was that they were seeking to diminish (in what must be considered a relatively small and inconsequential way) the professional embarrassment for themselves personally and/or the firm arising from setting aside the injunction. In this respect, it was closer to a 'white lie' (as in the case of SRA v Block Tribunal case number 10638-2010, 6 June 2011 (see below). There was no evidence of a collective benefit in respect of the firm's CFA or something of that sort as Mr Cunningham suggested; to the contrary Mr L obtained a cost order.

73. There was another and primary purpose of paragraph 15 of S8: to make disclosure to the court of what the Liquidating Trust knew at the relevant time – as set out in the Second Respondent's statement to JW in his email of 21:19 on 6 July 2010 that "Our concern is that this knowledge should have been disclosed to the Court". That was the correct thing to do (and improved Mr L's prospects of success); albeit the Respondents ought to have gone further and also explained that they had received the K email at the time. Dishonesty was the suppression of information whereas the purpose of paragraph 15 was to inform the court.

74. The gist of the Mr Justice Jay's finding was that the Respondents were seeking to shift the blame from the firm onto Mr JW. However, as the JW Affidavit demonstrated, Mr JW readily accepted that he bore at least some responsibility for the failure to draw the court's attention to the K email at the without notice hearing and

was willing to say as much in an affidavit. Unfortunately, like the Respondents, he regarded this particular point as being of no real consequence. It certainly could not be said that Mr JW was not aware or did not consent to the statement contained in paragraph 15 of S8 being made to the English Court. Indeed, it was overwhelmingly likely that paragraph 15 of S8 would not have ended up being framed as it was if Mr JW had not prepared and provided the JW Affidavit.

75. The reputation of the profession was unlikely to be harmed in any material way as a result of the omissions. One should keep the harm in context. This was hard fought commercial litigation where it was known that the Respondents were aware of the failed service and had not drawn it to the court's attention at the without notice hearing and until 8 July 2010. That could cause some harm to the profession's reputation but not harm of a serious kind; it was not stealing client's money or high yield investments or taking money from investment trusts. Indeed, in circumstances where S8 admitted to the Liquidating Trust's failures and increasing the likelihood that the freezing order would be discharged, members of the public might well find it difficult to understand that the profession has been materially harmed. Should some lesser sanction now be imposed on the Respondents, the perception of the public of the overall sanction, including that imposed on the Respondents in effect over the past four years, was that they would have well and truly paid their debt for an offence of the magnitude of that presently before the Tribunal.

76. As to burden on others, Mr Dutton submitted that Mr Cunningham asserted that JW was a victim of the dishonesty but the Tribunal had seen what JW said at the time. The Respondents should have taken a share of the blame but it was unfair to them to make him a victim. As to any burden on Mr L it did not affect his application to set aside and there had been no misconduct in respect of the 29 April 2010 hearing in respect of failed service of the bankruptcy documents because on 29 April 2010 the New York flat had been occupied. Furthermore his costs were paid.

77. In respect of benefit to the Respondents, Mr Dutton also submitted that Mr Cunningham said that it was of benefit to them that their knowledge of the K e-mail had not emerged but there was no commercial pecuniary or other benefit to them save to the extent that its not being revealed to the court might absolve them of blame. At paragraph 159 of his judgment already quoted Mr Justice Jay had speculated that there might have been concomitant grief in relation to the firm's CFA and the potential exposure of C/C Ltd to an application under section 51 but Mr L had his costs. It was purely speculation as to whether the Respondents' omission had any impact upon the dispute between Mr L and those parties about a property purchase.

78. While Mr Dutton accepted that other Tribunal cases provided only limited assistance as each turned on its own facts, he submitted that the finding of dishonesty in relation to S8 was clearly lower on the scale of seriousness than the conduct in other cases such as Imran Tribunal case number 11246-2014, (28 January 2015) where the dishonesty arose out of a speeding ticket and submission of a form falsely stating someone else had been driving. It involved perverting the course of justice and resulted in a two month prison sentence. The respondent was suspended for two years and the decision was upheld on appeal. In OSS v Fernandes Tribunal case number 8261-2000, (23 April 2001) where there had been forgery the Tribunal decided not to strike off but fined the Respondent £5,000. In SRA v Taylor Tribunal case number

10501-2010, (22 September 2010) there was a conviction of disguising criminal property leading to a suspended 39 week prison sentence. The Tribunal imposed a suspension of 12 months. Dishonesty was not alleged before the Tribunal or as part of the criminal offence. In SRA v Robinson Tribunal case number 10454-2010, (3 May 2011) there were allegations of false statements being made but no express allegation of dishonesty and a 12 month suspension was again imposed. In Burrowes, the Tribunal struck off the solicitor but an appeal was allowed on the basis it was obviously an excessive and disproportionate penalty. In Block where the dishonesty found proved concerned misleading the Legal Complaints Service in a letter, the Respondent was suspended (reference was made to a "white lie" which was intended to do no harm). In the case of SRA v Goodwin Tribunal case number 11411-2015, (12 January 2016) the dishonesty found proved consisted of the submission of a job application containing a false statement that the Respondent had obtained a 2:1 degree when in fact her degree was a 2:2. The Tribunal imposed an 18 month suspension.

79. Mr Dutton made particular reference to the case of SRA v Brett (SDT, Case No. 11157-2013, 5 December 2013) which had come before the Tribunal and been appealed to the Administrative Court. In Brett the solicitor allowed a journalist to file a witness statement and Counsel to make statements during oral submissions based upon the journalist's statement that suggested that the identity of a blogger (NightJack) had been ascertained from publicly available information, when in fact the respondent knew that it had been ascertained unlawfully by hacking into an email account.

80. In Brett there was no allegation of dishonesty. Mr Dutton submitted that the Tribunal found that there were a number of aggravating factors: the Tribunal accepted that "the proceedings were clearly influenced", the Tribunal found the respondent to be a "deeply unconvincing witness", and considered that "His culpability was high and … he showed very little insight". Mr Dutton asserted that Mr Brett had allowed the court to proceed on wrong evidence and had been found reckless and lacking in integrity as well as being an unsatisfactory witness. However the Tribunal was particularly impressed by his long service to the profession which was very like that of the First Respondent and he had distinguished written testimonials. The testimonials in Brett preceded the Tribunal's finding whereas in this matter they had been submitted after the Upheld Findings were known. Having taken mitigating factors into account (principally the respondent Mr Brett's "long and distinguished career"), the Tribunal declined to strike him off and instead imposed a six month suspension.

81. Mr Dutton pointed particularly to an exchange of letters between Mr Brett and solicitors of the opponent in the litigation. Mr Dutton submitted that Mr Brett knew of the hacking which was in all probability a criminal offence at the time he wrote his reply letter and he let the misleading statement go to court and the court proceeded on that basis. Mr Dutton submitted that at no stage did Mr Brett correct the misleading impression. The judgment in the litigation was circulated in draft and Mr Brett saw it and did not correct it as set out in the Tribunal judgment. Mr Dutton submitted that the Administrative Court found that this was tantamount to a finding of dishonesty. The evidence did not change on appeal. [However the Administrative Court substituted a finding of recklessness for knowingly misleading the court.] The Tribunal might think that this conduct was much more serious than the Respondents' conduct regarding paragraph 15 of S8. On that basis Mr Dutton submitted that in this

case it was very difficult to suggest that a suspension of more than six months would be appropriate.

82. Mr Dutton and Mr Glassey made oral submissions at the hearing about Mr Cunningham's interpretation of paragraphs 111 and 112 of the Brett judgment and after the conclusion of the hearing they submitted a supplemental note. The Applicant did not object to the Tribunal considering these late submissions.

83. Mr Dutton informed the Tribunal that acting for the Applicant, he had provided the summary which formed the basis of the Lord Chief Justice's comments at paragraphs 111 and 112 of the Brett judgment. The logic of what Mr Cunningham said was that everyone had wasted their time for the previous two hearing days because he said that there was no such thing as exceptional circumstances in respect of misleading the court however modest or however it lacked seriousness in terms of effect. Mr Cunningham's interpretation was highly surprising and wholly unjustified; nowhere did the Lord Chief Justice say that in circumstances such as those in Bolton or in this case that the Tribunal could not take the history into account.

84. It was submitted that Mr Cunningham's Skeleton was not easy to reconcile with his latest argument based on Brett because in the Skeleton he analysed the implications of Sharma and exceptional circumstances in respect of this matter and submitted that the fact it was the court in this case which was misled aggravated the offence and the Skeleton referred to the relevant paragraph from Brett merely as "compelling".

85. The interpretation placed by Mr Cunningham upon paragraphs 111 and 112 would have represented an important shift in the law and the Lord Chief Justice would have had to address specifically the current rule set out in Bolton and he would have used clear language to introduce any qualification to the principle that there would be dishonesty cases exceptionally where striking off was not justified in all the circumstances. It was also pointed out that Bolton was a Court of Appeal case of long-standing and binding on the High Court and the Tribunal. In Brett the Lord Chief Justice was sitting in the High Court. It was asserted that he would not have sought to limit the scope of the exceptional type of cases without considering whether this was appropriate for the High Court and inviting submissions from the Applicant and Tribunal as to whether in cases of deliberate misleading the Tribunal's discretion should be fettered and whether section 47 of the Solicitors Act which provided that the Tribunal might make such orders as it thought fit should be circumscribed by the court. The court would have required submissions as to why deliberate misleading required mandatory strike off without exception where, for example, dishonest misappropriation of client money, or perverting the course of justice had not.

86. Mr Dutton and Mr Glassey, in their supplemental note, proposed that the answer to Mr Cunningham's assertion was that both paragraphs 111 and 112 dealt with deliberate misleading. There was no express indication in paragraph 111 that it dealt with inadvertent misconduct: those express indications that there were ("a fundamental affront to the rule" and "integrity of the profession") were indicative of deliberate misconduct. On the basis that paragraph 111 dealt with deliberate misconduct the fact that in the paragraph the Lord Chief Justice restated the "usual principle" from Bolton ("Such conduct will normally attract an exemplary and deterrent sentence") rendered the Applicant's submission untenable.

87. Paragraph 112 concluded with the words, which Mr Cunningham emphasised in oral submission, that "the inference will be inevitable that he has deceived the court, acted dishonestly and is not fit to be a member of any part of the legal profession." An understanding of paragraph 112 required an understanding of the Brett case itself. The court had found it very difficult to accept that Mr Brett had not been said to have been dishonest, when he had been said to have misled the court deliberately. Mr Dutton and Mr Glassey submitted that paragraph 112 gave guidance that future such cases (of deliberate misleading) should all be treated as dishonesty cases. That was indeed how the court approached the appeal in Brett. In context, the word "inevitably" in paragraph 112 referred to the inevitability of an advocate who knowingly permitted untrue evidence to go before the court being found to have been dishonest: not, as the Mr Cunningham submitted, to the inevitability of striking off. The final few words were a reference to the usual sanction for dishonesty (i.e. no longer being fit to be a part of the profession), without the Lord Chief Justice seeing the need to re-use the word "normal" or "normally" in that part of the sentence as he had in the preceding paragraph. Should the Applicant's new submission be correct, it would have required a revision to paragraphs 40 and 43 of the Tribunal's Guidance Note on Sanctions (4th Edition) so as to introduce a qualification that in all cases of deliberate misleading of courts striking off was mandatory and the SRA Handbook would also have required a similar qualification; neither happened because the law had not changed. Mr Dutton and Mr Glassey therefore submitted that Brett did not bring about a change in the law on sanction.

88. As to there being no allegation of dishonesty in Brett, Mr Dutton submitted that in Brett the respondent had been motivated by trying to protect the journalist and this was not the same as being subjectively dishonest. However whatever the motives, misleading the court was still very serious. In Brett the court said that the finding had been effectively a dishonesty finding and substituted a finding of recklessness. Mr Dutton submitted that the question in each case was what had been done wrong and the epithet of dishonesty did not translate the facts which led to the dishonesty finding at paragraph 156.79 of the Tribunal's judgment into something more serious than in Brett and Mr Cunningham had not suggested that the Tribunal was wrong to sanction Mr Brett by a six-month suspension.

General Mitigation for the First Respondent

89. Mr Dutton referred to the length of time which this matter had taken to bring to a conclusion. Arguably if the strike off had been the final decision in 2013 then the Respondents could be practising again. The First Respondent had the constant stress of proceedings for four and half years and waited the two and half years for the matter to come back to the Tribunal. Mr Dutton asked the Tribunal to consider how that compared with what had been said in Bolton. The First Respondent had given his life to the profession and was always working as Mr Sutcliffe had attested. It was very rare where solicitors and barristers worked in hard-fought litigation for them to come to the Tribunal to give character evidence but Mr Best who had been the opponent in the proceedings in which Mr Sutcliffe was instructed had done that (by way of testimonial). He had provided his testimonial after the original Tribunal hearing and before the appeal was heard. Mr Dutton particularly commended to the attention of the Tribunal the final paragraph of the testimonial:

> "I have been engaged in litigation for more than 30 years during which time I can recall a few occasions when I have engaged with a professional opponent who has fallen short of the standards I expect of a solicitor. [The First Respondent] was not such an opponent."

There was also other evidence from Counsel. Mr Dutton submitted that the First Respondent's statement showed insight and understanding of the need to be accurate, straightforward and honest with the court. The First Respondent had undergone a shattering set of events. His whole career had been taken from him. He was genuinely very sorry for the trouble caused to the profession, to his colleagues at the firm and he bitterly regretted that he had got himself into his present situation. What happened with paragraph 15 of S8 did not set out the whole picture. Mr Dutton submitted that it was to the First Respondent's credit that he had started work as a mediator and was earning a very modest income for someone of his position in life. In the middle of the proceedings his situation had been such that he had had to put a family wedding on hold. Mr Dutton submitted it was time to draw a line under the matter.

Evidence of the First Respondent in Mitigation in respect of the Upheld Finding of dishonesty

90. The First Respondent confirmed that his fifth witness statement and his Personal Financial Statement were correct. He acknowledged and accepted the two Upheld Findings and was deeply sorry about what had occurred. He had over four years to reflect and consider what went wrong in the particular case. He had always tried to play with a straight bat and win cases fairly and honestly He usually crossed 'I s' and dotted 'T s' but did not do so in this case.

91. The First Respondent stated that only at the last minute had the application in England and Wales become without notice. The US Judge decided that the case could not proceed regarding quantum unless Mr L was served with all the evidence. At the time the First Respondent had a very heavy workload and was dealing with bigger cases. He had at least three teams of lawyers working under him. Usually he had a senior associate working on a case with assistants. He viewed this matter as a simple enforcement of a judgment and so he did not staff it adequately. The Second Respondent was very inexperienced and had only dealt with one injunction before this. The First Respondent made sure that a very senior Leading Counsel looked after the matter and there was also an experienced junior. He felt he had the right team on the job but he was not supervising it in the right way because he did not have time.

92. The First Respondent stated that he had become aware of the case some two years before the injunction application because of a separate client matter in which he had dealt with the previous trustee. It looked as if a lot of money had gone missing in the US and come to the UK and the First Respondent hoped that he could do something positive to assist the creditors. Once Mr L became aware of the proceedings he sought to set aside the default judgment which had to be partly done in New York because proceedings had been served there as he resided there at the time. It had been difficult because the lawyers appointed in New England were in different states. Bankruptcy was a Federal US offence but service was state based.

93. Regarding the Upheld Finding of dishonesty, this was a very aggressively fought case. Errors had been identified and the First Respondent apologised for them in S7 and S8. He was supervising partner and took responsibility. There were three points to be covered in an affidavit to be sworn by the First Respondent after the 6-8 July 2010 hearing but he failed to ensure that all the points were covered.

94. The First Respondent accepted that the wording of S8 did not go far enough but he did not recognise it at the time. He did not see the e-mail exchange between the Second Respondent and Mr JW on 6 July 2010 – it was all late at night – he had other cases that he was working on that day. The First Respondent attended court on 6 July but not on 7 or 8 July and so had not heard what the Judge had to say and the distinction to be drawn between the e-mail and the affidavit and that the e-mail was of importance. He was not taking a contemporaneous transcript and he would not have had time to read it at the time and so he did not pick up the point. The First Respondent fully accepted that if he had been in court or more hands-on he would have recognised that his knowledge and that of the firm was of equal importance to that of the Liquidating Trust and he would have had no difficulty or hesitation in putting the information in. The First Respondent also stated that he had not read the judgment of Mr Justice Roth when it came out and did not do so for several months. He was concerned to sort out costs. He did not read it and pick up on the criticism directed at the Liquidating Trust. If he had he would probably have written to the court. He was not aware until it was drawn to his attention probably by way of the Rule 5 Statement.

95. The First Respondent stated that he had made errors and he had to accept there was a finding that these were dishonest errors but he had given a very truthful account of what happened. He felt sorry that the Second Respondent had to suffer alongside him. If he was given the opportunity to practise again, the First Respondent stated that he would proceed with the utmost caution. He was not sure that he would want to get involved in without notice hearings again but would ensure any witness statements were comprehensive and gave a full explanation.

96. Mr Cunningham interposed that some of the things that the First Respondent had said might contravert the findings but he had said that he accepted that his errors were dishonest and that left the findings uncontroverted and so it was not appropriate or necessary to cross-examine him.

97. By way of clarification for the Tribunal the First Respondent stated that they had tried to remember exactly when S8 was sworn but they had no record. They assumed it was after the 6-8 July 2010 hearing finished. It was not noted in the First Respondent's diary. The firm of solicitors before which it had been sworn was in the same building as their offices and it was probably around 5 pm because the First Respondent had a full book of business in relation to other matters on that day. The First Respondent agreed that he was quite seised of the matter because he had sworn eight affidavits in the injunction proceedings but stated that normally the partner swore the affidavits which were drafted by junior counsel and a senior associate in this matter the Second Respondent. They included what needed to be addressed. The First Respondent would read the affidavit and exhibits to ensure that the affidavit was in accordance with the documents attached and was accurate. The First Respondent stated that he was not creating the affidavit afresh. He was not really aware of what was going on with the

particular case because he was involved in 25 other cases and had taken on too many. He had not appreciated the gravity of the matter at the time.

98. The Tribunal asked the First Respondent about his first affidavit in the Chancery proceedings which had related to problems of service. The First Respondent stated that Tribunal had not seen the first affidavits of Mr JW and Mr E; they dealt with all those points as well. His affidavit was drawn from what they told him and he was repeating what they had already sworn.

Mr Glassey's Submissions in Mitigation for the Second Respondent

99. Mr Glassey adopted Mr Dutton's submissions. He recognised that this was a difficult case for the Tribunal and submitted that a bold decision was called for. He also asked for a retrospective suspension for a period of months only which he submitted would be a just and permissible decision. The leading authority remained the case of Bolton. Having regard to the case of Sharma the starting point was proportionality. Mr Glassey submitted that it was important to note that the Sharma judgment stated that "relevant factors will include" the nature, scope and extent of the dishonesty. The factors listed were therefore not exclusive and the history of the case should be taken into account based on what was said in Bolton; if the case history made sanction oppressive it should not be imposed. Mr Glassey also relied on Imran in respect of which the Skeleton stated that having reviewed the previous authorities (including Bolton and Sharma), Mr Justice Dove emphasised that the consideration of the appropriate sanction in cases of dishonesty would be "fact sensitive" before confirming that:

> "Clearly, at the heart of any assessment of exceptional circumstances, and the factor which is bound to carry the most significant weight in that assessment is an understanding of the degree of culpability and the extent of dishonesty which occurred…"

This meant the Tribunal could look in an appropriate matter to all the circumstances and if the application of the normal sanction would be oppressive it should not be imposed and the additional factor of the history of the case was relevant.

100. Mr Glassey submitted that it was unusual for the Tribunal to be asked to understand the facts without having heard evidence and witnesses. He asked the Tribunal to be cautious regarding procedural fairness and not draw inferences unless they were spelt out in the two findings paragraphs of the judgment or supported by the contemporaneous documents which the Tribunal had seen. Mr Glassey did not seek to challenge paragraph 156.79 of the Tribunal's findings but submitted that the Tribunal was not bound by Mr Justice Jay's findings of fact. It had been wrong to say that "There was no failure by Mr JW to mention the [K] e-mail in his first affidavit. Service in New York had been addressed by [the First Respondent] in his first affidavit…" and "Furthermore, Mr [JW's] first affidavit had not covered these matters at all…" Mr Glassey submitted that the JW affidavit gave evidence about recent attempts to serve Mr L.

101. Mr Glassey submitted that the dishonesty occurred when the affidavit S8 was sworn and filed. The remission for decision to the Tribunal was very precise. The dishonesty on 8 July 2010 took place in the context of a three-day hearing the stated purpose of which was to decide if on the application of Mr L the without notice order should be set aside. Mr Justice Roth had to assess the evidence which had been submitted nine weeks earlier. There had been three affidavits which led to the making of the order; Mr JW's first affidavit; an affidavit of Mr E and the First Respondent's first affidavit. All three were lawyers. Mr E had been litigating against Mr L for several years by 2010. His statement gave the most information about the trust and the litigation. Mr JW's first affidavit recorded that prior to serving Mr L with the reissued summons and complaint on 23 December 2008 the process server had attempted to serve him at the New York apartment on four occasions unsuccessfully and then in accordance with US law validly serve the re-issued summons and complaint on the porter at the apartment. The Tribunal was directed to part of the affidavit which included the information upon which the Liquidating Trust relied as confirmation that Mr L was at that time resident at the New York apartment including company search results for UP Ltd dated 17 April 2010 recording that as his address, and recent credit checks recording the same. The lawyers involved were anxious to achieve service on Mr L so that the matter could proceed in the USA.

102. Mr Glassey submitted that on 6 July 2010 at 20:32 the Respondents received the good news in their office that the very serious allegation of perjury in the Chancery proceedings by Mr L regarding the K affidavit and the discrepancy in the date had been resolved. The Second Respondent at 20:53 asked Mr JW to prepare an affidavit setting out this explanation. Further e-mails then followed in which the Second Respondent was reminded about the K e-mail. Mr Glassey then examined what the Second Respondent had done dishonestly and the impact of the JW affidavit. He submitted that sentence 5 of paragraph 156.79 of the original Tribunal judgment was key: it was the finding against the Second Respondent. What was missing was what the Second Respondent knew to be untrue and allowed to be put before the court. Mr Cunningham said that the paragraph 15 of S8 misrepresented JW's state of mind. Mr Glassey submitted that paragraph 156.79 did not mention Mr JW and had nothing to do with him. Sentence 3 referred to 'his knowledge' where the subject of the sentence was the First Respondent. Sentence 4 referred to the K e-mail being 'overlooked' and the Respondents discussing the fact; it referred to the First Respondent having overlooked it and there was no reference to Mr JW. Based on this analysis, Mr Glassey submitted that the Tribunal finding of dishonesty regarding the Second Respondent in regard to S8 was that he knew that the First Respondent had omitted to mention K and that he the Second Respondent had also seen the K e-mail before the injunction was obtained. The original Tribunal was saying that the Second Respondent must have known that what was dishonest regarding the explanation in S8 at paragraph 15 was that the Respondents had also seen K e-mail and they left S7 of the First Respondent uncorrected. E-mail exchanges on 6 July 2010 reinforced that the Respondents had done the overlooking.

103. Mr Glassey also asked what the point was of the First Respondent including the information in his witness statement as it did not go to the question before the court in July 2010. By the time Mr Justice Roth decided whether the injunction was to be set aside Mr L was in the courtroom in London and there was no uncertainty about his whereabouts. There might be criticism of the omission to mention K when the

injunction was obtained but the Liquidating Trust was not trying to reopen the question of where Mr L was. This was important because it went to the materiality of the point on which the court was misled. It was possible to have a significant professional failure and dishonesty about an insignificant point alternatively one might have a significant failure regarding a significant point which would be harder to justify; that was not the case here.

104. Mr Glassey addressed why the Respondents were using the JW affidavit if it was not to attack the dishonesty finding. Mr JW's evidence was critical to the Respondents' case. It undermined Mr Justice Jay's finding about the egregiousness of the dishonesty; the Judge thought that the Respondents had had a moment of realisation and blamed everything on JW. Mr Glassey referred to paragraphs 167 and 256 of the Jay judgment:

> "167. [Referring to paragraph 15 of S8] This was untrue. The first sentence contains a mealy-mouthed explanation, and on the face of things it is an almost irresistible inference that this was deliberate. Mr [JW] was not given this information orally by Mr [K] on an uncertain date in mid-April 2010; he received an e-mail on 12th April which was forwarded to [the firm] twice and then formed the subject-matter of a conference call. [The First Respondent] was not suggesting that [JW] had overlooked what he had been informed by Mr [K]; rather, he was suggesting that Mr [JW] took a deliberate decision not to appraise the Court of this information because he thought it would be sufficient that the Court had been told that Mr [L] was in London. But the e-mail timed at 21:50 on 6th July is inconsistent with Mr [JW] possessing that belief, and we know from bullet point 3 in [the Second Respondent']s e-mail timed at 22:22 that the source of this retrospective explanation was [the firm] and not Mr [JW] at all. It was [the First Respondent] who, at best, had overlooked the [K] e-mail and it was incumbent on him to correct what he had said in his first affidavit about Mr [L] evading service in New York (with the corollary inference that Mr [L] might dissipate his assets) and in his seventh affidavit about his firm being unaware of the [K] affidavit and its contents. At this stage [the First Respondent] could not honestly take the point that there could be a distinction between the [K] affidavit and its contents on the one hand, and the [K] e-mail, which exactly replicated the contents of the affidavit, on the other. Indeed, he was not taking that point in relation to Mr [JW's] state of mind. Even assuming that [the First Respondent] did not attend the Roth J hearing, he must have understood that the effect of his seventh affidavit was that all the blame would be heaped on Mr [JW] rather than his firm, which is exactly what happened when Judgment was handed down (see paragraph 31 and 32 of the judgment…) To this day, no letter of apology has been sent by the firm to Mr Justice Roth…"

105. Mr Glassey submitted that the better example of undermining Mr Justice Jay's findings about the egregiousness of the dishonesty was paragraph 256 already quoted in part above:

> "256. The simple bald facts are that by the time [the Respondents] were contemplating the [K] e-mail over the course of the period 6-8th July 2010, each was well aware that the Court had been told in [the First Respondent's] seventh affidavit that [the firm] had been unaware about it but the Liquidating Trust knew about it. The truth which had just emerged (assuming the best facts from the Appellants' perspective) was that [the firm] was aware of the [K] e-mail and so was the Liquidating Trust, albeit the latter's awareness was founded not on early receipt of the [K] affidavit (that had not occurred) but on receipt of the [K] e-mail on the day it was sent. There was never any question of Mr [JW] overlooking or taking a deliberate decision not to mention the [K] e-mail; that never passed through his mind. This affidavit was silent on the issue of attempted service in New York. On the available evidence, at no stage did Mr [JW] enter into any thought process which led him to say that the reason the [K] e-mail was not mentioned by him "was because [Mr JW] thought it was sufficient that the Court had been told that it was believed that Mr [L] was by then in London". This was the explanation [the Second Respondent] conceived late on 6th July 2010, was assented to by [the First Respondent], and then placed into Mr [JW's] mouth by the latter in the final paragraph of his eighth affidavit. This was surely designed to give the Court the impression that the fault was Mr [JW's] (entirely consistent with the impression given by Mr [O QC] during the course of oral argument), and the upshot we can see in paragraphs 31 and 32 of Roth J's Judgment."

106. Mr Glassey submitted that Mr Dutton made clear that Mr K was retained by JW and he reported to JW; that helped to support the Second Respondent's instinctive reaction in asking JW to explain the point in an affidavit. Also it was the Second Respondent's instinct to focus on JW's first affidavit because it was primary evidence. The First Respondent's S7 affidavit was secondary evidence which only went to how the mistake happened and whose fault it was. Mr Glassey was not saying that he should have overlooked correcting S7 but he was right to focus on correcting JW's first affidavit because that was the evidence on which the injunction was obtained.

107. Mr Glassey submitted that in context the dishonest error of not correcting S7 in S8 was an insignificant point; it did not go to the hearing before Mr Justice Roth; it just went to how the mistake (in S7) arose. Mr Glassey reverted to the nature, scope and extent of the dishonesty and the quotation he had already made from Imran referring to the extent of the dishonesty being at the heart of any assessment of exceptional circumstances; the use of the word "extent" was consistent with there being a spectrum of dishonesty. The evidence in S7 was inconsequential and so he submitted its dishonestly not being corrected lay at the minor end of the dishonesty spectrum.

108. Mr Glassey also relied on the views of Mr Justice Jay and Lady Justice Rafferty. In considering whether the matter should be remitted to the Tribunal, Mr Justice Jay stated:

> "Even approaching the issue solely with reference to what is currently before me, I cannot be satisfied to the requisite standard of confidence that striking off is inevitable: a reasonable SDT *could* appropriately impose a lesser sanction, taking into account relevant guidance and authority…"

Mr Glassey submitted that the Judge made these comments despite the egregious circumstances he identified in the absence of the JW affidavit that the Respondents put words in JW's mouth and so the Tribunal was left with a less serious offence of dishonesty than Mr Justice Jay thought had occurred. In response to an application for permission to appeal Mr Justice Jay's decision to restore the Respondents to the Roll, Lady Justice Rafferty in the Court of Appeal stated:

> "This application is hopeless. … The Judge asked himself whether it were inevitable [the Respondents] would be struck off. On any view it was not, as a reading of his long and detailed judgment makes plain. He had scythed his way through a good many of the findings of the SDT and in the context of a rehearing on a basis much narrower than the first but still potentially amenable to the mitigation of the stratified complexities of the litigation founding the first, one could without difficulty contemplate a SDT reviewing more than one sanction."

Mr Glassey submitted that both Judges recognised that the present case was very much in 'exceptional circumstances' territory, albeit that they recognised the final decision was ultimately a matter for the Tribunal. It should also be noted that neither Judge had had the benefit of full submissions on sanctions, and nor were they aware of the JW Affidavit at the time that they made their comments.

109. Having regard to whether the conduct was momentary or over a lengthy period, Mr Glassey submitted that Mr Cunningham's case was that the matter became live because of the non disclosure of Mr K's evidence and everything unravelled at the discharge hearing and he unsurprisingly made attempts to characterise the dishonesty as drawn out. Mr Glassey submitted that the dishonesty only occurred on 8 July 2010 when the S8 affidavit was drafted signed, sworn and served and any unravelling took place on the afternoon or evening of 8 July 2010 and that squarely fitted into the category of momentary dishonesty.

110. Mr Glassey submitted that the Second Respondent should have thought of S7 when drafting S8 but he derived no benefit from not doing so.

111. As to burden, Mr Glassey disagreed with Mr Cunningham's assertion that Mr L would have been a victim. The logical response was to look at the decision of Mr Justice Roth. The Judge knew by then about Mr K and that the doorman at the New York apartment had forgotten Mr L also that Mr Justice Morgan who granted the injunction was not told about Mr K. The only thing Mr Justice Roth did not know was that the Respondents knew about the K evidence before the injunction was obtained. Mr Glassey submitted that the omission could not influence the Judge's decision. The Judge discharged the freezing order saying:

> "In the light of all the evidence before the court, I find that no real risk of dissipation has been established in this case. On that basis also, therefore, I would discharge the freezing order."

Had he known about the K e-mail it would only have improved his factual understanding in respect of the Respondents. Mr Cunningham interposed to accept that Mr Justice Roth knew about the K evidence and that, to use a phrase from the Brett case, there was no interference with the course of justice and that Mr L was not prejudiced because his costs were settled at every stage of the process.

112. In respect of the relevance of the history of the case, Mr Glassey added to Mr Dutton's submissions that the Tribunal normally had the luxury of the Applicant having applied its scalpel in bringing proceedings but the opposite approach had been taken in this matter. Mr Glassey submitted that the Rule 5 Statement was the root cause of all the problems that dogged the case. It was over a hundred pages long. The Tribunal had had visited upon it the full impact of commercial litigation on a grand scale. It had been a nigh on impossible task for any Tribunal to give justice to the trial that followed.

113. Mr Glassey submitted that there had been criticism of a volte face on the question of privilege. Mr Justice Jay's referred to Mr L's Leading Counsel submitting that the Respondents had been selective about the privileged material they sought rely on and that he was inclined to agree with those submissions. The firm had to consider the interests of the Liquidating Trust and of C/C Ltd and Mr L was mounting civil claims against them as well as the firm. This put the Respondents in an extraordinarily difficult position. Mr Dutton had made submissions to Mr Justice Jay about it. Another leading counsel advised the Respondents throughout on the subject and their solicitors Mayer Brown had written about it to the Applicant on 25 August 2015. The Cs had funded a senior junior to observe the Tribunal proceedings on their behalf. Mr Glassey submitted that this was a reason why the matter was so unusual; the Respondents had to protect their clients' privilege and would have faced other sanctions had they had released other documents in respect of the Cs or Mr L (whereas as the Tribunal indicated if the Applicant had brought the original prosecution it would have been able to have access to all the documents in the matter regardless of client privilege).

114. As to personal mitigation, Mr Glassey submitted that when the dishonesty offence occurred on 8 July 2010 the Second Respondent was 28 years old. He was then three or four years qualified and a junior member of the team. He had joined the firm six months earlier and his career as a solicitor had been brought to an end three and a half years ago. He was still a solicitor and he had a career of potentially 30 or 40 years in the law ahead of him. Mr Glassey asked for proportionality to be taken into account. He referred the Tribunal to the summary in the Skeleton as follows.

115. At all material times the Second Respondent was acting under the supervision and direction of the First Respondent. He had limited experience of injunctions and without notice hearings and this claim was vastly different in scale and complexity to what he had worked on before. His youth and relative lack of experience ought to be taken into account (as it was in Imran). In relation to the dishonest conduct itself, it was not the Second Respondent who swore S8 and the evidence before the Tribunal

was that he was not responsible for any of the strategy in the case. Character references had been provided for him by the Head of Commercial Litigation at the firm dated 1 February 2013 (which was available to and taken into account by the 2013 Tribunal). Although the Second Respondent was a relatively junior assistant solicitor, the Head of Commercial Litigation explained that the Second Respondent was held in high regard at the firm by colleagues and clients and conducted himself with maturity and integrity. The other three testimonials dated 1 August 2016 addressed the experience of the Second Respondent over a long period of time, and were not available to the 2013 Tribunal. The writers spoke very highly of a young professional whom they had each worked with from four to six or seven years. One referred to the view of the Second Respondent held by the senior partner of a leading law firm, he described the Second Respondent as "a gentleman and trustworthy to his core", and concluded by expressing the view that he was a young person whom he considered would be an asset to the legal profession. At the original Tribunal hearing, Mr L accepted, through his counsel, that the Second Respondent had apologised with "proper grace" and that he had been genuinely trying to assist the Tribunal.

116. The effect of these disciplinary proceedings has also been severe – in the Second Respondent's own words he had been "totally devastated", his "life has been ruined" and he had suffered "years of trauma". The experience had left him extremely nervous and lacking in confidence. Mr Glassey described his family circumstances and the impact of the disciplinary proceedings. If he was struck off, his future career prospects would be greatly reduced; not only would he be unable to practise as a solicitor, but he would also be unable to pursue a career in any other position involving trust.

Evidence of the Second Respondent in Mitigation in respect of the Upheld Finding of dishonesty

117. The Second Respondent confirmed the truth of his third witness statement in these proceedings dated 14 April 2015. He acknowledged and accepted that the findings including dishonesty and deeply regretted that he had fallen below the standards demanded of solicitor. He would have to live with the findings for the rest of his life. He had failed dishonestly in his duty to include the K e-mail in S8. The last four and a half years had weighed heavily upon him. What should have been the happiest time of his life with a new family had been overshadowed by the ongoing proceedings. He had worked hard to become a member of the legal profession. He had studied law from the age of 16 and gained a distinction in the Legal Practice Course; it was a subject he always enjoyed. The opinion of people who had known him over many years had not changed. He was now rebuilding his confidence and working in a litigation funding company. He would like to work as an in-house lawyer. He had learnt very powerful lessons and there was no risk of his breaching his professional duties again.

118. The Second Respondent confirmed that he had joined the firm in August 2009. He was engaged in standard commercial litigation before moving to London where the work was hugely different to that he had experienced in extremely modest cases in the North East. The case involved was the biggest he had been involved in. He had never undertaken freezing injunctions. He was not necessarily out of his depth but he had no experience of international cases. The team comprised the Second Respondent,

himself and some paralegals. The First Respondent had been hands-on and did not leave him to his own devices and counsel was also involved. The Second Respondent accepted that there was no excuse for the dishonesty finding but the K email was one piece of information among a huge amount of information and there was the difficulty of understanding American law. He should have done more regarding S8. In respect of when the affidavit S8 was sworn they had tried to but just could not remember. He could not recall if it was he who had filed it.

The Upheld Finding of Misuse of Confidential Information

Mr Cunningham's Submissions for the Applicant

119. The Upheld Finding was in the original Tribunal's judgment at paragraph 156.77:

> "The Tribunal agreed that the disclosure of confidential information regarding the Applicant's assets did amount to a breach of an implied obligation of confidence [allegation 4.1.1] and/or implied undertaking to the Court and constituted a breach of CPR 31.22 [allegation 4.1.2]. Accordingly the Tribunal found allegation 4.1 substantiated against both Respondents because they were satisfied that such confidential information had been disclosed to [JD] and must therefore have been at risk of being further disclosed by them to their clients Mr [C]/[C Ltd], although such further disclosure was not found by the Tribunal as a matter of fact. The Tribunal did not consider that allegations 4.2 and 4.3 had been proved to the requisite standard and the allegation of dishonesty was not pursued against the Second Respondent in respect of allegation 4.2. However, the Tribunal did consider that the First Respondent's conduct in relation to allegation 4.2 (but not the Second Respondent's) had shown a reckless disregard for his duty as an officer of the Court. The Tribunal also found that the First Respondent's and the Second Respondent's failings amounted to a breach of the Code of Conduct and therefore found allegation 4.4 substantiated against both Respondents."

120. Mr Cunningham also referred the Tribunal to the précis of the allegations in the original Tribunal's judgment which is set out at the beginning of this judgment. He explained that if one obtained a freezing order it included an obligation on the Respondent to disclose means and assets for the purposes of enforcing the order. Mr L made disclosure and it was disseminated wider than was intended. Mr Cunningham relied on the CPR, Part 31 – Disclosure and Inspection of documents. Part 31.22(1) provided:

> "A party to whom the document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed…"

The Upheld Findings included breach of the following in the 2007 Code, Rule 1.01 relating to the administration of justice, Rule 1.02 relating to integrity, Rule 1.03 relating to independence, Rule 1.04 relating to public confidence and Rule 10.05 relating to undertakings. In addition in the case of the First Respondent the Tribunal found "reckless disregard" under allegation 4.2. Mr Cunningham referred to the findings of Mr Justice Jay:

> "The facts in relation to this allegation were not substantially in dispute, and the SDT made no finding of dishonesty.
>
> Mr [L] was required by the without notice Order to provide a statement of his assets; this is, of course, standard practice. Mr [L] complied with this order through his solicitors providing information between 6th and 8th May 2010, and he provided an affidavit on 10th May. Pursuant to CPR r. 31.22 the Liquidating Trust and its advisers were impressed with duties of implied confidence in relation to this information: in short, it was axiomatic that it could not be disclosed to third parties. Yet it appears from [the Second Respondent's] e-mail timed at 2:25 pm on 10th May 2010 that the information contained in Mr [L's] solicitors' letters was transmitted to two lawyers at [JD] who were included in a group e-mail sent to a number of others who did have a legitimate interest in this material. [The First Respondent] was not copied into it.
>
> Mr [W QC] points out that [the Second Respondent's] e-mail was sent with [the First Respondent's] approval… His contention was that [JD] were legitimate recipients of this information as "part of the Trustee's US legal team". Yet elsewhere in his first witness statement filed for the purposes of the SDT proceedings the First Respondent] made clear that [JD's] role was limited to advising [the firm] and the US Attorneys as to "US law and procedure "– this must be a reference to bankruptcy law, which I understand to be the specific expertise of the two [JD] lawyers I have previously mentioned. In that limited role it is difficult to see what interest [JD] had in this information. Furthermore it ought to have been obvious to [the First Respondent] that [JD] were wearing two hats and, at the very least, a risk arose that the confidentiality of this information would not be safeguarded in that it might be transmitted to [C/C Ltd] (in the event, this risk did not mature)."

121. Mr Cunningham clarified for the Tribunal that in terms of seriousness this matter came considerably below the dishonesty allegation. Mr Justice Jay used the word "excoriating" in terms of the Tribunal's finding but Mr Cunningham could not say that the Tribunal should disregard an Upheld Finding and the Tribunal finding of reckless disregard must be taken into account in sanctioning the First Respondent.

122. Mr Cunningham clarified Mr Justice Jay's reference to the firm JD wearing two hats; JD had been involved in two capacities – they were advisers of the firm but not as part of the Chancery proceedings. Mr L's affidavit of means went beyond the four corners of the legitimately entitled team. The Respondents risked unfair use of the information having regard to JD's role which related to bankruptcy advice. Mr Cunningham could not say that it had catastrophic consequences.

Mr Dutton's Submissions for the First Respondent regarding the Misuse of Confidential Information

123. Mr Dutton submitted that the firm was instructed by the Liquidating Trust which had instructed several other law firms as well; a great deal of money and property was involved in the American action. The firm brought in JD a highly recognised

international law firm which through Ms O'N and Mr M had expertise in international bankruptcy law. They were part of the team working in the US for the Liquidating Trust. He referred the Tribunal to Mr Justice Jay's description (at his paragraph 111) of JD's role quoted above. JD had a legitimate role but they also had C/C Ltd as clients and in the Second Respondent passing the information to them there was a risk that JD might disclose the L affidavit of means to their clients. At paragraph 156.77, the Tribunal made a finding that the affidavit of means had not been passed onto their clients. This was the full extent of the Respondents' factual misconduct. They were acquitted regarding deliberate misconduct or dishonesty but recklessness was found in the case of the First Respondent. Mr Dutton submitted that Mr Cunningham had made a reference to and relied in respect of seriousness on the case of R v G in terms of the definition of recklessness but there was no analysis of recklessness in paragraph 156.77 and the definition involved a risk in respect of which one had an advertent state of mind. The original Tribunal did not refer to that case and no reference was made to the First Respondent's state of mind. Mr Dutton submitted it was very difficult to show to what the First Respondent applied his mind to knowing of risk and continued nevertheless; the First Respondent provided or condoned provision of information to lawyers who acted properly and did not pass it on outside the circle of lawyers acting for the Liquidating Trust. Mr Dutton referred the Tribunal to paragraph 243 of Mr Justice Jay's judgment where he said:

> "Although the e-mail to [JD] was not sent by [the First Respondent], I have referred to the evidence showing that this was done with [the First Respondent's] approval (see paragraph 111 above). In my judgment, this was a straightforward issue which did not require any more reasoning than that which fell from the SDT, although its elliptical style of expression is not to be commended. This information should not have been transmitted to [JD], and although the finding of reckless disregard was somewhat excoriating, it was within the SDT's range of permissible responses as an expert Tribunal…"

124. Mr Dutton submitted that the e-mail should not have gone to JD certainly without an undertaking regarding only using it to advise the trust but it did not in fact go to any third parties and it was with JD's clients that the potential risk lay. In paragraph 156.77 of the original Tribunal's judgment, the Tribunal found that the disclosure to JD of the information relating to Mr L's assets amounted to a breach of an implied obligation of confidence; an implied undertaking; and was in breach of CPR rule 31.22. The Tribunal rejected the allegation of dishonesty. Mr Dutton submitted that the finding of reckless disregard for his duty as an officer of the court against the First Respondent who was not a party to the e-mail was difficult to understand and was not explained by the Tribunal. However the finding stood. Mr Justice Jay had done his best in referring to the original Tribunal's elliptical reasoning and used the word "excoriating". Mr Dutton submitted that the Tribunal had seen much worse conduct than this which had occurred in very contentious litigation.

125. Mr Dutton also questioned how the conduct rule breaches arose out of the circulation of the L information. The First Respondent's conduct was only compromised because the e-mail was sent to a law firm where there was a risk of their sending it on but that risk did not materialise. That was the extent of the finding about the misconduct swallowing up five different rules without any analysis of how the breach occurred. Mr Dutton submitted Mr Cunningham was exaggerating the seriousness of the

misconduct. While in no way belittling the finding, it related to one e-mail only and represented no more than a mistake on the Respondents' part. It was questionable whether on its own the breach of duty of confidence would have justified a reference to the Tribunal and doubtful that it would have merited a Tribunal penalty.

First Respondent's Evidence in Mitigation regarding Misuse of Confidential Information

126. The First Respondent testified that he brought in JD who were highly regarded and whose bankruptcy department could help on a particular aspect of the case. In his mind and that of the Second Respondent all four sets of lawyers and Mr E who was also a lawyer were part of the same team and round robin e-mails were used if anything happened. The First Respondent was aware that JD acted for C/C Ltd but JD was highly reputable and knew about confidentiality and privilege and the First Respondent did not think that he had to spell it out. The e-mail regarding Mr L's assets had been sent without the First Respondent's knowledge but he would have approved of it. He would probably have suggested that specific undertakings be obtained from JD as belt and braces because of the possibility that information might go outside the confidential circle. He did not become aware of the e-mail until after it was sent. He was sorry and it should not have happened and he apologised for that.

Mr Glassey's Submissions in respect of Misuse of Confidential Information

127. Mr Glassey submitted that this was the lesser finding against the Second Respondent because there was no recklessness and it was a relatively unimportant finding which in the ordinary course of events would not have come to the Tribunal and if this allegation were brought in isolation it would not have caused the Second Respondent's practising certificate to be affected.

Second Respondent's Evidence in respect of Misuse of Confidential Information

128. The Second Respondent stated that the breach of confidentiality was an honest mistake; he recognised JD as part of the legal team but they had a double capacity. He apologised to the Tribunal, Applicant and Mr L. There had been a standard circulation list so far as the Second Respondent could recall. He knew JD was acting for C Ltd but he was not sending the e-mail in the expectation that they would send it to C Ltd. He was honestly not sure if he checked whether one name or all of the names would come out when he used the circulation list. He should have thought of the potential conflict but it did not cross his mind.

Sanction

129. The Tribunal had regard to its Guidance Note on Sanctions, to the submissions for the Applicant and in mitigation for each Respondent, the oral evidence of the Respondents and the testimonials for the Respondents including the oral evidence given for the First Respondent. The Tribunal had to determine a sanction in respect of the two Upheld Findings one of which was much more serious than the other. Although the Tribunal would impose one sanction in respect of both Upheld Findings the Tribunal felt it might assist the parties to address them separately.

Misuse of confidential material

130. The less serious misconduct involved the misuse of confidential material. The original allegation extended to breaches of the 2007 Code, Rules 1.01 (the requirement to uphold the rule of law and the proper administration of justice), 1.02 (the requirement to act with integrity), 1.03 (the requirement not to allow one's independence to be compromised), 1.06 (the requirement not to behave in a way that was likely to diminish the trust the public placed in the solicitor or the profession) or 10.05 (related to undertakings). The parties were not agreed about the extent of the Upheld Finding and the Tribunal relied on paragraph 243 of Mr Justice Jay's judgment where it said:

> "In my judgment, these actions placed the First Respondent in breach of rules 1.01, 1.03 and 1.06 of the Rules of Conduct. I am less clear about rules 1.02 and 10.05, but do not believe that these really add to the gravamen of the criticism."

The Tribunal followed the guidance of Mr Justice Jay and agreed with his reasoning so accordingly ignored Rules 1.02 and 10.5 in its deliberations as to sanction.

131. The Tribunal considered that the nature of the information was significant, the details of the assets and liabilities of Mr L. It could have constituted important evidence quite central to the litigation and needed careful handling. However Mr Justice Jay had described the Tribunal's decision as "excoriating". It was not a winning point that the American lawyers to whom the information had been released did not in turn release it to their clients wearing their other hat of advising C/C Ltd outside their role of advising Respondents on bankruptcy issues. The important point was that it could have been used but the Tribunal considered that JD's dual role in the litigation was a mitigating factor as it added scope for confusion.

132. As to the respective roles of the First and Second Respondents, the main actor in releasing the confidential material was the Second Respondent but the First Respondent indicated in evidence that he would have approved the release albeit subject to appropriate safeguards. It was recorded in the original Tribunal judgment that when the First Respondent attended the meeting in Boston with representatives from C Ltd and the Liquidating Trust's American lawyers it was agreed at the meeting that "lawyers for the Liquidating Trust and [C] Ltd would share information and strategy in the US proceedings "and that that information would remain confidential"". The Tribunal noted that the First Respondent was therefore also aware of JD's dual role. The First Respondent was more appraised of the unrelated dispute between Mr L and C/C Ltd and of the risk that US lawyers might not be aware of the niceties of High Court procedure. While the First Respondent did not know of the release for some time he set up the arrangements with the American lawyers and maintaining confidentiality was absorbed into his supervisory role in the litigation and finding of recklessness had been made against him.

133. The Second Respondent was assisting the First Respondent. It was recorded in the judgment of the original Tribunal that:

> "In continuing cross-examination, the Second Respondent accepted that any documentation that had been disclosed should only have been used for the purposes of proceedings. He said that he had not thought about what information [C Ltd] properly received. He agreed that he had sent the e-mail to [JD] but pointed out that [JD] had been part of the legal team and were certainly advising the Liquidating Trust."

The Tribunal noted that the Second Respondent was not involved in the initial high-level meeting, was not in touch with C/C Ltd and it felt that he might not have appreciated the implications of the latter's litigation against Mr L. There was no finding of recklessness against the Second Respondent in respect of the misuse of the information.

134. In terms of the seriousness of the misconduct the Tribunal considered that no harm resulted from the same but this was the Respondents' good fortune rather than their doing. The Tribunal also bore in mind that Mr L had no choice but to provide information and that the provisions of Rule 31.22 were quite clear about the limits on its use. The Tribunal did not consider that this was merely a technical breach by either of the Respondents. However notwithstanding the finding of recklessness against the First Respondent, the Tribunal considered that it was questionable that the matter would have come to the Tribunal if this had been the only allegation. The Tribunal determined that if misuse of confidential information had been the only allegation before it, the Tribunal would have imposed a fine on the First Respondent because of the recklessness, his seniority and his greater knowledge base of the involvement of the various parties and lawyers but it would have been a modest fine because he did not send or even receive the e-mail at the material time. The Tribunal would at most have imposed a reprimand on the Second Respondent bearing in mind his comparative lack of seniority and lesser role and knowledge of the various parties.

Dishonesty

135. The Tribunal had heard lengthy submissions from the advocates for all parties. It had allowed the advocates some latitude in this regard because it needed to understand the factual background to the two Upheld Findings and where the Respondents had both been struck off already in the proceedings great care was needed in arriving at sanction a second time. Particularly in respect of the far more serious Upheld Finding of dishonesty against both Respondents, the Tribunal had at the forefront of its mind that its role in this matter was strictly limited to the imposition of sanction. The fact that there was a new material before the Tribunal which had not been seen by the original Tribunal or Mr Justice Jay in no way blurred the definition of the Tribunal's sanctioning role at this hearing and the Tribunal had regard to Mr Justice Jay's prescription that the Respondents could not seek to adduce evidence whose purpose was to undermine the previous Tribunal's findings of fact on the anterior question of dishonesty. The Tribunal would address the material as described at the preliminary hearing on 23 February 2016 "to determine the relevance, context and weight to be placed on the evidence when determining sanction." That determination by the Tribunal had not been appealed and therefore stood.

136. The Tribunal had regard to the fact that the original sanction against both Respondents had emerged at the conclusion of the hearing in which a large number of other allegations including dishonesty against the First Respondent had been found proved whereas this Tribunal was looking at only two Upheld Findings. As Lady Justice Rafferty said in refusing the appeal the Tribunal was now working on a basis much narrower than its predecessor. The Tribunal had heard arguments about the meaning of paragraph 156.79 of the original Tribunal's judgment. The Tribunal was satisfied that it understood the meaning of the finding and that in the third sentence the person whose knowledge was referred to was the First Respondent.

137. The Tribunal's Guidance Note on Sanctions stated at paragraph 43:

> "The most serious misconduct involves dishonesty, whether or not leading to criminal proceedings and criminal penalties. A finding that an allegation of dishonesty has been proved will almost invariably lead to striking off, save in exceptional circumstances."

For the Applicant, Mr Cunningham sought to construe alternatively this aspect of the guidance which was based on authorities beginning with Bolton and including Sharma by asserting that the words of the Lord Chief Justice at paragraphs 111 and 112 of the judgment by the High Court in the case of Brett left the Tribunal with no alternative save strike off regardless of any exceptional circumstances where a Respondent had knowingly misled the court. The Tribunal had the benefit of submissions for the parties and a supplemental note from Mr Dutton and Mr Glassey on this point. The Tribunal noted that the Lord Chief Justice was giving a very clear steer that the duty not to mislead the court placed a very heavy burden on solicitors. Mr Cunningham made the point that these words were uttered after Mr Justice Jay and Lady Justice Rafferty made their pronouncements and after the original Tribunal determined that the appropriate penalty for an albeit greater number of proven allegations was strike off. However the Tribunal was not satisfied that the Lord Chief Justice was overturning the basis upon which sanction was arrived at in the Tribunal in this particular type of case nor would his remarks have been intended to fetter the Tribunal's discretion. The Tribunal agreed with the defence contention that both paragraphs of the Brett judgment referred to advertent misleading of the court. The Tribunal also agreed that the reference to an inevitable inference in paragraph 112 referred to an inference that the Respondent acted dishonestly rather than that there was an inevitable inference that such a respondent should be struck off. Having been unconvinced by Mr Cunningham's submissions, the Tribunal must consider whether there were any exceptional circumstances that would make it inappropriate to strike off either or both Respondents.

138. The Tribunal had carefully considered the representations made about the relevance of the case of Brett to the seriousness of the Respondents' misconduct and particularly the submissions that the misconduct in Brett was more serious than that of the Respondents so suspension in their case would also be justified. The Tribunal agreed that the dishonesty related to a fairly narrow point in a very large and complex case but the Tribunal also considered that Brett made clear that however nuanced the dishonesty was, if it involved misleading the court it was of particular gravity for the reasons set out by the Lord Chief Justice because the solicitor was an officer of the court. The Tribunal also found however that there was a most significant difference

between the two cases; there had been no allegation of dishonesty in the case of Brett but in this matter dishonesty had been alleged and found proved and as Mr Justice Jay had made clear it was not open to the Tribunal to go behind that finding. The Upheld Finding precluded the misleading of the court having been interpreted as inadvertent.

139. The Tribunal had heard about the particular circumstances of the matter including the background that the High Court litigation, during which the dishonest misconduct occurred, had been hard fought and conducted in a very aggressive manner. The Tribunal had also heard that the circumstances of the Tribunal proceedings were unique; including that the prosecution had been brought by a lay applicant, the Rule 5 Statement was not in the conventional format and the approach taken had been described as a blunderbuss and again was conducted aggressively. No doubt the Respondents had been put under considerable pressure while giving evidence. The Tribunal also found itself in unusual circumstances because it had not heard or seen the original evidence or witnesses save that both Respondents had given evidence in mitigation. The Tribunal considered that while the circumstances of both the litigation and the disciplinary proceedings to which it gave rise might have aggravated the circumstances, they could not justify dishonesty. Its consideration of exceptional circumstances must be applied to the act of dishonesty rather than its context. The Tribunal accepted that dishonesty could vary in its seriousness.

140. In order to determine sanction including considering whether there were exceptional circumstances the Tribunal found it necessary to arrive at some conclusions based on the facts presented to it. The Respondents' dishonesty related to the eighth affidavit of the First Respondent dated 8 July 2010 which was filed at some point after the conclusion of a three-day hearing on 6 to 8 July 2010 before Mr Justice Roth but before he gave judgment on an application by Mr L to discharge a worldwide freezing injunction. In the affidavit S8 there was a failure to correct the First Respondent's seventh affidavit dated 6 July 2010 in which the First Respondent stated:

> "My firm was not aware of Mr [K's] affidavit or its contents but it is accepted that the Liquidating Trust should have had access to Mr [K'] affidavit prior to the ex-parte hearing. I apologise on behalf of the Liquidating Trust for the fact that the Court was not made aware of the contents of Mr [K's] affidavit."

In fact Mr K's affidavit did not exist prior to the ex parte hearing, there was a mistaken impression that it did because of calibration problems with his fax machine which predated documents by 13 days. However the Respondents' firm was aware of what later became the contents which were contained in an e-mail which the firm received on 12 April 2010 but which the Respondents had overlooked. The Tribunal accepted that the main focus of the Respondents' attention early on in the Roth hearing was to rebut an allegation by Mr L that had that there had been improper conduct relating to K's affidavit. The issue about the fax brought K's evidence into sharp relief so that the Second Respondent undertook work to clarify the position. The damage to the Respondents and the dishonesty flowed from that point in time onwards.

141. In the course of the Second Respondent's investigations through an exchange of e-mails with Mr JW in the USA on the evening of 6 July 2010 the Second Respondent was reminded by Mr JW of the firm's receipt of Mr K's e-mail. His reaction was set out at an e-mail which included:

> "Our concern is that this knowledge should have been disclosed to the Court…"

The Tribunal considered that this concern was justified because the search for Mr L was a major issue when the Respondents were trying to enforce an order based on his evading service which had been described in another case as "thermonuclear". The absence of that information contributed to the Respondents' presentation of Mr L as someone seeking to evade service and who would dissipate his assets. Any deficit in the information which led to obtaining such an order needed to be notified to the court as the Second Respondent articulated. The Respondents' dishonesty lay in their failure to do so. The Tribunal noted that Mr Justice Roth recorded in his judgment that he had required a further affidavit to be served in order to clarify the nature of Land Registry documents which had been attached to another affidavit in the proceedings. It was decided on the advice of Leading Counsel that the further affidavit, which became S8, would also be used to inform Mr Justice Roth about the resolution of the fax machine issue and should have been used to inform him about the overlooking of Mr K's 12 April 2010 e-mail. Mr Justice Roth clearly took note of S8; he referred to it as follows:

> "In the [First Respondent's] 8th affidavit, he adds this "I am told by Mr JW that the reason why he did not mention it in his First Affidavit was because he thought it was sufficient that the court had been told that it was believed that Mr [L] was by then in London."

The Judge, aware of what had happened when Mr K attempted to carry out personal service on 9 April 2010 and learned that Mr L was unknown to the doorman, not listed in the residents' directory and that his New York telephone number was no longer in service, then went on to criticise what he described as "a serious misunderstanding of what is required by full and fair disclosure in English proceedings when it is being alleged that the Defendant is attempting to evade service." He directed his criticism at Mr JW but if S8 had been as it should be then the Respondents would also have been the subject of that criticism. The Tribunal noticed incidentally that in the penultimate paragraph of his judgment Mr Justice Roth referred to:

> "this succession of errors that [the First Respondent] has tendered to the court on behalf of his firm. I would only observe that indicates remarkable lack of proportion and supervision in the preparation of the documents to be placed before the court on a without notice application."

He went on to state that it did not affect his decision to discharge the injunction. It was clear that Mr Justice Roth had taken a close interest in evidential matters which made it particularly important to get these things right.

142. The Tribunal noted that not only did S8 fail to correct the mistaken impression which had been given in S7 that the firm was not aware of the K evidence but that paragraph 15 of S8 did not replicate exactly paragraph 6 of Mr JW's affidavit. It was subtly but significantly different. S8 stated:

> "I understand from Mr [JW] that despite not receiving the fax on 17 April 2010, he was told by Mr [K] in mid-April 2010 the facts set out in Mr [K's] affidavit dated 30 April 2010. I am told by Mr [JW] that the reason why he did not mention this in his first affidavit is because he thought it was sufficient that the Court had been told that it was believed that Mr [L] was by then in London."

Mr JW's affidavit stated:

> "Notwithstanding, on or about April 12, 2010, MR [K] informed me of the facts that are set out in his affidavit of service, I did not inform the court regarding this information in my first affidavit because by the time of my first affidavit it had become apparent from investigations carried out by Mr [KN] that Mr [L] was in London rather than New York and this had been communicated to the court."

The Tribunal noted that the First Respondent made no reference to the words "rather than New York". Having assessed the relevance and content and determined the weight to be accorded to the JW affidavit as it said it would do at the preliminary hearing, the Tribunal considered that it assisted the Respondents in dispelling the suggestion that they had been motivated by a desire to blame Mr JW for the court not being informed about the K Evidence at the without notice hearing. However and conversely it was detrimental to them because the affidavit showed that the wording in S8 was not a perfect match for the wording in the JW affidavit because the former omitted the reference to New York which would have made it expressly clear to the Judge that not only was Mr L thought to be in London by virtue of the enquiries which were then being made but also that quite specifically he was not in New York at the time of the 29 April 2010 without notice hearing.

143. The Tribunal considered the various types of exceptional circumstances which the Respondents' advocates had submitted applied to their conduct. The issue of Mr K's evidence about the attempt at service on 9 April 2010 became an issue on the first day of the hearing before Mr Justice Roth and it remained an issue throughout 7 July and 8 July 2010. Before the evening of 6 July the situation was that the Respondents had overlooked the K email. It had been suggested that what occurred was a moment of madness. The Tribunal had heard submissions that the dishonesty lasted only 32 minutes late on the evening of that day. The Tribunal considered that the dishonesty lasted longer than that and spanned a period of two or three days beginning on the evening of 6 July 2010; the affidavit was not filed until after the conclusion of the hearing on 8 July 2010. At some point after that matters moved on and the Tribunal considered that the issue of the K evidence passed from the Respondents' minds. Accordingly the Tribunal determined that the Respondents' dishonesty should be considered as limited in timescale to those two or three days.

144. Mr Dutton had submitted that the dishonesty related to the procedural conduct of the proceedings and not to any underlying matters of substance. The Tribunal rejected that submission and considered that the dishonesty was crucial in respect of not correcting, with Mr Justice Roth, the information which had been used in the without notice proceedings, and even if the matter had been procedural it was of no less significance. Obtaining the without notice freezing order turned on procedural matters – the facts around service. The whole focus of the without notice hearing was that Mr L was alleged to be evading service and might dissipate his assets. The Tribunal considered it to be a neutral point that in the event the contents of S8 improved Mr L's position and Mr Justice Roth stated that the succession of errors of which he was aware did not affect his decision to discharge the order and that the outcome of the hearing was unaffected.

145. The Tribunal also considered the submissions which it had received about whether the dishonesty involved an act of omission or commission included in which was Mr Dutton's submission that acts of omission were generally considered to be less serious than commission. The Tribunal considered that the product of omission in misleading the court could be just as serious as commission because it could have an equivalent effect and did so in this case. The Tribunal noted in paragraph 112 of Brett the Lord Chief Justice put them on equal footing and referred to the situation where "a litigator puts before the court matters which he knows not to be true or by omission leads the court to believe something he knows not to be true…"

146. It was submitted that the Respondents were not seeking to and did not obtain a pecuniary benefit from their dishonest conduct and that the most that could be said was that they were seeking to diminish in a relatively small and inconsequential way professional embarrassment for themselves personally, and/or for the firm. The Tribunal considered that if Mr Justice Roth had known the truth it could have had costs consequences for the Respondents and for the firm and its client, the Liquidating Trust. It could also have affected the judicial criticism which Mr Justice Roth made and against whom.

147. Mr Dutton submitted that the primary purpose of paragraph 15 of S8 was to make disclosure to the court of what the Liquidating Trust knew at the relevant time but that the Respondents should have gone further and explained that they had also received the K e-mail. The Tribunal considered that the Respondents' misconduct was more serious than that; by their dishonest conduct the Respondents did not put the record straight and thereby failed to discharge the proper duties of an advocate to the court.

148. Mr Dutton had also made submissions about Mr Justice Jay's finding that the Respondents were motivated in their dishonesty by seeking to shift the blame from their firm to Mr JW. The original Tribunal did not determine sanction by reference to the findings of fact which Mr Justice Jay made. As set out above the affidavit of Mr JW assisted the Respondents in that regard and Mr Cunningham had in any event made it plain that he did not rely upon those findings of fact. The Tribunal noted incidentally that, although placing blame on Mr JW was not the Respondents' intention, as a matter of fact the court was plainly misled as a result of their dishonesty because they did not say that they too had seen the K e-mail and had overlooked it.

149. As to the effect on the reputation of the profession, the Tribunal considered that a finding of dishonesty by misleading the court on the part of a solicitor as an officer of the court damaged the profession in the eyes of the judiciary. The Lord Chief Justice had said as much in paragraph 111 of Brett:

> "Indeed, the reputation of the system of the administration of justice in England and Wales and the standing of the profession depends particularly upon the discharge of the duties owed to the court."

It was also apparent from the judgments of Mr Justice Roth and Mr Justice Jay (although the criticism by the former could only extend to Mr JW because the Judge had not received all the relevant information). The Tribunal also considered that the public if fully appraised of the circumstances and duties of an advocate would also think less of the profession because of what had occurred.

150. The Tribunal accepted having regard to the evidence of the testimonials for both Respondents and the oral evidence for the First Respondent and the profile of their practice that neither had a predisposition to dishonesty but regrettably there were plenty of examples before the Tribunal of otherwise decent people who committed dishonest acts. The First Respondent was a well respected solicitor operating at a senior level in the profession with a great deal of experience of complex litigation. It was to his credit that he did not seek to place any blame on the Second Respondent who had only been qualified for three years when the conduct complained of occurred. The Tribunal accepted that the Second Respondent lacked experience of worldwide freezing injunctions but did not consider that fact to be relevant to something as fundamental as the solicitor's duty to the court. As set out in Bolton one of the elements of sanction might be punitive. In this case the Respondents had clearly already suffered considerably and the Tribunal was not of the opinion that they were likely to repeat their misconduct. The judgment in the case of Bolton specifically addressed the issue of the adverse personal consequences of a severe sanction and the Tribunal had due regard to it:

> "It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren… He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again… All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness."

The Tribunal also had regard to the guidance in Bolton about the possible relevance of the history of the case. The Respondents' restoration to the Roll ordered by the court which had lasted two years was not material because the issue here was strike off rather than suspension and strike off was a permanent sanction. The temporary restoration therefore only constituted an interruption to what would otherwise have been a continuous period of strike off.

151. After very careful consideration of what might constitute exceptional circumstances and having fully allowed for the highly pressurised circumstances of the complex litigation during which the dishonest conduct occurred and the mitigation brought to its attention, the Tribunal could not find that the conduct of either Respondent fell into the small residual category of cases where strike off was not a reasonable and proportionate sanction for dishonesty. The appropriate sanction for the Tribunal to be applied in relation to both Respondents was accordingly striking off the Roll of Solicitors.

152 Notwithstanding that the Tribunal could not find an exceptional circumstance to meet this finding of dishonesty; from what the Tribunal was called upon to consider, it was not inevitable that these two Respondents should be totally precluded from the profession in some shape or form subject to supervision and subject to the Applicant's approval albeit not as solicitors. The First Respondent had had a long and impressive career absent the matter under consideration. His peers could not have spoken more highly of him. In respect of the Second Respondent the Tribunal felt that it was a matter of regret that someone who had had such a short time in the profession and who had spoken with such passion and pride as to a career that he wanted to devote his working life to had fallen by the wayside at such an early stage with such impact on himself and his family. It was particularly noteworthy that his employers, where he had worked for a mere nine months, had backed him financially and spoke so well of him. In making these observations the Tribunal was of course mindful that its deliberations were limited to the Upheld Findings which had been referred to it for sanction and to no other matters.

Application by Mr O'Malley for the Applicant for Directions in respect of Findings set aside by Mr Justice Jay

153 Mr O'Malley submitted that now that the Tribunal had dealt with the Upheld Findings it should now deal with those which had been set aside in the High Court. He asked that the Tribunal order that a Case Management Hearing take place on the first available date 28 days after publication of its written judgment. This would enable Mr Glassey to take instructions from the Respondents about any appeal which decision would have to be made within 21 days of the judgment's publication date and it would give the Applicant the opportunity to consider its position regarding proceeding with the set-aside findings. Mr O'Malley indicated that he was mindful of the finding in respect of sanction which the Tribunal had just announced. The Tribunal pointed out that its function at this hearing had been to deal with the two Upheld Findings but this particular division of the Tribunal had no application before it in respect of the findings set aside. Mr O'Malley submitted that Mr Justice Jay had left it to the discretion of the Tribunal to determine the order in which the Upheld Findings and the set-aside findings should be dealt with. His application was not made on the basis that the same division of the Tribunal should consider both. In making his application Mr O'Malley relied upon the order of Mr Justice Jay at paragraph 3.

154. For the Respondents, Mr Glassey submitted that there was a subtle difference in the positions of the parties. He was not sure that the question of the set-aside findings had been remitted to this particular division of the Tribunal as opposed to being remitted to the Tribunal generally. He suggested that the parties, the Applicant and his firm acting for both Respondents unless and until he was instructed otherwise should

correspond about the best way to take forward the outstanding matters. The Respondents might wish to appeal the Tribunal's finding on sanction and the Applicant would need to consider if it was in the public interest to continue with the prosecution of the set-aside findings. Mr Glassey suggested that there would not necessarily have to be a formal hearing to determine the matter as the Clerk to the Tribunal could take it forward. The parties would want to deal with the matter quickly.

155. The Tribunal noted that neither Respondent was present at this point and was concerned whether it would be appropriate to consider the way ahead for the set-aside findings. It suggested that the best way to deal with the matter would be before another division of the Tribunal. The solicitor member of the Tribunal suggested that one of the difficulties of the case had been the nature of the original Rule 5 Statement and suggested if the set aside findings were to be pursued they ought properly to be brought back to the Tribunal in a more digestible form. The Tribunal considered for practical reasons in the particular circumstances that it would not be appropriate for this particular division of the Tribunal at this time to make directions as to the future conduct of the set-aside findings at the Tribunal.

Costs

(On 10 August 2016, Mr Cunningham for the Applicant and Mr Dutton and Mr Glassey for the First and Second Respondents respectively made preliminary submissions on costs. These were pursued on 2 September 2016 by Mr O'Malley for the Applicant and Mr Glassey for both Respondents following the Tribunal's determination of Sanction. The First Respondent chose not to be present for submissions on costs. The Second Respondent did not appear on that day.)

156. The Applicant applied for costs by reference to a schedule of costs dated 9 August 2016 and a statement of further costs for the adjourned hearing on 2 September 2016 together totalling £51,514.10. The Tribunal had before it a letter from the Applicant to the parties dated 1 August 2016 which made clear that the Applicant included in its costs claim time commencing from Mayer Brown's letter dated 18 July 2014 but no time spent prior to that date. The Applicant had not charged for any time/work relating to the preliminary correspondence and preparation during the period from August 2015 to 23 February 2016 as the Tribunal made no order for costs at the preliminary hearing. The Applicant had removed from the costs schedule any duplication of time/work between Ms Lavender and Mr O'Malley, its in-house legal advisers who had dealt with the matter. Mr Cunningham submitted that a large proportion of the costs were his own fees. If he had charged at a commercial rate the schedule would have been double the figure. This was a uniquely unusual and troubling case. He did not suggest that the Tribunal in any summary assessment should discount the bill very considerably; he submitted that the schedule was reasonable. Mr Cunningham also made reference to the fee charged by Mr Dutton acting for the Applicant in the case of Brett for a one-day hearing which was similar to his own claim for this longer matter. Mr Cunningham submitted that it was proper in cases like these for Leading Counsel to be instructed and that he had had quite a lot of involvement over a couple of days. There were no other outstanding costs as the reserved costs ordered by Mr Justice Jay in January 2014 of the original trial before the Tribunal in February 2013 and the costs of the appeal which had been reserved by

Mr Justice Jay to be considered after the final determination of further proceedings before the Tribunal, had been settled between the parties and Mr L. As to the ability of the Respondents to meet any costs award having regard to their statements of means Mr Cunningham submitted that the First Respondent had a sizeable amount of assets which were realisable or chargeable. The Second Respondent was in more straitened circumstances. Aside from the property in which he resided but did not own he had another property with about £50,000 of equity and a £7,000 indemnity for costs from the firm.

157. On 2 September 2016, Mr O'Malley for the Applicant informed the Tribunal that costs were not agreed between the parties and invited the Tribunal to carry out a summary assessment. He submitted that it was not unusual for joint and several orders to be made and that the Tribunal had a wide discretion about how much each Respondent should pay. Mr O'Malley acknowledged that the Respondents had already paid the costs of one Tribunal hearing and did not suggest that the Tribunal should not take that into account but this matter had been remitted to the Tribunal by the High Court. The Applicant involved itself in the matter after many of the original Tribunal's findings had been set aside so that the Applicant was left with the Upheld Findings including a finding of dishonesty and a costs quagmire. If no order for costs were made against the Respondents the profession would have to bear the Applicant's costs. He also acknowledged that sanction of strike off had consequences for them.

158. For the First Respondent, Mr Dutton submitted that the amount of costs applied for of around £50,000 was a very large sum. Mr Dutton took issue with the Applicant's claim for Leading Counsel to the extent of the sum of £15,150 (of the total counsel's fees of £30,150) in respect of advising in consultations in person and by telephone throughout the matter. Mr Dutton submitted that all those acting for the Applicant did so at special rates but Mr Cunningham's brief fee must have included getting to grips with the rest of the case aside from the Upheld Findings. Considerable time would also have been spent by the Applicant. Mr Dutton submitted that there must be some allowance for the fact that the Applicant's quagmire of a case ended up with only two matters and that the costs award should not go beyond the Upheld Findings. He did not suggest that the Applicant could not recover a suitable proportion of its costs since it became involved in 2014 and he accepted that the Respondents should make some modest contribution to costs. However where a case was overturned on appeal there might be a regulatory settlement agreement ("RSA") between the parties if admissions were made. The Applicant had declined to enter into an RSA. There was nothing in previous cases which could assist the Tribunal.

159. On 2 September 2016, Mr Glassey submitted that the Second Respondent would oppose a joint and several costs order and he suspected that the First Respondent would agree. He reminded the Tribunal that the original Tribunal ordered both Respondents to pay costs in the proportion 80% by the First Respondent and 20% by the Second Respondent. Generally Mr Glassey submitted that costs seemed high and should be reduced. He acknowledged that if the Tribunal did not make a full costs order against the Respondents then the profession would foot the bill but submitted that in a sense the profession had benefitted from what happened if the case assisted people faced with a private prosecution before the Tribunal. He also suggested that the unusual nature of the Rule 5 Statement should be taken into account and result in a discount in the costs to be paid by the Respondents.

160. As to their ability to pay costs, Mr Dutton submitted on 10 August 2016 (before sanction was determined) that the Respondents were not people of serious means and they needed to start making their way back to some form of professional life. How much the Respondents could afford would be informed by whether in the case of the First Respondent he could keep working as a mediator or as a solicitor with a practising certificate. Mr Dutton submitted that the First Respondent showed a modest monthly income for a man of his stage in life. He had some assets. Mr Glassey submitted that despite the success of the Respondents at the February 2016 preliminary hearing no order for costs was sought or made. The Second Respondent had an indemnity from the firm for costs up to a cap of £7,000. On 2 September 2016, Mr Glassey referred the Tribunal to the statements of means submitted by each Respondent. He submitted that the First Respondent was of an age where he would otherwise have retired and that the Tribunal's finding would diminish his income generating capacity. It was likely that if he were to be struck off again it would have a negative impact on his work as a mediator although it was thought that this did not require him to be a solicitor. The Second Respondent had heavy commitments in respect of family and little by way of assets and income.

161. The Tribunal had regard to the submissions for the Applicant and the Respondents. The history and nature of the matter meant that the costs position was complex although Mr Justice Jay's judgment was of assistance in making clear what costs had to be considered by the Tribunal. The Tribunal had been greatly assisted by the advocacy for all parties in this difficult case; its decision to reduce costs did not in any way reflect adversely upon that. The Tribunal did not consider it appropriate that the Respondent should pay for Leading Counsel's fees for advising in the sum of £15,150 because the Tribunal considered that those fees were the consequence of the Applicant taking over the case from Mr L and that they must extend to issues beyond those before the Tribunal; the Respondents should not have to bear the costs of the prosecution being taken over and recommenced by the Applicant. The Tribunal would limit costs to those related to this sanctions hearing and assessed total costs in the fixed amount of £36,000.

162. The Tribunal did not consider itself to be bound by the apportionment of costs between the two Respondents which had been made by the original Tribunal. These proceedings were quite different. There was a finding of dishonesty against both Respondents, a finding of misuse of confidential information against both but in the case of the First Respondent this was compounded by a finding of recklessness. The Tribunal had regard to the time taken during the hearing in respect of each Respondent. The time spent in respect of the First Respondent including hearing his character witnesses was considerably more than that for the Second Respondent. The Tribunal considered that an apportionment of two thirds of the costs to the First Respondent and one third to the Second Respondent would be reasonable and proportionate. As to their ability to meet the costs order the Tribunal considered that the First Respondent had considerable assets from which to meet the order notwithstanding the adverse effect that the sanction of strike off and his age would have upon his ability to work. The Second Respondent had the benefit of an indemnity up to the amount of £7,000 from his former firm and the Tribunal considered that he had sufficient assets to meet the balance of the order being made against him. However the Tribunal expressed the wish in the case of both

Respondents that the Applicant would take a realistic attitude in arriving at payment arrangements.

Statement of Full Order

First Respondent

163. The Tribunal Ordered that the Respondent, Andrew William Shaw, solicitor, be struck off the Roll of Solicitors and it further Ordered that he do pay a contribution to the costs of and incidental to this application and enquiry fixed in the sum of £24,000.

Second Respondent

164. The Tribunal Ordered that the Respondent, Craig Stephen Turnbull, solicitor, be struck off the Roll of Solicitors and it further Ordered that he do pay a contribution to the costs of and incidental to this application and enquiry fixed in the sum of £12,000.

Dated this 6th day of October 2016
On behalf of the Tribunal

J. C. Chesterton
Chairman