SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11026-2012

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

JOHN JAMES Respondent

Before:

Mr R. Nicholas (in the chair)
Mr R Hegarty
Mr D. Gilbertson

Date of Hearing: 22nd and 23rd January 2013

Appearances

Jayne Willetts, Solicitor of Cornwall House 31 Lionel Street, Birmingham, B3 1AP for the Applicant.

Gareth Edwards, Solicitor of Crangle Edwards Solicitors, 159 Councillor Lane, Cheadle, Cheshire, SK8 2JE for the Respondent who appeared.

JUDGMENT

Allegations

1. The allegations made against the Respondent, John James on behalf of the Solicitors Regulation Authority were that:

1.1 He permitted and/or caused a false representation to be made to the Solicitors Regulation Authority ("SRA") on his behalf by letter dated 3 March 2011 and in subsequent correspondence to the effect that a telephone conversation had taken place with an expert witness on 29 April 2010 in breach of Rules 1.02 and 1.06 of the Solicitors Code of Conduct 2007 ("the Code").

1.2 He fabricated an attendance note to evidence the alleged telephone conversation in breach of Rules 1.02 and 1.06 of the Code.

Dishonesty was alleged in relation to allegations 1.1 and 1.2 but it was submitted that it was not necessary to prove dishonesty for the allegations to be made out.

1.3 He permitted and/or caused his firm to produce to the SRA an attendance note that was not an accurate record in breach of Rules 1.02 and 1.06 of the Code.

Documents

2. The Tribunal reviewed all the documents including:

Applicant

- Rule 5 Statement dated 11 July 2012 with exhibit JBW1 numbered 1-59
- Supplemental bundle of documents numbered 60-69
- Additional documents numbered 70-75
- E-mail from Ms Willetts to the Tribunal dated 20 January 2013
- Applicant's schedule of costs dated 10 January 2013

Respondent

- Witness statement of the Respondent dated 18 January 2013 with exhibits JJ1-JJ7
- Letter from Mr Edwards to the Tribunal dated 18 January 2013
- Addendum witness statement of the Respondent dated 18 January 2013
- E-mail from Mr Edwards to the Tribunal dated 21 January 2013
- Tribunal judgment in case number 9877/2008 Smith and Parsonage heard on 1 and 2 October 2008 with head note endorsed from Solicitors Regulation Authority v Smith and Parsonage and Another [2012] EWHC 1519 (Admin)
- Summary of judgment in Solicitors Regulation Authority v Smith and Parsonage and Another [2012] EWHC 1519 (Admin)
- Public and Regulatory Law Group Alert June 2012 re the above case

- Bundle of testimonials

Preliminary Issues

3. For the Applicant, Ms Willetts made three applications to the Tribunal seeking to exclude evidence. She referred the Tribunal to the late filing of both a witness statement and an addendum witness statement of the Respondent both dated 18 January 2013. Also at lunchtime on the previous day, she had been provided with a witness statement from the Respondent's former secretary Ms Preedy ("MS P") which had not yet been placed before the Tribunal. The matters which were before the Tribunal had first been raised with the Respondent in June 2011 and the decision to refer the Respondent to the Tribunal had been made on 13 January 2012 with proceedings issued on 11 July 2012. Ms Willetts submitted that the Respondent had been aware of the nature of the allegations and their seriousness for some time and that the date for the hearing of the substantive application had been fixed around 18 October 2012. The Respondent was an Officer of the Court and she submitted that he had ample time to prepare but had left it to the last minute to produce his evidence. Ms Willetts objected to the following documents being admitted into evidence for the Respondent. First, a document marked JJ4 which was attached to the Respondent's witness statement. It was a "screenshot" relating to a telephone attendance note being created on a certain date. Rule 13(6) and (7) of the Solicitors (Disciplinary Proceedings) Rules 2007 provided that:

> "(6) Any party to an application may, by written notice, not later than nine days before the date fixed for the hearing, request any other party to agree that any document may be admitted as evidence.
>
> (7) If any other party desires to challenge the authenticity of a document which is the subject of paragraph (6), he shall no later than the date on which the period of six days beginning with the date on which the notice was served, give notice that he does not agree to the admission of the document and that he requires that its authenticity be proved at the hearing."

Ms Willetts submitted that an issue arose about the genuineness of the document. It was quite easy to change dates on computers to show any dates that one chose. Without independent IT evidence and an examination of the Respondent's laptop by an independent expert, Ms Willetts submitted that it was unsafe for the Tribunal to rely on the screenshot. The Respondent was required to prove the authenticity of the document if he wished to rely on it. Because of its late service, the Applicant had no opportunity to test this evidence. The second issue was whether the screenshot related to the attendance note which the Respondent had produced. Ms Willetts submitted that there was nothing to indicate that it related to a particular file for the client Ms C. In his witness statement, the Respondent said that at the time the telephone note was typed he "had approximately over 300 live files and at any one time, there would be at least 20 tapes waiting to be typed." Ms Willetts cautioned the Tribunal against admitting the screenshot without independent authentication, which she submitted it was the Respondent's responsibility to provide under the Rules and to enable the Applicant to test the evidence before the Tribunal. The second document which Ms Willetts objected to was marked JJ7 also attached to the Respondent's witness

statement. It purported to be a letter of 8 August 2011 from the client Ms C to the Respondent. The client was not to be called as a witness. Ms Willetts submitted that the letter appeared to be hearsay evidence written at the request of the Respondent recounting what she was told by him. Ms Willetts appreciated that the Tribunal had discretion but again advised caution regarding admitting the letter into evidence. The document could not stand as evidence of whether the telephone call had taken place and the client had not been present at the time. Ms Willetts' third objection related to the witness statement of Ms P. She reminded the Tribunal that Rule 14(2) stated:

> "Every Statement upon which any party proposes to rely shall be filed with the Clerk and served on all other parties to the application in question no later than 21 days before the date fixed for the hearing of the application together with a notice in the form of Form 6 in the Schedule to these Rules."

If Rule 14(2) was not complied with, then Rule 14(6) required:

> "If any party intends to call as a witness any person who has not produced a Statement, he must, no later than 10 days before the date fixed for the hearing, notify the Clerk and any other party to the proceedings of his intention and forthwith serve a copy of a written proof of evidence on the other party and lodge five copies of the proof with the Clerk."

Ms Willetts submitted that the evidence served the previous day was outside the time limits set out in both limbs of Rule 14 and its service did not give the Applicant the opportunity to consider the evidence in adequate time.

4. For the Respondent, Mr Edwards submitted that he had been given notice of one of Ms Willetts' applications late last week and the other two on the morning of the hearing. He had been instructed in this matter very late. The Tribunal was a professional one and well experienced and judicial notice could be taken of the fact that many people did not instruct advocates as efficiently as did the Applicant. In respect of the particular applications, Mr Edwards conceded Ms Willetts' points regarding the timing of the submission of the screenshot JJ4. Neither she nor Mr Edwards were experts and he took it from her on trust that a screenshot could be altered. It was an exhibit provided by the Respondent who would give evidence and Ms Willetts could question its veracity in cross examination. Mr Edwards conceded that the timing was a breach of the Rules and that in giving evidence the Respondent would explain the reasons for the delay. The Tribunal could attach what weight it wished to the document and he asked the Tribunal to exercise its discretion to enable the Respondent to present his case. In respect of document JJ7, Mr Edwards submitted that the Tribunal had already had the opportunity of considering the statement to which it was exhibited. The Respondent rather than Mr Edwards had drafted this letter and Mr Edwards submitted that the letter was exhibited not to prove to the Tribunal what it contained but rather to attest to the truth of the fact that the letter was written. Again the weight to be attached to the document was a decision within the remit of the Tribunal. As to the admission of the witness statement of Ms P, Mr Edwards submitted that this was a more straightforward issue. Ms P could certainly add to the case by means of her personal evidence. The Tribunal could decide what weight to attach to it. The Tribunal had no knowledge of what the witness statement would say because rightly, while Ms Willetts had been provided with the

statement, Mr Edwards considered it would not be appropriate to put it in at this stage. He submitted that the evidence was cogent and relevant and Ms P had come all the way from Birmingham to assist the Tribunal and Respondent. She would explain why the evidence was submitted so late although Mr Edwards conceded that the timing was not helpful. Ms Willetts could put any point she wished to the witness in cross examination and the Tribunal could also ask questions. It was regretted that the Tribunal was in this position but Mr Edwards submitted that the interests of justice should override other considerations. He submitted that if justice was to be done and to be seen to be done it was desirable that the witness statement should be admitted and that Ms P should be heard.

5. The Tribunal considered the submissions for both parties and determined as follows:

- In respect of JJ4 the screenshot the Tribunal did not consider that it added a great deal if the Respondent's former secretary was to be heard as a witness. The Tribunal noted Ms Willetts' concerns about the authenticity of the document and considered that as an expert Tribunal, it could attach what weight it saw fit to the document based on the evidence which came before it. In the interests of justice the Tribunal decided to refuse Ms Willetts' application to exclude document JJ4.

- In respect of document JJ7, the Tribunal noted that the Respondent had drafted it and that it had no statement of truth. Furthermore the writer was not to be called as a witness. The Tribunal regarded the letter as hearsay evidence and noted that it was out of time. It considered that the letter should be admitted in the interests of justice but would attach a relatively low weight to it. Accordingly the Tribunal refused Ms Willetts' application to exclude JJ7.

- In respect of whether the witness statement and witness evidence of Ms P, the Respondent's former secretary should be admitted into evidence, the Tribunal understood that the potential witness had arrived at the Tribunal from Birmingham. The Tribunal was concerned that the late production of the statement had not given the Applicant the opportunity to lodge an earlier objection or to call evidence in rebuttal. However it had been open to either party to seek an adjournment of the case but no such application had been made. The Tribunal considered that it would be in the interests of justice to allow Ms P to give oral evidence and be cross examined but that it would not be appropriate for the witness statement, which the Applicant had had very little opportunity to consider, to be admitted into evidence. Accordingly the Tribunal granted Ms Willetts' application in part and excluded the witness statement.

Factual Background

6. The Respondent was born in 1966 and admitted in 1997. He held a current practising certificate. He was at the material time and remained a director of James Pearce & Co Ltd ("the firm") of Great Barr, Birmingham.

7. Dr Roger Goulden ("Dr G") was instructed by the Respondent as an expert witness to prepare a report on behalf of a client Ms C who was concerned about dental treatment that she had received. Dr G prepared the report and submitted it to the Respondent.

8. By letter dated 26 April 2010, the Respondent requested Dr G to make amendments to the report because his client was dissatisfied with the contents. The letter contained 14 numbered paragraphs of detail and concluded:

> "With the very greatest of respect, I would be obliged if you would amend your report as it stands, my client feels that it is not acceptable in its present format.
>
> Perhaps it might be appropriate if you would like to contact me to discuss this matter and I await to hear from you at your earliest convenience."

9. By letter dated 29 April 2010 Dr G wrote, including:

> "Thank you for your letter of April 26th. As you suggested I did telephone your office, but you did not follow up the message I left with your secretary.
>
> I note that you are seeking further and better particulars in respect of this matter, and having reviewed these requests I would advise that if I am to give full and proper consideration to them, noting that they extend over three pages, I would estimate the time for this exercise to be approximately two hours. The fee for this would be based on my current rate of £190 per hour plus VAT a [sic] shown on the attached schedule.
>
> I would be most grateful if you would confirm that you would still like me to proceed on this basis."

10. By letter dated 17 May 2010, the Respondent wrote:

> "Thank you for your recent letter. I will have to seek my client's instructions and revert thereafter."

11. By letter dated 14 June 2010, the Respondent wrote:

> "Further to the above matter, we have now had the opportunity to take our client's further instructions.
>
> Whilst we note that you wish to recover monies in respect of amendments that need to be made for [sic] the report, our client is of the opinion, as are we, that the report stands [sic] is not an accurate reflection of what occurred.
>
> In the circumstances, we think it is appropriate for you to amend the report without further charge given that we have set out all of the items that appear not to be correct which have been alluded to in your report.

> Accordingly, we trust that you would make the amendments without further charge but if this is not the case then perhaps you would like to contact the writer, [the Respondent] who has care and conduct of this particular matter.
>
> On a positive note, we have been looking for a consultant dental surgeon to deal with clinical negligence cases and we would prefer if we could enter into a mutually beneficial relationship so that in future we can refer cases to you. Obviously, we would wish that the initial case that was sent to you was dealt with to the satisfaction of our client."

12. By letter dated 18 June 2010, Dr G replied:

> "Thank you for your letter of June 14 and as suggested I again tried to contact you direct to discuss this matter, but as was the case on when I called your office on 29.4.09 [sic], you were not available, and did not follow up the message I left for you."

13. Dr G went on to "reaffirm" his role as an expert witness under the Civil Procedure Rules, commented on what he believed was required of him in the letter of 14 June 2010 as opposed to the Respondent's letter of 26 April 2010, stated that his opinion on the matter was based on the materials available to him and that the points raised in the Respondent's April letter would not trigger any amendment. He stated that the Respondent and his client were attempting to influence his opinion and that what was asked was additional work and would demand an additional fee. Dr G also reminded the Respondent that the original contract required his fees to be paid by 27 April 2010 and asked for payment with interest.

14. On 11 August 2010, Dr G wrote again reminding the Respondent about his unpaid fees and threatening to issue proceeding if payment was not made.

15. On 26 August 2010 the Respondent wrote:

> "I enclose here with cheque in settlement of your account…
>
> I am extremely concerned as to the tone of your recent letter, the manner in which you have dealt with the queries that have been raised and the content of your report. I am surprised you did not amend your report in accordance with my letter of 26th April 2010. All of the other experts that I use are generally more than happy to make the appropriate amendments especially when the client is utterly dissatisfied with the contents, which rarely happens. I note your position.
>
> I confirm that my company will not use your services in the future and I will be recounting my experiences with you to all of my local solicitors and barristers especially when I attend upon Court…"

16. By letter dated 31 August 2010, Dr G made a complaint to the Office for the Supervision of Solicitors ("OSS") about the Respondent. Dr G was concerned that the amendments requested were improper and that the Respondent had tried to influence him to make those amendments with the suggestion that he be instructed on other

matters. He was also concerned that following his refusal to amend the report, the Respondent had advised him that the Respondent would recount his experiences with Dr G to local solicitors and barristers. Dr G also wrote on 31 August 2010 to the Respondent acknowledging payment of his fees, commenting on the points in the Respondent's letter of 26 August 2010 although not referring to it by date and advising him that he had contacted the Respondent's regulatory body.

17. The complaint was raised with the Respondent's firm, who submitted a response to the Applicant on 3 March 2011. The response included:

> "…our client is saying that the original report is inaccurate and wrong. It is not the case that [the Respondent] wishes to report to be altered, he required amendment because in effect on the clients [sic] instructions, the contents of the report are quite simply inaccurate.…"

18. Enclosed with that response was a copy of a telephone attendance note dated 29 April 2010. The attendance note recorded:

> "Returned Dr [G's] call and thanked him for responding so quickly. Had a general chat and he explained that he was keen to strike up a relationship for future work. I told him that I had a couple of potential other claims and he said would be happy to take on more work.
>
> I then talked about the concerns of the client with his report, as per my letter of 26 April.
>
> Dr [G] was quite happy to amend the report on the basis that the client paid an additional £190.00 per hour. I suggested that this was somewhat steep but said that I would talk with the client.
>
> Timing engaged: 13 minutes"

19. The attendance note was relied upon as evidence that Dr G was interested in conducting further work for the Respondent and to explain the reference in the letter dated 14 June 2010 from the firm to Dr G to:

> "entering into a mutually beneficial relationship so that in future we can refer cases to you."

20. The Applicant's investigation was closed at this stage on the basis of the response from the Respondent's firm.

21. Dr G was notified by letter from the Applicant dated 4 April 2011 that the investigation was concluded. The letter included:

> "I have now received a response and I enclose a copy of the firm's letter (and attachments) dated 3 March 2011 for your records."

22. Later in the letter it said:

> "While it is not for this office to become involved in examining the proposed amendments, which are obviously of a technical medico/legal nature, it is appropriate for us to examine the context in which the proposed amendments arose. In this regard the firm have provided evidence by way of a telephone attendance note of 29 April 2010 in which the potential for future work and possibilities of amending the report were discussed. The note states you were "quite happy to amend the report on the basis that the client paid an additional £190.00 per hour."

23. Dr G informed the Applicant by letter dated 8 April 2011 including:

> "I must advise you that this alleged telephone conversation never took place."

24. Dr G produced telephone records in support of this contention. He further explained that all calls to his office telephone were diverted to other telephone numbers. He used a system from BT called Smart Direct so that all calls to his office were listed on the BT account as he had to pay for each and every diversion as per the instructions attached to his letter. There was no telephone equipment at the office for the particular number so all calls were diverted by this system. He provided a redacted copy of his BT telephone account showing calls on 29 April 2010 and on the day before and the day after the alleged call. The maximum length of the call was three minutes and 20 seconds. There was no call recorded of 13 minutes as per the attendance note dated 29 April 2010.

25. The question of the alleged telephone attendance note was raised with the Respondent's firm. In a letter of 8 July 2011, the Respondent's firm stated:

> "Firstly I should point out that the file of papers which I obtained contains the attendance note dated 28 April 2011 to which I have referred. I have asked [the Respondent] about the attendance note and he is adamant that he had a telephone conversation with Mr [G] and that that telephone conversation was as detailed within the context of that attendance note. What I am not, however, in a position to confirm beyond doubt is the actual date upon which the attendance took place nor the timing of it.
>
> With regards to the date of the attendance note I am afraid that on previous reviews I have frequently found that the Respondent fails to properly record on tape the day upon which a telephone conversation is made. That is to say that he will dictate a note of a telephone conversation and that dictated tape will be placed with a series of tapes ready for typing but unfortunately he does not necessarily date the tapes. We then have a situation that when the tape is typed it is unclear the exact date upon which the telephone conversation took place. In this case it would be entirely possible that the telephone conversation took place either on the 29th April 2010 or sometime thereafter. It is likely that the secretary who subsequently typed the attendance note dated the attendance note the 29th April 2010 because that attendance note referred to returning Mr [G's] call which was received on the 29th April 2010 and I enclose a copy of the telephone message recording which was taken by the reception staff on that date. I appreciate that this is not ideal however it is

> entirely possible that the conversation took place either on the 29th April 2010 or possibly sometime thereafter.
>
> With regards to timings, of course, we record times in units generally of 6 minutes. I anticipate that the attendance note has a slight mistake in that it should read 12 minutes but this is generally taken to relate to any conversation which in effect lasted longer than 6 minutes. Therefore [the Respondent] has recorded a slightly longer than standard telephone conversation but it may not necessarily have last [sic] for a period of 12 minutes.…"

26. The telephone message note recording Dr G's call to the firm was timed at 1439 on 29 April 2010 and the box "Please call back" was ticked.

27. The Respondent's firm also indicated in the 8 July 2011 letter that it would obtain the firm's telephone records and revert to the Applicant.

28. A further response from the firm was submitted on 29 July 2011, stating:

> "I have spoken in detail to [the Respondent] about this matter. [The Respondent] is adamant that the conversation with Mr [G] took place and that that conversation took place on or after the 29th April 2010…"

29. Further correspondence passed between the Applicant and the Respondent's firm regarding telephone records on 24 and 26 August; 30 September and 10 October 2011 which established that it was not possible to produce records from the telephone provider to the Respondent's firm for telephone calls which cost less than 50p.

30. The matter was referred to an Adjudicator whose decision of 13 January 2012 referred to the allegation that:

> "[The Respondent] fabricated an attendance note which was submitted to the Solicitors Regulation Authority as evidence to support his position that a telephone call had taken place with Dr [G] on 29 April 2010…"

The Adjudicator stated:

> "The telephone records being relied upon are indicative of the veracity of the allegation that is made and in the absence of any cogent documentary evidence having been produced to corroborate [the Respondent's] position, and taking into account that he has now retracted some of the assertions he made previously, and cast doubt upon whether his own telephone attendance note can safely be relied upon as an accurate contemporaneous note, I am satisfied that the balance of the evidence satisfies the evidential test for making a referral to the Solicitors Disciplinary Tribunal."

31. By letter dated 17 January 2012, addressed to the Respondent at the firm marked "Private & Confidential" the Applicant notified the Respondent that the Adjudicator had decided to refer his conduct to the Tribunal.

Witnesses

Dr Roger Goulden

32. Dr Roger Goulden gave evidence. He confirmed the truth of his witness statement dated 22 June 2012. He had been an expert witness since 1985 and had never made a complaint to the Applicant that he recalled before his letter of 31 August 2010 about the Respondent. He had been concerned about the passage in the Respondent's letter of 14 June 2010 about the possibility of receiving further cases from the Respondent's firm because he considered that the satisfaction of the particular client had nothing to do with further work being sent to him. He had also considered the statement in the Respondent's letter of 26 August 2010 that the Respondent would recount his experiences with the witness to other lawyers as being inappropriate and unprofessional. The witness's purpose in making the complaint was that he felt that these matters should be brought to the Applicant's attention.

33. The witness confirmed the accuracy of the chain of events which followed his complaint. He knew the telephone conversation of 29 April 2010 had never taken place and so he made an investigation into his telephone records. They confirmed that there was no 13 minute call on that date. There were no landlines at the premises which he had moved into in 2004 and he only worked there occasionally and not at fixed times, hence his using the call diversion system. It recorded the duration and time of telephone calls passed onto his chosen number(s) but did not identify or log the incoming call. The longest telephone call directed to him on 28 April 2010 had lasted three minutes and 20 seconds. The witness confirmed that he tried to telephone the Respondent as invited in the letter but the Respondent was out and so the witness left a message. The witness had referred to the Respondent's failure to respond to his telephone call in his letter to the Respondent of 29 April 2010. As to the speed with which the witness had sent his letter of 29 April on the same day as his unsuccessful call to the Respondent, the witness explained that this was a discipline which he had; he tried to deal on the day. When the Respondent's letter of 26 April 2010 came to hand it was an active file on the witness's desk. Having written the letter he would put the file away until the next step was required. It was put to the witness that in his statement, the Respondent said that he had not received the witness's letter of 29 April 2010. As to whether there was a reference to the 29 April letter in correspondence from the Respondent on the witness's file, the witness had received a letter dated 17 May 2010 from the Respondent which said:

> "Thank you for your recent letter. I will have to seek my client's instructions and revert thereafter."

34. The witness stated that there was no letter from the Respondent between the witness's letter of 29 April 2010 and this letter of 17 May 2010. He confirmed that the reference in his letter dated 18 June 2010 to his calling the Respondent's office on 29 April 2009 was a typographical error; it should have read "2010". The witness confirmed that he had telephoned the Respondent's office on two occasions and left messages which were not returned. (In his statement he said:

> "I have telephoned his office on two occasions (29 April 2010 and between 15 and 18 June 2010) and left messages for him to return my calls but he never did.")

35. The witness confirmed that he had experience of solicitors engaging in communication after he had sent out a report. He did receive requests to look again at reports if there was extra data. He denied that he had been aggrieved by the Respondent raising issues about the report. As soon as he looked at the Respondent's letter of 26 April 2010, it was quite clear that none of it would change his opinion in any way. The witness had experienced this scenario before, where clients wanted every little thing clarified. If he had to answer all these questions, it would take some period of time. That was what he had in mind when he had picked up the telephone on 29 April 2010 to speak to the Respondent. These were a lay person's questions and frankly were wrong. The witness was an independent expert and it was of no consequence to him if clients were disappointed because they were not hearing what they wanted to hear. It was the solicitor's job to explain to the client the role of the expert witness. The witness rejected the suggestion that he had previously been approached about mutually beneficial arrangements; he had had instructing solicitors say that they were grateful for his work and hoped they would do further business together. He agreed that the Respondent's letter could have been a clumsy way of making a gesture of goodwill but then the Respondent had referred to dealing with the matter to the satisfaction of the Respondent's client. The witness was not sure that this could be meant as a tactful way of dealing with the client's concerns. He felt it was difficult to take that paragraph (about future work) in isolation. The witness was referred to the Respondent's letter of 28 August 2010 when the Respondent had said:

> "I am extremely concerned as to the tone of your recent letter, the manner in which you have dealt with the queries…"

The witness was not sure he could agree that the letter had a tone of frustration at his refusal to amend the report. He accepted that there was the question of his fees which until that point had not been paid and there had been parallel correspondence about that. However the witness could not see any reason for the Respondent to write in such terms unless it was intended to be derogatory when he said that he would recount his experiences with the witness. The witness left it to the OSS to make up their minds. He agreed that the intention of his initial complaint had been to bring the matter to the regulator's attention. He denied that he was angry because he felt that his integrity had been impugned; as an expert witness he had had the experience of someone threatening to blow up his surgery. These things were "water off a duck's back" to him. The witness agreed that having regard to his expressed intention in bringing the complaint, on one interpretation it was a satisfactory outcome when the regulator closed their file but their letter then brought into the picture the matter of the telephone attendance note and this raised another and far more serious issue. The matter of the telephone call was very important to the witness because the note said that he would amend his report if he was paid more money. He was very unhappy about this. The issue was personal to him. He could not comment on the letter at JJ7 from the client. The witness agreed that mistakes could always occur but in this instance and he stated that he was aware that he was on oath, the telephone conversation did not take place; he did not know what the Respondent's voice was like; and he did not know what the Respondent looked like although he could guess

which of the people in the courtroom he was. The witness stated that he had never spoken to the Respondent in his life. If the telephone conversation had taken place on 29 April 2010, why on earth would he the witness have written his letter of that day; why was the telephone conversation never referred to in correspondence. If roles were reversed, the witness would have mentioned it in letters; there was no record of it whatsoever. The witness did not have to remember the telephone conversation because it never took place. He would never say "Give me £190 to amend the report". That would never happen. As to whether the telephone records which he had produced could be erroneous, the witness stated that nothing was impossible but the provider seemed to be assiduous when it came to charging. There was no limit below which a redirected call was not recorded. He could not swear that some external factor such as a power cut could not undermine the validity of the records. The witness confirmed that apart from occasional delays in receiving post and the problems during the national postal strike in October 2009 to which the Respondent had referred in his witness statement when he said that the witness had not received his first letter of 25 September 2009 inviting him to prepare a report on this client, the witness had not encountered any other postal problems.

Ms Wendy Preedy

36. Ms Wendy Preedy gave evidence. She stated that she was an office manager who had worked at the firm for the period October 2005 to December 2010. The witness explained that she had left the firm because she had been headhunted for another position, a promotion. Her contacts with the firm since leaving have been to visit a couple of times to see staff. While working at the firm the witness had been the Respondent's personal secretary. She confirmed that the Respondent had asked her to go back to the firm in October 2012 as he wished to show her something in the case of Ms C. She had been more than happy to go in to assist the Respondent. When she did so, he explained to her that a complaint had been made against him about a telephone note which she showed her. The witness confirmed that when she went to see the Respondent on 25 October 2012 she had looked at the telephone attendance note which she had typed and the Respondent had checked on its properties in front of her. During her October visit to the firm, the Respondent had showed her the screenshot and she took the Tribunal through it. The witness recalled Ms C's file because it related to dental treatment and she could not stand visiting the dentists. Ms C's experience had been harrowing and the witness felt that what Ms C had gone through had had a big impact on her life; she had felt sorry for this client. She recalled that there were a lot of medical notes on file particularly the initial attendance notes in which the client went into a lot of detail. The witness recalled that she had typed a long letter to what she described as the "new expert" because there had been a lot of factual errors in the report. The witness apologised for the fact that she had come into the case very late in the day as she had had personal difficulties to which she had to give priority but she did want to do the right thing with the Respondent. The witness had drafted a document in mid-November 2012 but the only computer to which she had access at home had broken. She had come because she appreciated that the allegations against the Respondent were very serious.

37. The witness explained that at the material time she used to type five, six or seven tapes a day and they could have a backlog of 20 tapes at a time, usually of some four days but particular matters might jump the queue for example if there was a hearing

coming up. She could not say whether this particular attendance note would have been treated as urgent; it might depend what else was on the tape. In terms of trying to ascertain when the telephone call to which the note related had taken place, the witness thought that it had been probably a day or two before the note was typed. She would have dated it 29 April 2010 if no date was given at the beginning of the document and taken 13 minutes as the time engaged from the tape. The witness remembered having had a conversation with the Respondent about the telephone call in question. She recalled the Respondent as someone who was very calm and great to work for; he never got uptight and she remembered that he had been uptight when he told her about the telephone conversation and she also remembered because the client had tried to find money for the initial expert's report and now she would have to find more money to fund correction of the report.

38. The witness confirmed her understanding of how the firm's computer system worked; when she opened the document she would save it immediately generating the date the document was created and when she finally saved it having completed typing it, there would be another time noted. The witness believed that only someone who had the access rights of an Administrator could change the date and time. As to how the Tribunal could know that the screenshot related to Ms C, her address was shown at the top and her file reference 7790. The witness accepted that if she had typed the telephone attendance note she would not actually know if the call had taken place; she would not witness every single one of the Respondent's telephone calls.

The Respondent's witness evidence

39. The Respondent explained that he was in partnership with an individual who had been a school friend since age five; they now had four offices and employed 70 people. In respect of the accuracy of his witness statement, the Respondent now accepted that he had received Dr G's letter of 29 April 2010 (which he had stated he did not receive on the basis that he always replied to Dr G's letters expeditiously.) When he had dictated his letter of 17 May 2010, the letter of 29 April had probably been retained in another office as typing was done wherever there was capacity.

40. The Respondent had not thought it appropriate to deal with the complaint from Dr G to the Applicant; his partner EP dealt with complaints. The Respondent sent the file to EP who went through it and if EP asked questions, the Respondent replied. The file included the disputed attendance note. He did not specifically recall discussions regarding it, but EP might have said there was a dispute over the document and the Respondent would have responded. The Respondent stated that he had had very little to do with the regulator and his view of the Applicant was one of fear as was that of all solicitors. He believed that if he misled the Applicant he would end up before the Tribunal and be struck off the Roll. In respect of the Applicant's letter of 16 November 2011 which was addressed "Private and Confidential" to the Respondent at the firm, the Respondent stated that as it was from the Applicant, it automatically went to EP. As to the Respondent's letter of 10 December 2011 when he had written in response to the Applicant's letter of 1 December 2011, where he had said that EP was dealing with the matter and referred to issues about his mother's health and that he would liaise with EP, he had left the matter to EP as he was better at dealing with it and he left it to EP's discretion. The Respondent did not recall the Adjudicator's decision of 13 January 2012 or the letter from the Applicant addressed

to him by name marked "Private and Confidential" of 17 January 2012 enclosing the Adjudicator's decision; He had no doubt that EP had dealt throughout. The Respondent did not dispute that he had taken no action in respect of these serious allegations between November 2011 and January 2012. At the time EP had said just to leave everything with him and then he said that the only way to deal with it was for the Respondent to give evidence and the Respondent relied on what he said. It was partly a matter of friendship.

41. The Respondent emphasised that he would never ask an expert to change their opinion or prognosis. He had been intending to strike up a relationship with Dr G because it was difficult finding an expert dental practitioner. He had been recommended to Dr G as he had set out in his witness statement. The client had been concerned that there were major factual errors in the report not necessarily about prognosis or opinion. The Respondent invited her to annotate the report and this was the basis of his letter to Dr G of 26 April 2010. It was put to the Respondent that he had invited Dr G to call him in his letter of 26 April 2010 and that the internal log recorded that Dr G had done so on 29 April 2010 and the telephone message note was recorded at 1439 on that day. He was invited to explain how his, the Respondent's telephone call recorded in the disputed attendance note, tied up with that. Based on the screenshot the Respondent replied that he guessed that his own call had taken place before Dr G's. The screenshot recorded that the note was created at 1316 and so that had to be the case. The Respondent stated that it could have been on 27 or 28 April that he spoke to Dr G but he did not know if it had been 29 April. He had spoken to Dr G before Dr G wrote his letter of 29 April 2010. As to Dr G saying in that letter that the Respondent had not followed up his message left at the firm, the Respondent stated that Dr G was referring to the message that Dr G had left at 1439 on 29 April when there was just over two hours of the working day left. As to why Dr G would call him this second time, the Respondent stated that the attendance note did not give the full details; it was not verbatim. In the earlier conversation, he would have asked Dr G to reconsider the proposed charge of £190 per hour. The Respondent could not recall exactly what he had said, probably that this was a bit steep; he probably asked Dr G to reconsider and said that he would get back to the client. It was put to him that this account of events was not consistent with the file. The Respondent stated that based on the file note and his recollection, Dr G had called him earlier and that Dr G's records did not say when, but there had been two telephone calls. The Respondent had not been happy after the telephone call; he liked to think he was a fairly even tempered person but he had gone to his secretary and told her that Dr G wanted £190 an hour to rectify factual errors in the report. The witness was not then speaking in the even tones which he was employing in the hearing. It was also put the Respondent that there was nothing in the telephone note referring to the fact that he had been annoyed after he had spoken to Dr G and the Respondent replied that he would not put that in a telephone note. It was put to the Respondent his memory was selective; he could remember things from years ago when he was working with three secretaries but in his witness statement he relied on an inaccurate file, which was missing Dr G's 29 April 2010 letter.

42. The Respondent denied that he had fabricated the disputed file note when he received the complaint from the Applicant to deflect attention away from the allegation of inappropriate behaviour. He was absolutely sure that the conversation took place. He believed that there was ample evidence to disprove the allegations. His former

secretary would attest that they had discussed the telephone call and he had discussed it with the client on 8 June 2010 and he referred the Tribunal to an attendance note of that date. It bore the client's file reference 7790. He confirmed that his approach to recording time was to include all work done around a telephone call. He could not say that he had dictated the telephone attendance note straightaway; it could have been when he put the file away. He did not type his own file notes. The Respondent accepted that he had nothing to support his contention about the date he spoke to Dr G. The firm's telephone records were useless in terms of identifying the details. Dr G's records did not indicate where a call came from. He had been through these matters with EP before coming to the Tribunal. They had worked out that the call had taken some one minute 20 or one minute 30 seconds. He realised that he had been stupid not to record time worked in units.

43. As to the Respondent referring in his witness statement to receiving a document without an accompanying letter on 2 June 2010 indicating that payment was outstanding, the Respondent stated that there seemed to be a bit of a hiatus. There was only correspondence when he had seen the client and then he wrote his response to Dr G. He could not pay Dr G because he did not have the client's instructions.

44. Having regard to the screenshot, the Respondent stated that it was impossible to alter the computer as Word showed a date and time 1316 for the creation of the document and the time of its completion on 29 April 2010. It took one minute 14 seconds to type. As the document was held on a networked computer system, the date and time could not be altered. The copy before the Tribunal did not show the full file reference but did record an address, the date and a description "TELEPHONE NOTE". It had been accessed on 11 January 2013 (to produce a copy for the witness statement). Its late production arose because EP did not realise that a screenshot could be produced. As to why there were matters in his recent witness statement which had not been heard before, the Respondent stated that when the matter had been passed to him by EP, he the Respondent realised that he could obtain a screenshot.

Findings of Fact and Law

45. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondent's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

(The submissions recorded below include those made orally at the hearing and those in the documents.)

46. **Allegation 1.1: He [the Respondent] permitted and/or caused a false representation to be made to the Solicitors Regulation Authority ("SRA") on his behalf by letter dated 3 March 2011 and in subsequent correspondence to the effect that a telephone conversation had taken place with an expert witness on 29 April 2010 in breach of Rules 1.02 and 1.06 of the Solicitors Code of Conduct 2007 ("the Code").**

46.1 For the Applicant, Ms Willetts submitted that a statement had been made to the Applicant in the firm's letter of 3 March 2011 on the Respondent's behalf that the

disputed telephone call had taken place and the attendance note was produced in support of that statement. Ms Willetts submitted that this constituted a breach of Rule 1.02 relating to integrity and 1.06 relating to the reputation of the profession. The false representation had been repeated on the Respondent's behalf in the firm's letters of 8 July 2011 and 29 July 2011, both of which asserted that the Respondent was adamant that the telephone conversation had taken place. Ms Willetts relied on the evidence of Dr G that no such telephone conversation had taken place and that he had never spoken to the Respondent on the telephone. She submitted that this was corroborated by the documentary evidence. Dr G's letter of 29 April 2010 to the Respondent began:

> "Thank you for your letter of April 26th. As you suggested I did telephone your office, but you did not follow up the message I left with your secretary…"

This was a contemporaneous letter sent before the telephone attendance note had been seen or produced. In a letter dated 18 June 2010, Dr G had written:

> "Thank you for your letter of June 14th and as suggested I again tried to contact you direct to discuss this matter, but as was the case when I called your office on 29.4.09 [2010], you were not available, and did not follow up the message I left for you."

46.2 Ms Willetts also referred the Tribunal to the Respondent's letter of 14 June 2010 to Dr G quoted in the background to this judgment. Dr G was concerned that the last paragraph could be construed as an inducement to amend his expert report:

> "On a positive note, we have been looking for a consultant dental surgeon to deal with clinical negligence cases and we would prefer if we could enter into a mutually beneficial relationship so that in future we can refer cases to you. Obviously, we would wish that the initial case that was sent to you was dealt with to the satisfaction of our client."

When looked at together with the telephone note which was in dispute, it was submitted that the Applicant in dealing with the complaint felt that Dr G's concerns were diluted on the basis that the possibility of further work had already been discussed on 29 April 2010 before the Respondent's letter of 14 June 2010 was written. It was noteworthy that the letter of 14 June did not refer back to the earlier alleged telephone conversation on 29 April. The other letter that Dr G was concerned about was that of 26 August 2010, in which the Respondent had said:

> "I confirm that my company will not use your services in the future and I will be recounting my experiences with you to all of my local solicitors and barristers especially when I attend upon Court."

The two letters of 14 June and 26 August 2010 from the Respondent to Dr G caused Dr G to make his complaint to the Applicant by his letter of 31 August 2010. Dr G had felt under pressure to amend his report and that he had been offered an inducement. He further felt that it was appropriate for the situation to be investigated.

46.3 Ms Willetts relied on what she submitted was the false representation which the Respondent had caused EP to make in the letter of 3 March 2011 with which EP enclosed the disputed telephone attendance note. Ms Willetts submitted that it appeared that the explanations given in writing to the Applicant by EP were confirmed by the Respondent. Ms Willetts emphasised that the Applicant did not make any allegation of a conspiracy between the Respondent and EP rather that the Respondent had passed information to EP and he had relied on it. In EP's letter of 8 July 2011, he said that he had asked the Respondent about the attendance note and that he was adamant that he had a telephone conversation with Dr G and that it was as detailed within the context of the attendance note. The Applicant attached particular importance to EP's letter of 29 July 2011, the third letter to the Applicant, where EP said:

> "I have spoken in detail to [the Respondent] about this matter. [The Respondent] is adamant that the conversation with Mr G took place and that that conversation took place on or after 29 April 2010."

46.4 Ms Willetts submitted that this was not what the Respondent had said in evidence during this hearing. He now said that the telephone conversation took place before 29 April 2010. Subsequently the Respondent changed his version of events as he was challenged by recollection and documentary evidence. As a solicitor and Officer of the Court he had a duty of utmost good faith in all his professional dealings including with the Applicant his regulator. Ms Willetts also referred to the screenshot regarding the preparation of the disputed attendance note; she reminded the Tribunal that it was not produced with expert evidence to authenticate it and she again cautioned the Tribunal in relying on it.

46.5 Ms Willetts reminded the Tribunal that dishonesty was alleged in respect of this allegation. It was submitted that the Respondent acted dishonestly in permitting and/or causing his firm to make a false representation to the Applicant that he had spoken by telephone to Dr G on 29 April 2010 both by letter dated 3 March 2011 and in subsequent correspondence to the Applicant. Having regard to the test for dishonesty in Twinsectra Ltd v Yardley 2002 UKHL 12 reinforced in respect of Tribunal proceedings in Bryant and Bench v the Law Society [2007] EWHC 3043 (Admin), it was submitted that viewed objectively making a false representation to the Applicant in any circumstances would be regarded as acting dishonestly. Viewed subjectively, the Respondent was aware that he had not spoken to Dr G by telephone not only from his recollection of events but also from the contemporaneous letters from Dr G dated 29 April 2010 and 18 June 2010. It was alleged that the Respondent took a conscious decision to invent a telephone conversation and that therefore he knew that what he was doing was dishonest. Ms Willetts submitted that having particular regard to the evidence including that of Dr G, the Tribunal would come to the conclusion that the Respondent did not speak to Dr G by telephone and if that was the case the only conclusion on the evidence was that he must have invented the telephone conversation to refute or defend the original complaint against him by the Applicant arising out of Dr G's letter of 31 August 2010.

46.6 For the Respondent, Mr Edwards admitted that the Respondent's denial that the telephone conversation in question never took place was in no way intended to impugn the honesty or reputation of Dr G, a professional man and it was accepted that

the documentation seemed to back up Dr G's assertions. The Respondent presented an entirely different picture and had always been adamant that the conversation took place as reported in the terms of the telephone attendance note which Mr Edwards admitted was good documentary evidence in support of it. He also relied on the evidence of the screenshot and the evidence of Ms P who recalled typing the note. The Tribunal had the sworn evidence of two defence witnesses. Dr G was a very busy man and these events took place several years ago; Mr Edwards submitted that he might be mistaken. In respect of Dr G's telephone records, Mr Edwards submitted that even the best designed systems could fail and disruptions could occur. Mr Edwards submitted that if the Tribunal accepted Dr G's evidence then it needed to decide whether the Respondent had allowed his partner to make misrepresentations to the Applicant and if so one would expect EP to be here as a witness or as another Respondent. Mr Edwards could not imagine that a solicitor would have truck with correspondence to his regulator that he believed to be false. The Respondent had said that everyone was scared of the Applicant and this was not the view of someone who fabricated something he knew to be false. It would also involve telling a deliberate lie to a partner whom he had known for many years. The Tribunal had to decide whether it believed that the situation described here for the Applicant really did occur.

46.7 Mr Edwards reminded the Tribunal that they did not have to find dishonesty proved even if they found the allegations proved. He also referred to the two limbed test for dishonesty in Twinsectra and referred the Tribunal to two articles about the case of Solicitors Regulation Authority v Smith and Parsonage and Another [2012] EWHC 1519 (Admin) and the need for the Tribunal to be really sure that both limbs of the test for dishonesty had been satisfied. He submitted that dishonesty could not properly be said to have been found in this case. Mr Edwards also referred to a bundle of testimonials submitted on behalf of the Respondent which went to his professional good character. The Respondent had never been before the Tribunal before and was not aware of any adverse findings against him with the Applicant although there had been correspondence about service complaints. The Respondent took pride in how he and EP had made something out of very little in terms of the firm. The majority of his work came from recommendations and he did not engage with referral fees. If there was doubt, he was entitled to the benefit of it. No dishonesty had ever taken place. Mr Edwards submitted that serious and deliberate dishonesty was alleged but the Applicant's case did not evidence or support that. There was a question as to why the Respondent would approach the situation in the way alleged in the first place. He had everything to lose and he had explained his position on oath. Mr Edwards submitted that the whole question of the disputed telephone call and the telephone attendance note and the allegation of dishonesty had to involve an element of conspiracy. The track record of EP suggested that he was not a fool and he would treat correspondence from the Applicant with diligence and ensure what he wrote was accurate. Mr Edwards asserted that any solicitor who had to deal with the Applicant was more likely to be accurate than they would be in respect of routine matters. All this cast doubt on the allegation that the Respondent had produced an inaccurate file record and had presented it to the Applicant. If there was any doubt then the Respondent was entitled to the benefit of it. Mr Edwards submitted that Ms Willetts could not fairly be said to have proved the allegations she raised. He asked the Tribunal to direct their minds to what the witnesses had said and submitted that what they said was cogent and believable; it was an accurate record of what had happened. He referred the Tribunal to the demeanour of the witnesses in unfamiliar surroundings which he

submitted said a lot about their approach to the task and their motives. Dr G was a man of integrity who came to assist the Tribunal because he wanted to and because he felt aggrieved because the dispute had taken place between him and the Respondent. Mr Edwards did not question that Dr G had a sincere belief about what had happened but submitted that a mistaken or a forgetful witness could be very convincing. The Respondent had chosen to give evidence, even though it was up to the Applicant to prove the case, because he wanted to give his version and put matters straight. He accepted with the benefit of hindsight that a different approach might have been taken. He gave evidence in good faith and to the best of his ability and Mr Edwards submitted that his evidence must create a sufficient doubt whether the allegations were true. Mr Edwards commended the evidence of Ms P to the Tribunal; she had told the Tribunal about how the practice operated and what she did for the Respondent as well as why she remembered events so well. She attended very quickly when requested to do so and agreed to give a witness statement realising that she would be challenged by cross-examination. She was aware of the serious consequences if it were ever shown that what she had said was a pack of lies. In the midst of the personal problems which she had described, she had to decide whether to become involved in this matter. Mr Edwards submitted that she would not have become involved unless she was sure that she was recalling the facts accurately. The value of her evidence was crucial and if taken together with other evidence must lead the Tribunal to doubt the Applicant's case.

46.8 The Tribunal had considered the submissions for the Applicant and the Respondent, the evidence of the Respondent, Dr G, and Ms P and the testimonials as to the Respondent's good character. As to the evidence of Dr G, he had testified that the telephone conversation had never taken place. Dr G, who the Tribunal considered was a compelling and convincing and completely honest witness, was certain not only that he had not spoken to the Respondent on any of the dates in April 2010 suggested by the Respondent but had never done so in his life. The Tribunal was aware that it did not necessarily follow from the certainty of Dr G's evidence that he was right. The Tribunal did not accept that the telephone record provided by Dr G was irrefutable. It was subject to technical failure. However while not conclusive of itself, the log contributed to the overall picture. The correspondence and Dr G's telephone records were consistent with his oral evidence and witness statement. Although Dr G might have reason to be angry with the Respondent in that his report had been criticised and his bill had not been paid promptly, the Tribunal considered from his oral evidence that he would have accepted the Applicant closing the complaint file and would not have pursued the matter if he had not been provided with the disputed telephone attendance note. Dr G's motives had not been substantively challenged; he was seeking to protect his good name from what he viewed as assaults on his integrity by way of inducement and the Tribunal was satisfied that this was why he had pursued the complaint. Although the events had taken place over two years ago, there was no indication in Dr G's evidence that he was confused about what had happened.

46.9 The Tribunal considered the chain of correspondence. The Respondent's letter of 26 April 2010 had suggested that Dr G telephone him; he said:

> "Perhaps it might be appropriate if you would like to contact me to discuss this matter and I await to hear from you at your earliest convenience."

That was what Dr G testified had happened; he had tried to telephone the Respondent on 29 April 2010. It was not disputed that as set out in his witness statement and confirmed in his oral evidence, Dr G had made a telephone call to the firm, had spoken to a member of the administrative staff at 1439 on 29 April 2010 and left a message for the Respondent to return his call as the firm's records showed. (Document JJ2 the incoming telephone message timed at 1439 and document JJ3 dated 29 April 2010 both recorded an incoming call from Dr G and the second document showed that it was after 1425 (the time recorded against an earlier incoming call from another individual). Dr G said that he thought that he had made two calls to the Respondent during the matter; in his witness statement he said that:

> "I have telephoned his office on two occasions (29 April 2010 and between 15 and 18 June 2010)…"

His witness statement also referred to the Respondent not returning his 29 April call as being further evidenced by his letter of 18 June in which he stated:

> "Thank you for your letter of June 14th and as suggested I again tried to contact you direct to discuss this matter, but as was the case, when I called your office on 29 April 2009 [2010] you were not available, and did not follow up the message I left for you."

The Respondent now said that the entry in the firm's log recording Dr G's call referred to Dr G calling further to an earlier call from the Respondent to which the attendance note related and that explained the time difference between the record of the telephone call coming in at 1439 and the timing on the screenshot of 1316 for the creation of the attendance note.

46.10 The Respondent had given evidence. His defence changed throughout from the position in the original letter of 3 March 2011 sent by EP to a quite separate position. EP had stated in his letters to the Applicant that he had liaised with the Respondent and the Respondent did not deny that. The Tribunal had particularly noted that in the letter of 3 March 2011, EP said:

> "I have of course needed to investigate the matter and speak to [the Respondent] about the same."

The reference to speaking to the Respondent was not just made once but repeated in the letters of 8 July 2011 and 29 July 2011; both referred to conversations taking place with the Respondent before EP wrote the letters. The Tribunal noted that EP had not been called but did not draw any inferences or conclusions from that fact. The Respondent had originally said via EP's letter of 8 July 2011 that he was adamant that the telephone call took place and because of his approach to recording matters:

> "It would be entirely possible that the telephone conversation took place either on the 29th April 2010 or sometime thereafter."

and

> "…however it is entirely possible that the conversation took place either on the 29th April 2010 or possibly thereafter."

46.11 In his letter of 29 July 2011, EP said that the Respondent was "adamant" that the telephone call had been made "on or after 29th April 2010". The Respondent maintained this account until the beginning of the hearing. Now he said that the telephone conversation had taken place on 27 or 28 April or less probably on 29 April 2010. This undermined his credibility as a witness. As the Tribunal understood the Respondent's version of events in evidence, he said that Dr G rang him before 29 April 2010 but after the Respondent's letter of 26 April 2010; the Respondent rang Dr G back on 27 or 28 April and then Dr G rang back again on 29 April 2010. The Tribunal agreed with Ms Willetts that it was hard to see why, if the Respondent was taking his client's instructions after the first of these alleged conversations, Dr G would phone him back rather than the Respondent reverting to Dr G. The Tribunal had had no expert IT evidence but the Respondent had introduced the screenshot and the Tribunal felt entitled to take into account its timing at 1316. If the note were genuine then it could not have been created until after a conversation had taken place on the telephone between the Respondent and Dr G. Although at one time he had raised doubt as to whether he had received Dr G's letter of 29 April 2010, the Respondent now accepted that he had, but that it had been left in another of the firm's branch offices where his typing had been done. The Respondent's 17 May 2010 letter produced by the Applicant shortly before the hearing and not disputed by the Respondent did not refer to any telephone conversation taking place. The Respondent wrote to Dr G on 17 May 2010, saying:

> "Thank you for your recent letter. I will have to seek my client's instructions and revert thereafter."

The Tribunal found as a fact that this letter was a reply to Dr G's letter of 29 April 2010. On 14 June 2010, the Respondent wrote to Dr G beginning:

> "Further to the above matter, we have now had the opportunity to take our client's further instructions. "

The letter went on to refer to the fact that Dr G wished to charge in respect of amendments to the report, Dr G having mention this in his letter of 29 April. Again this letter from the Respondent made no mention of any telephone conversation. The Respondent did not deny writing the 14 June 2010 letter.

If the Respondent's account of the sequence of events was accurate, it meant that when Dr G wrote his letter on 29 April 2010, he had already had a conversation with the Respondent but he did not refer to it. The Respondent was unable to provide any telephone evidence. The Tribunal did not attribute any great weight to the letter from the client at JJ7; she could not attest to the telephone conversation taking place.

46.12 The Tribunal considered the evidence of Ms P. It was clear that she was a good honest witness. Ms P had not witnessed any telephone conversation between the Respondent and Dr G taking place as she freely admitted. Ms P could not attest to the date when her own conversation with the Respondent took place. The Tribunal did not dismiss the possibility that the Respondent and Ms P had a conversation about Dr G's

approach to the Respondent's request that he amend the report but was not convinced that it related to the disputed telephone conversation.

46.13 The Tribunal found the Respondent's evidence to be muddled and unconvincing. The Tribunal considered that the chain of correspondence between Dr G and the Respondent was clear, containing no references to any telephone conversations between them. The Respondent had not denied in evidence that he had spoken to EP as set out in the various letters from EP to the Applicant. The overwhelming weight of the evidence against the Respondent was such that the Tribunal found that no telephone conversation had taken place between the Respondent and Dr G. The Tribunal also found that the Respondent had on his own evidence permitted and/or caused a false representation to be made to the Applicant on his behalf by the letter dated 3 March 2011 and in subsequent correspondence and that in so doing had breached the Code as alleged. Accordingly the Tribunal found allegation 1.1 proved.

46.14 The Tribunal then went on to consider whether the Applicant had proved its case on dishonesty according to the two limbed test, to the required standard. The Tribunal considered the testimonials as to the Respondent's honesty. In arriving at its determination the Tribunal had had regard to the case of Solicitors Regulation Authority v Smith and Parsonage and the importance of applying both limbs of the test in Twinsectra Ltd v Yardley. The Tribunal considered that if the telephone conversation with Dr G recorded in the disputed telephone attendance note did not take place and the Respondent caused or permitted a false representation about a non-existent telephone call to be made to the Applicant, then by the standards of reasonable and honest people he had acted dishonestly. The Respondent knew that what he was doing by those standards in respect of a false representation was dishonest and that the subjective test was also satisfied. The Tribunal therefore found dishonesty proved to the required standard in respect of allegation 1.1.

47. **Allegation 1.2: He [the Respondent] fabricated an attendance note to evidence the alleged telephone conversation in breach of Rules 1.02 and 1.06 of the Code.**

47.1 For the Applicant, Ms Willetts submitted that if the Tribunal was satisfied that the telephone call in issue did not take place, then the attendance note could not be genuine and was created by the Respondent. The only person to benefit from such a misrepresentation would be the Respondent who sought to deflect attention from Dr G's complaint by providing documentary evidence of the alleged telephone conversation. The attendance note took his defence to a higher level and strengthened his refutation of the complaint; it was so powerful that the Applicant closed its file. The Respondent had convinced the Applicant but not Dr G, who knew that he had never spoken to the Respondent. Ms Willetts submitted that objectively, fabricating an attendance note or indeed any document would be regarded as acting dishonestly and that the Respondent had so acted in fabricating the attendance note dated 29 April 2010. In order to find dishonesty, the Tribunal also needed to be satisfied in respect of both allegation 1.1 and allegation 1.2 that the Respondent took a conscious decision to strengthen the evidence and that therefore he knew that what he was doing was dishonest.

47.2 For the Respondent, Mr Edwards submitted that Dr G could not give evidence of what had happened at the offices of the firm. The Tribunal had heard the Respondent and

Ms P on that subject and had seen the screenshot. While for the Applicant, Ms Willets submitted that timings on the computer could be altered, the defence said otherwise. Ms P used the systems regularly. Mr Edwards submitted that the use of the screenshot was crucial in this case. He believed that in the criminal trial of Dr Shipman there had been expert evidence that the dates and times of medical records did not tally with computer records or screenshots. For Mr Edwards submissions in respect of dishonesty see allegation 1.1 above.

47.3 The Tribunal considered all the evidence including that of Ms P. It was clear that she was a good honest witness. Her account of office procedures made it possible with the backlogs and rate of typing that a note in respect of a telephone conversation on 27 April would not be typed until 29 April but there could be no certainty about that. She did not specifically recall typing the disputed note. The Tribunal noted that whilst the Respondent's statement said that the screenshot before the Tribunal at exhibit JJ4 was the one that he printed out in October 2012, this was not in fact the case; he had produced a later one in January 2013 because he had to revive Ms P's evidence following the delay caused by her personal difficulties. The Tribunal did not attach any significance to this. The Tribunal found the weight of evidence overwhelmingly against whatever note Ms P had typed on 29 April 2010, if the screenshot were accurate, relating to a telephone conversation between the Respondent and Dr G. The Tribunal had found already that the telephone conversation claimed in the attendance note had not occurred. It also found that the note of the conversation was fabricated by the Respondent and that in so doing he had breached the Code as alleged. The only inference to be drawn was that the Respondent had fabricated the note to enhance the refutation of the complaint against him. The Tribunal found allegation 1.2 proved.

47.4 As to dishonesty in respect of allegation 1.2, if the telephone conversation had not taken place and the Respondent nevertheless created the attendance note, his action would have been dishonest by the objective test. Fabricating an attendance note to evidence the call was dishonest and the nature of these acts was so clearly dishonest, this not being a grey area of any kind, that in carrying it out the Respondent realised that by those standards his conduct was dishonest. The Tribunal found dishonesty proved to the required standard in respect of allegation 1.2.

48. **Allegation 1.3: He [the Respondent] permitted and/or caused his firm to produce to the SRA an attendance note that was not an accurate record in breach of Rules 1.02 and 1.06 of the Code.**

48.1 Ms Willetts reminded the Tribunal that there was no allegation of dishonesty in respect of allegation 1.3. The firm initially stated on the Respondent's behalf that the telephone call in question took place on 29 April 2010. The Respondent now said that he could not be sure that it took place on that date and it was now not entirely clear when it was claimed that the telephone call took place. The telephone attendance note indicated that the telephone conversation took 13 minutes but this was an inaccurate representation because in correspondence from the firm on 8 July 2011, it was indicated that a slight mistake had been made in that the note should read 12 minutes and that that was taken to relate to any conversation which lasted longer than six minutes. The Respondent now said that the timing of 13 minutes could include reading the file and preparing for the conversation. In his witness statement he said:

> "I never note the time spent on the telephone call itself but the total time taken, as often I might review the file prior and after the call and therefore note the total time attended upon that particular phone call."

Ms Willetts submitted that on the Respondent's own admission, the attendance note was inaccurate regarding both the date and time of call. Both the public and clients were entitled to rely on documents produced by solicitors as being accurate records of what they stated. It was not a sufficient excuse to say that the date might or might not be correct. If the telephone call did not take place on 29 April 2010, the attendance note should not say that it did and it was damaging to the profession for inaccurate documents to be produced to the Applicant. Attendance notes were also records of time spent on files and if the file were costed, the file would have had an inaccurate record regarding the telephone call. While no allegation of dishonesty was made in respect of allegation 1.3, it was a significant matter for inaccurate attendance notes to be produced by a solicitor and damaging to the public interest and that of the client. The note was not contemporaneous, the date was inaccurate and the time spent on the call was inaccurate. Mr Edwards had said that there were two very different accounts of what happened. Ms Willetts submitted that the account from Dr G, backed up by documentary evidence and his telephone record, was logical, contemporaneous and consistent. The other account, that of the Respondent was illogical, did not fit with the documents on file or the order of events and sprinkled confusion around the Tribunal like confetti in an attempt to defend the allegations. The Respondent did not fulfil the standards of the profession in the evidence he gave. If the Tribunal found against the Applicant in respect of allegation is 1.1 and 1.2, the Applicant relied on allegation 1.3.

48.2 For the Respondent, Mr Edwards submitted that there was some overlap between this allegation and allegation 1.2 concerning fabricating the attendance note. It was most unlikely that the telephone attendance note had been fabricated on 29 April 2010 or at any other time if credence was attached to the evidence of Ms P and the screenshot. Ms P had attended voluntarily and had done so in spite of bad weather; she had no axe to grind and Mr Edwards submitted that weight should be attached to her evidence for those reasons. The partners in the firm had a close and trusting relationship; if the allegation was true then this could be seen as a conspiracy to produce records which were not quite right to a regulator which had Draconian powers.

48.3 The Tribunal had found allegations 1.1 and 1.2 proved including dishonesty in respect of both allegations. It considered that allegation 1.3 was essentially an alternative and therefore the Tribunal dismissed allegation 1.3.

Mitigation

49. Mr Edwards did not make any mitigation on behalf of the Respondent, as he submitted that he expected that the most serious sanction would follow based on the Tribunal's findings.

Previous disciplinary matters

50. None.

Sanction

51. The Tribunal having found dishonesty proved and having occurred over a period of time, determined that this case was not exceptional and that the Respondent should be struck off the Roll of Solicitors. Mr Edwards indicated that the Respondent intended to appeal and asked that the Tribunal suspend its order pending that appeal. He submitted that it was in everyone's interests that the matter be examined afresh. The Tribunal considered that dishonesty having been found proved, its obligation to protect the public made it inappropriate to suspend the order and refused the application.

Costs

52. For the Applicant, Ms Willetts applied for costs in the amount of £13,908.78. Mr Edwards conceded that this had been a lengthy hearing but submitted that the Rule 5 Statement was short and that a lot of correspondence and paperwork had been generated by the Applicant. His own costs were less than half that of the Applicant and his hourly rate was higher than that of Ms Willetts. The Respondent's financial circumstances included that he drew around £25,000 from the firm per year and was the sole earner with the usual expenses that went with a family. His income would now cease. The Tribunal assessed the costs summarily in the amount sought but having regard to the fact that his livelihood was now to be removed it ordered that costs should not be enforced against the Respondent without leave of the Tribunal.

Statement of Full Order

53. The Tribunal Ordered that the Respondent John James, Solicitor, be Struck Off the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £13,908.78 not to be enforced without leave of the Tribunal.

Dated this 26th day of February 2013
On behalf of the Tribunal

Mr R Nicholas
Chairman