SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11176-2013

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

RESPONDENT D Respondent

Before:

Mr D. Glass (in the chair)
Mr R. Nicholas
Mr M. Palayiwa

Date of Hearing: 10 February and 10 March 2014

Appearances

Ms Tetyana Nesterchuk, counsel, of Fountain Court Chambers, Fountain Court, Temple, London EC4Y 9DH instructed by Suzanne Jackson, legal adviser for the Solicitors Regulation Authority, The Cube, 199 Wharfside Street, Birmingham B1 1RN.

Mr B, a qualified lawyer of a European Union country for the Respondent, who was present.

JUDGMENT
ON A PRELIMINARY ISSUE

Terminology

1. For reasons set out below, the Tribunal directed that this Judgment on a Preliminary Issue should not be published by the Tribunal or the parties in a form which would permit the Respondent to be identified. A version of this Judgment on a Preliminary Issue containing the name and other information about the Respondent was provided to the parties on 7 April 2014.

2. In this document, the Respondent shall be referred to as masculine, but this should not be taken to indicate anything about the Respondent's gender.

3. The Respondent will be referred to as D. His home country, which is a member state of the EU, will be referred to as F. The Respondent is a qualified lawyer in country F. Reference will be made in this document to the Respondent being regulated by his "home bar" which is the bar of the capital city of F but will simply be referred to as the F Bar. The Respondent practised for many years, including at the relevant time, in the capital city of a different EU State; that country and its capital city will be referred to as G, such that there will be reference to the Respondent being regulated by the G Bar. Other references in this Judgment which might cause the Respondent to be identified have been redacted.

4. At the relevant times, the Respondent worked within a firm regulated in England and Wales by the Applicant, in that firm's office in G. The firm will be referred to as M. At the dates of these hearings, the Respondent worked for a different firm recognised by the Applicant in that firm's G office; that second firm will be referred to as P LLP. The Respondent's legal representative in these proceedings is a qualified lawyer of country G and will be referred to as Mr B.

Background

5. An application and Rule 8 Statement in this case were made on 8 August 2013 and the matter had been certified under Rule 6 of the Solicitors (Disciplinary Proceedings) Rules 2007 ("the Rules") as showing a prima facie case to answer shortly thereafter. The Rule 8 Statement alleged that the Respondent had occasioned or been a party to an act or default in relation to legal practice which involved conduct on his part of such a nature that it would be undesirable for him to be involved in a legal practice in one or more of the ways mentioned in s43 (1) of the Solicitors Act 1974 ("the Solicitors Act") as amended by the Legal Services Act 2007 ("the LSA"). In this document, any references to the Solicitors Act will be deemed to include the additional words "as amended by the LSA". The particulars of the conduct alleged related to utilisation of the money of the firm with which he worked, M LLP, and billing of certain matters to clients. It was alleged that the Respondent's conduct was dishonest.

6. For the purposes of the hearing on 10 February and 10 March 2014 the substance of the allegation was not considered in any detail. No determinations were made concerning the allegation. The Tribunal noted, however, that the alleged conduct was of a type which would fall within the range of conduct which it usually had jurisdiction to hear; the alleged misconduct was more than trivial. There was no

application or submission which suggested that the nature of the allegation or alleged misconduct fell outside the scope of the Tribunal's usual jurisdiction.

7. The Tribunal heard and read information concerning the Respondent's professional career and work history, including the circumstances in which he had ceased to work with or for M LLP. However, the Tribunal did not consider this information to be relevant to this application, save to the extent mentioned in this Judgment on a Preliminary Issue. Such information and evidence might be relevant at any substantive hearing but the Tribunal made no determination on that point.

8. At a Case Management Hearing on 4 December 2013 the Tribunal had given directions to prepare for the hearing of certain preliminary applications by the Respondent and the hearing on 10 February 2014 had been listed, with a time estimate of one day.

9. At the hearing on 10 February Mr B, on behalf of the Respondent, made two applications each of which was made on several grounds. The Applicant opposed both applications.

10. The first application was for the hearing on 10 February, and any subsequent hearings involving the Respondent, to be heard in private. The Tribunal determined that the hearing should not be in private. A separate Memorandum records the application, submissions and determination of that issue. The Tribunal deferred to the end of the hearing of both applications the question of publicity concerning the case and noted that it was normal practice to anonymise client details.

11. The second application (set out in detail in this document) was for dismissal or stay of these proceedings on the basis that the Tribunal did not have jurisdiction over the Respondent. So far as the Tribunal was aware, the points raised were novel and could have wider implications. However, the Tribunal noted that it must determine this application on the basis of the Respondent's particular circumstances and the submissions made.

12. It was not possible to conclude the hearing on 10 February, although the Tribunal had heard all of the relevant evidence and submissions on the application concerning jurisdiction. The hearing was adjourned to 10 March 2014. On that date, the Tribunal deliberated on the application, gave its decision (in outline) and then heard submissions on consequential matters, including costs and publication of the decision.

13. This Judgment does not deal with the arguments advanced in the order in which the case was presented but attempts to organise the submissions into areas. This Judgment also uses terminology in common use in the Tribunal and English courts, which may not in all cases be the same terminology used by Mr B but in each instance the Tribunal was satisfied it understood the key points of the Respondent's arguments and the issues on which it was addressed. The Tribunal did its best to accommodate the fact that neither the Respondent nor Mr B were familiar with the Tribunal's practice and procedure, just as it did with any party which was not represented by a solicitor or counsel familiar with the Tribunal.

14. The Tribunal wanted to make clear that it was independent of the Applicant and the Respondent. It determined the issues fairly and transparently, for the reasons recorded in this document.

Documents

15. The Tribunal reviewed all of the documents submitted by the parties, which included:

Applicant:-

- Application and Rule 8 Statement dated 8 August 2013 (but not the exhibit to the Statement)
- Skeleton argument dated 27 January 2014
- Speaking note on Respondent's additional procedural grounds dated 10 February 2014
- Witness statement of Andrew Donovan dated 10 January 2014, with exhibit "AD1"
- Witness statement of Suzanne Jackson dated 10 January 2014, with exhibit "SEJ1"
- Bundle of authorities (1) comprising 15 authorities
- Bundle of authorities (2) comprising 12 cases, 6 items of legislation and 4 other items

Respondent:-

- Skeleton argument dated 24 January 2014, with 38 annexes (685 pages)
- Letter from Mr B dated 10 January 2014 concerning proceedings by the G Bar.

Witnesses

16. Andrew Donovan and Suzanne Jackson of the Applicant gave oral evidence, in which they confirmed the contents of their witness statements and were cross-examined by Mr B. It being noted that the witnesses were not giving evidence of fact but more in relation to procedure and principles, that Ms Jackson was the instructing solicitor and there being no objection by Mr B, the witnesses were allowed to remain in court whilst the application was made, prior to giving evidence.

The Application

17. The Respondent's application was expressed to be for (so far as relevant to this Judgment, privacy matters being dealt with separately):

- A declaration that the Tribunal has no jurisdiction over an Exempt European Lawyer who was not registered with the Law Society of England and Wales (or SRA);

- A declaration that the Respondent could not be considered to be a solicitors' clerk nor a solicitors' manager under s43 of the Solicitors Act;

- A declaration that the present proceedings are inadmissible, disproportionate, irrelevant, unwarranted and against the principle of subsidiarity;

- Acquittal of the Respondent of all alleged wrongdoing in the proceedings on procedural grounds

- (In the alternative, if the Tribunal determined that it has jurisdiction to deal with the Respondent as an Exempt European Lawyer and/or were to determine that the Respondent could be considered as a solicitors' manager under s43 Solicitors Act) a declaration that the proceedings have taken too long pursuant to Article 6 of the European Convention on Human Rights ("Article 6 Rights") as implemented by the Human Rights Act 1998 ("the Human Rights Act")

18. In addition, the Respondent applied for costs against the Applicant.

19. The Tribunal adopted the following approach to the applications:

a. Determination of the Respondent's status;

b. Determination of whether that status ordinarily falls within the jurisdiction of the Tribunal;

c. The location in which the alleged misconduct took place i.e. territorial jurisdiction issues;

d. The application of the European Union Lawyers Establishment Directive 98/5/EC ("the 1998 Establishment Directive") and the European Union Lawyers Establishment Directive 77/240/EEC ("the 1977 Establishment Directive");

e. The application of the SRA Overseas Rules 2013 ("the Overseas Rules");

f. The role of the G Bar in this case;

g. Whether the Respondent could have a fair hearing given the rules of the G Bar;

h. Whether delay in bringing the case meant that the Respondent's Article 6 Rights had been breached/whether there could be a fair hearing;

i. Whether the proceedings were inadmissible disproportionate, irrelevant, unwarranted and/or against the principle of subsidiarity;

j. Determination of the application for a) dismissal and, if relevant, b) a stay;

k. Costs issues;

l. Publication and publicity issues

20. This approach would enable the Tribunal to make determinations on the applications made. If it were determined that the Tribunal did not have jurisdiction to deal with the case, it would be dismissed with no findings against the Respondent; if the Tribunal determined that it had jurisdiction it would then have to consider the further issues concerning whether any hearing could be fair and/or if there had been delay in breach of the Respondent's Article 6 Rights.

The Respondent's Status

21. The Respondent's status, role and work history were not substantially in dispute; what was in dispute was whether he was subject to the jurisdiction of the Applicant and/or the Tribunal.

22. The Respondent was a lawyer of country F, having qualified in the 1980s, with a practising certificate (or equivalent) from the F Bar which he had held at all relevant times. The Respondent had practised for many years in G, and held a practising certificate (or equivalent) from the G Bar, at all relevant times. The Respondent had joined M (which at that time was a partnership and later became a LLP) in their G office. At the relevant times, the Respondent had practised as a lawyer of country F in G with a firm, M, which was a body recognised by the Applicant as being suitable for the provision of solicitor or other relevant legal services pursuant to section 9 of the Administration of Justice Act 1985. The Respondent was an equity partner in M until about March 2010. The Respondent had never practised from or in England and Wales, had never been a solicitor, a Registered European Lawyer ("REL") or Registered Foreign Lawyer ("RFL").

23. The Respondent now worked with P LLP, a firm recognised and authorised by the Applicant, at their G office. Again, the Respondent was an equity partner or member of that firm.

24. Mr B argued that the Respondent was an Exempt European Lawyer ("EEL"). The SRA guidance document entitled "The Establishment Directive and REL's" published in August 2009 stated:

> "An "exempt European lawyer" (i.e. exempt from registration with the SRA) is a member of an Establishment Directive profession who is either:
>
> - Registered with the Bar Standards Board; or
> - Based entirely at an office or offices outside England and Wales
>
> and who is not a "lawyer of England and Wales"…"

25. The Tribunal noted that there had been some confusion and error in correspondence with the Respondent in describing the Respondent's status. Mr B argued that the Respondent was not a Clerk or Manager and was not employed by solicitors. The confusion of terminology was regrettable, but the Tribunal had to consider the proceedings as submitted to it. The terms "clerk" or "solicitors' clerk" were traditionally used to describe someone working in a legal practice who was not a solicitor; this terminology was not appropriate to someone of the Respondent's standing as an equity partner and a member of an Establishment Directive recognised

legal profession. The Tribunal did not consider that the mistaken description of the Respondent in correspondence from the Applicant affected the nature or validity of the current proceedings.

26. The Tribunal was referred by Ms Nesterchuk for the Applicant to the wording of s43 of the Solicitors Act. This referred to "a person who is or was involved in a legal practice but is not a solicitor." A solicitor is someone who has been admitted as a solicitor and whose name is on the roll (and to be a practising solicitor, the solicitor must hold a practising certificate). There was no doubt that the Respondent was not and never had been a solicitor and so was not regulated by the Applicant as a solicitor. There was also no doubt that s43 of the Solicitors Act applied to persons who were not regulated by the SRA as a solicitor. The Applicant asserted that its ability to regulate the Respondent arose from his role, which meant he was "involved in a legal practice". S43(1A) of the Solicitors Act provides a list of ways in which a person may be involved in a legal practice, including:

> "(e) is a manager of a recognised body;
> (f) has or intends to acquire an interest in such a body"

27. The Tribunal noted the following definitions under ss43(5A) and 43(5B) of the Solicitors Act:

> "(5A) In this section-
>
> "manager", in relation to a recognised body, has the same meaning as it has in relation to a body in the LSA (see s207 of that Act);
>
> "recognised body" means a body recognised under s9 of the Administration of Justice Act 1985;
>
> (5B) A person has an interest in a recognised body for the purposes of this section if the person has an interest in that body within the meaning of Part 5 of the LSA (see ss72 and 109 of that Act)"

28. There was no doubt that M LLP was a recognised body at all relevant times; indeed that point had not been disputed by the Respondent.

29. s207 of the LSA defines "manager" as follows:

> "manager", in relation to a body, means… a person who –
>
> (a) if the body is a body corporate whose affairs are managed by its members, is a member of the body;
> (b) if the body is a body corporate and paragraph (a) does not apply, is a director of the body;
> (c) if the body is a partnership, is a partner, and
> (d) if the body is an unincorporated body (other than a partnership) is a member of its governing body."

30. The Tribunal noted that the Respondent relied on his status as an equity partner in M to dispute any suggestion he was a clerk or manager employed by the firm. The

Tribunal further noted that in accordance with the Members' Agreement of M (dated 2008) the affairs of the firm were managed by its members in accordance with the terms of that Agreement. As the Respondent was the Managing Partner of the G office, he appeared to be what was described in the Agreement (clause 13.5) as a Jurisdiction Head with a list of responsibilities set out in clause 13.5, including driving implementation of the firm's strategy. The Applicant submitted that the Respondent was a "manager" within the definitions set out above.

31. Under s72(3) LSA a person was defined as having an interest in a body if:

> "(a) The person holds shares in the body, or
>
> (b) The person entitled to exercise, or control the exercise of, voting rights in the body."

S72(6) LSA stated that:

> "In this Act "shares" means:-
>
> (a) In relation to a body with a share capital, allotted shares (within the meaning of the Companies Acts);
> (b) In relation to a body with capital but no share capital, rights to share in the capital of the body;
> (c) In relation to a body without capital, interests-
>
> (i) Conferring any right to share in the profits, or liability to contribute to the losses, of the body, or
> (ii) Giving rise to an obligation to contribute to the debts of expenses of the body in the event of a winding up;
>
> and references to the holding of shares, or to a shareholding, are to be construed accordingly."

32. The Respondent was, on his own case, an equity member and entitled to a share of profit and liable to contribute to the losses of M. The Applicant submitted that, therefore, the Respondent held "shares" and had an interest in the recognised body. The Applicant did not rely on any contention that the Respondent was a clerk or manager employed by the firm.

33. The Tribunal determined that the Respondent was an equity partner and later member of M and was the Managing Partner of the G office at all relevant times. It accepted the Respondent's submissions on this point. It further accepted that the Respondent could be described as an Exempt European Lawyer in that he was not required to register with the Applicant and had no permanent office within England and Wales. However, the description of the Respondent as an EEL did not determine whether or not he came within the scope of s43 of the Solicitors Act. That section applied to certain people who were not solicitors (or RELs); the Solicitors Act made other provisions for the regulation and/or discipline of solicitors and RELs. The Tribunal determined that an EEL may come within the scope of those to whom s43 applied if the other requirements of that section were met. There was certainly nothing within s43 which excluded an EEL from regulation under that section.

34. The Tribunal noted the definitions within s43 (1A), as set out at paragraph 22 above. A person was "involved in a legal practice" if s/he was a manager of a recognised body or had/intended to acquire an interest in a recognised body. The Tribunal also noted that s43 (1A) came into force from 31 March 2009; prior to that date, the provisions of s43 (1A) (e) and (f) had not been in force.

35. The Tribunal determined that at the relevant time – which appeared to be from December 2007 to December 2009 – the Respondent was both a manager of a regulated legal practice and had an interest in that practice. The former was clear from his status as the Managing Partner of the firm's office in G and the latter from his status as an equity partner. In making this determination, the Tribunal had regard to the definitions set out at paragraphs 22 to 26 above. Even if there were any doubt about his status as a "manager", the Respondent himself had asserted that he was an equity partner; as such, he must have an interest in the recognised body. The Respondent clearly held shares in the recognised body, within the definition in s72 (6) LSA. The Respondent was an EEL but this could not in itself have the effect of removing him from the categories of person included in s43 (1A).

Whether the Respondent's status would ordinarily bring him within the Tribunal's jurisdiction

36. In the light of the Tribunal's determination set out at paragraph 30, the Tribunal determined that – subject to the points of EU and domestic law addressed below – the Respondent clearly came within the category of persons to whom s43 applied, from 31 March 2009; the Tribunal was not satisfied it applied to him before that date. Accordingly, the Respondent would be subject to the Tribunal's s43 jurisdiction unless the application of European law led to a different conclusion.

Where the alleged misconduct occurred

37. The allegations made were based on matters recorded in a report prepared by KPMG, accountants, in 2010. The transactions and matters relied on were said to have occurred in or about December 2007 to December 2009. Throughout that period, the Respondent worked from the firm's G office. There was no suggestion in the papers seen by the Tribunal that the allegations or transactions in issue had any connection with England and Wales. The only direct connection appeared to be that the firm of which the Respondent was a member was regulated in England and Wales, having originated as an English firm.

The 1977 and 1998 Establishment Directives

38. The Tribunal was referred to the Directives and relevant cases in support of the Respondent's argument that the Tribunal did not have jurisdiction over him. It was alleged that the Applicant's action against the Respondent constituted an infringement of EU law, such law being binding on the Tribunal and Applicant as public bodies. It was submitted that Articles 6 and 7 of the 1998 Establishment Directive provided that the Respondent's host bar, in this case the G Bar, had exclusive jurisdiction over his professional conduct.

Article 6(1) read:

> "Irrespective of the rules of professional conduct to which he is subject in his home Member State, a lawyer practising under his home-country professional title shall be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host Member State in respect of all the activities he pursues in its territory."

Article 7 of that Directive dealt with disciplinary proceedings against lawyers. This provided, amongst other matters,

> "In the event of failure by a lawyer practising under his home-country professional title to fulfil the obligations in force in the host Member State, the rules of procedure, penalties and remedies provided for in the host Member State shall apply."

It was submitted for the Respondent that the effect of Articles 6 and 7 was that the disciplinary and professional conduct rules of the G Bar took precedence over other disciplinary and professional conduct rules, although it was accepted that the F Bar could also have a role in supervising the Respondent's professional conduct. In short, the host bar took precedence over the home bar and the Applicant, being neither the home nor host regulator, had no jurisdiction over the Respondent. It was submitted that there was no "regulatory gap" as the Respondent was subject to appropriate conduct rules and possible disciplinary proceedings. It was further submitted that EU law established a system that deals with circumstances such as this based on principles of subsidiarity and mutual recognition seeking to prevent undue restrictions to the right of establishment of EU lawyers

39. For the Respondent, it was submitted that he should not be brought within the scope of s43 Solicitors Act. Rather, the G Bar had the power to investigate the alleged misconduct and deal with the Respondent accordingly. He was subject to extensive professional regulation where EU law provided for a mechanism for resolving any conflicts between competing jurisdictions. It was submitted that it was discriminatory for a solicitor and a non-solicitor to be treated differently as there would be an impact on other lawyers from Member States and possibly a breach of the Equal Treatment Directive. There was no legitimate reason for drawing the distinction in this way.

40. For the Respondent it was further submitted that the G office of M had been subject to regulation by the G Bar and had agreed to be so subject.

41. For the Applicant it was submitted that the 1998 Establishment Directive did not apply to the Respondent in respect of any potential practice of his in England and Wales but only to his practice in G. The Directive, at Article 1, stated,

> "The purpose of this Directive is to facilitate practice of the profession of a lawyer on a permanent basis in a self-employed or salaried capacity in a Member State other than that in which the professional qualification was obtained."

42. It was submitted that the 1998 Establishment Directive would apply to the Respondent if he sought to establish himself as a lawyer in England and Wales, but he had never sought to do so. The Directive was clear that if, for example, the

Respondent as a lawyer of country F established himself in England and Wales on a permanent basis the Applicant's professional rules would apply to him. It was submitted that this was not the situation here. In particular, it was not alleged that the Respondent had breached the Solicitors Code of Conduct 2007 (or other relevant professional rules or principles of conduct). Rather, it was a matter of common law whether the Respondent's conduct was such as to make it undesirable for him to be involved in a legal practice regulated by the Applicant without the permission of the Applicant.

43. The Tribunal considered carefully the oral and written submissions of the parties on this point. The Tribunal determined that the Directives did not help to determine the issue of the Tribunal's jurisdiction (or that of the Applicant) as those Directives applied to lawyers seeking to establish themselves or actually established in another Member State. The Directives were concerned with the right of lawyers within the EU to practise in countries other than those in which they had qualified; they did not seek to impose a uniform system of regulation or disciplinary proceedings. In this instance, the Respondent had established himself in G, not England and Wales, having qualified in F and did not seek to practise in England and Wales.

44. The Tribunal was satisfied that the Respondent was subject to the jurisdiction of the G and/or F Bar; it appeared that the former would normally take precedence. However, there was nothing in the Directives which excluded the jurisdiction of the Tribunal and/or the Applicant; the issue of a third possible regulator was not addressed in the Directive and so it could not be said that such a possibility had been excluded. The Tribunal accepted that the G office of M was subject to regulation by the G Bar but this could not oust the jurisdiction of the Applicant and/or the Tribunal over those who worked within the G office of that SRA-recognised body. There was a public interest in the Applicant having some regulatory function in relation to those working within the overseas office of a recognised body based in England and Wales. If the Applicant did not have any role in regulating who might work in such a firm – and if the Tribunal could not make relevant determinations in relation to those who came within s43 of the Solicitors Act – there would be a "regulatory gap". If the Respondent's argument was accepted, it would not be possible for a regulator of a firm which had a base in one country to have any control over those who could be involved in that firm from another EU Member State at an office outside England and Wales. The Applicant had a duty to protect the public interest and this would be restricted if it could not have any jurisdiction over those involved in legal practice in the overseas offices of regulated bodies. The Tribunal noted that such regulation was limited to those who were "involved" in legal practice as defined. The Tribunal noted the Respondent's arguments, and the point that it could appear unfair to be subject (potentially) to three sets of regulation. However, the Tribunal determined that the public interest outweighed any possible unfairness to the Respondent and in any event the question of jurisdiction did not fall to be decided simply on grounds of what might appear to be fair but rather on the correct application of the law. The Tribunal noted that the principle of subsidiarity applied such that there was no attempt to provide for an over-arching scheme of regulation of lawyers from EU Member States. Any determination that the Respondent was subject to some oversight by the Applicant did not oust the jurisdiction of the Respondent's home and host Bars.

The SRA Overseas Practice Rules

45. The Tribunal was referred to the SRA Overseas Rules 2013 by Mr B, which were dated 30 August 2013. The Tribunal was not addressed specifically on whether those Rules had any retrospective effect; no prior version of the Rules was available for consideration. It was submitted on behalf of the Respondent that these rules recognised the supremacy of host member states deontology rules and jurisdiction for UK solicitors practising in other UK states so that a UK solicitor permanently established in G as a partner with a UK solicitors firm would be subject to the G Bar deontological and disciplinary rules. It was argued that the same principles should apply to the Respondent's circumstances. Mr Donovan was asked about the effect of the Rules. He told the Tribunal that the Rules provided that solicitors working abroad would be subject to the host country's regulations and professional practice rules, to the extent that there was no conflict with the SRA's rules.

46. The Tribunal determined that the Overseas Rules did not have any bearing on this application. The Respondent is not and never has been a solicitor and so is not subject to compliance with the SRA Principles or Code of Conduct.

The role of the G Bar

47. The Tribunal was told about and saw written evidence that the G Bar had commenced an investigation into the Respondent's conduct. By a letter dated 12 September 2013 the President of the G Bar had written to the Tribunal. The certified translation of his letter, so far as relevant, and after referring to the proceedings and the pre-listing date, read:

> "I am rather surprised about this situation because (the Respondent) has been registered on the EU list of the [G Bar] and any disputes about his services must be heard in G.
>
> This means that (the Respondent) is subjected to the applicable G code of conduct, which is why I am opening a disciplinary investigation against him.
>
> Therefore, this case will be further dealt with in G.
>
> Please may I request that you, at least temporarily, suspend the case opened by your department…"

48. Mr B, in a letter to the Tribunal dated 10 January 2014, confirmed that an investigation into the Respondent had been opened by the G Bar and an investigator had been appointed. It was stated that the investigator would be given full access to the facts and reports, including the KPMG report. The G Bar might then transfer the matter to the disciplinary tribunal of the G Bar; if it was not transferred, the parties would be informed. Mr B promised to keep the investigator informed of all relevant matters arising in the Tribunal's proceedings.

49. For the Applicant, Ms Jackson gave evidence concerning the information she had received concerning the proceedings in G. Ms Jackson told the Tribunal that the purpose of the proceedings in G appeared to be disciplinary; the possible outcomes if allegations were proved included a warning, a "blame", suspension or disbarment.

Ms Jackson told the Tribunal that s43 proceedings were regulatory in nature, not disciplinary. They would not generally affect the Respondent's ability to work in G as a lawyer of country F but – if the allegations were proved, and an order were made – the Respondent would only be able to work in a SRA regulated legal practice with the permission of the Applicant and any such permission might be subject to conditions. Ms Jackson further told the Tribunal that the G Bar had refused to share with the Applicant any information relating to the conduct or progress of their inquiry. She accepted that this was in accordance with the Establishment Directive which only requires sharing of information with the European lawyer's home regulator but showed why it was necessary and appropriate for the Applicant to be able to act independently in respect of a firm which it regulated.

50. It was submitted for the Applicant that the case of Swanney v GMC [2008] SC 592 was authority for the proposition that a body in the UK could deal with conduct which had occurred overseas; in that case the misconduct occurred in Canada but the fitness to practice of the Scottish doctor involved had been dealt with in the UK.

51. The Tribunal noted that the Respondent sought an order that if the current Tribunal proceedings were not dismissed (for want of jurisdiction) they should be stayed pending the proceedings at the G Bar.

52. The Tribunal noted that the Establishment Directives did not provide any assistance to it on the question of whether any proceedings in G should take precedence over proceedings before the Tribunal. Whilst the Directives dealt with the circumstances in which "home" and "host" Bars would deal with disciplinary matters, they did not address the situation where there was a third regulatory body involved.

53. If this case were to proceed and if the allegations were proved such that the Tribunal made a s43 Order, there would be limited impact on the Respondent's ability to practise as a lawyer of country F, or on his ability to work in G. Such an Order could have an impact on the Respondent's ability to work in or for a legal practice recognised by the Applicant. The Tribunal noted that the nature of the proceedings before the Tribunal was said to be regulatory rather than disciplinary and so it could be argued that the case in England and the case in G would be dealing with different issues. However, it appeared that the proceedings in G were based on substantially the same facts as the Tribunal proceedings.

54. It seemed to the Tribunal that there was some risk of the Respondent facing "double jeopardy", with the further risk of inconsistent findings by the two different bodies. The Respondent might face the difficulty of dealing with two sets of proceedings at the same time. However, the Tribunal was at a disadvantage in determining whether there was any substantial risk of either problem. The Tribunal did not have full information on the matters being investigated by the G Bar, nor the likely timescale for those proceedings. Further, the Tribunal had not been addressed on whether or not there was any risk of "muddying the waters of justice" in relation to the G proceedings as it was not known whether any findings by this Tribunal would be referred to within the G proceedings.

55. The Tribunal determined that there was, in principle, no reason why two sets of proceedings, in different jurisdictions, could not proceed arising from substantially the

same facts where there was jurisdiction in both countries to deal with those matters. However, to ensure that the proceedings before the Tribunal were fair it would be appropriate to consider these points further. The Tribunal determined that there should be a Case Management Hearing at which issues of double jeopardy, the timing of the proceedings/hearings and whether there was any risk of "muddying the waters of justice" could be considered (together with other matters mentioned below). The Tribunal was clear that it had jurisdiction to hear this case; the matters to be considered at the Case Management Hearing were in relation to how best to ensure a fair procedure and that the timing was not in conflict with the proceedings in G. The Tribunal respected the right of the G Bar to conduct its own enquiry and apply its own professional ethics and rules but this did not preclude the Tribunal from considering a case against someone who came within its jurisdiction.

Ability to hold a fair hearing

56. The Respondent alleged bias against him by the Applicant, in particular in the way in which the Applicant had communicated with his present firm and decided to publish the prosecution on the Applicant's website.

57. The Tribunal was entirely independent of the Applicant and could not determine any issues concerning the Applicant's publication policy and whether that was correctly applied. The Respondent may or may not have other remedies available to him. The Tribunal could make orders concerning the publication of its decisions, and this point is dealt with below.

58. The Tribunal's independence of the Applicant meant that it was not influenced by any prior dealings between the parties. If and when the case reached a final hearing, the Tribunal would evaluate the evidence presented in order to determine if any of the alleged misconduct had been proved; the test to be applied, in accordance with the Tribunal's normal practice, was the higher standard. That is, the Applicant would have to prove the case beyond reasonable doubt in order for the Tribunal to find an allegation proved. The Tribunal would then consider whether it was appropriate, in the light of its findings on the allegations, to make an order under s43 of the Solicitors Act. The Tribunal was satisfied that there was no risk of bias such that it was unsafe to continue with the proceedings, due to the Tribunal's independence and the application of the higher standard of proof.

59. The Respondent argued that he was bound by the G Bar code of conduct, in which client confidentiality (described in the translation of part of the code of conduct as "professional secrecy") was of great importance. The Tribunal heard that Article 31 of the Professional Conduct Code provided:

> "The professional secrecy of the lawyer serves the general interest and is a public order obligation and covers without limitation into time everything he learns and discovers as a consequence of his mandate. A lawyer cannot be excused of his professional secrecy obligation by his client."

The Tribunal was told that this obligation of confidentiality could be enforced through the penal code, with a term of imprisonment of up to six months.

The Respondent also relied on this provision in support of his application for the proceedings to be held in private.

60. The Respondent submitted that he would not be able to use or rely on any information concerning his clients or their matters to defend himself in this case or he would be in breach of the G Professional Conduct Code and potentially subject to criminal sanction.

61. For the Applicant, it was submitted that the Respondent did not appear to be arguing he would be unable to defend himself in any disciplinary hearing in G for reasons of client confidentiality. Further, the translation of Article 458 of the G Penal Code provided by the Respondent read, so far as relevant:

> "Medical practitioners… and all other persons who, owing to their status or professional, obtain knowledge of secrets entrusted to them and disclose them otherwise than if called upon to give evidence in legal proceedings… or unless required to disclose them by law, shall be liable to imprisonment of eight days to six months and fine…"

Further, the Tribunal was referred to the translation of Article 459 of the G Judicial Code provided by the Respondent, which read:

> "The disciplinary committee examines the case in a public hearing unless the lawyer concerned requests a hearing in chambers…"

It was submitted, therefore, that the practice in G as in England and Wales was for disciplinary hearings involving lawyers to be held in public unless there was a reason not to do so.

62. It was further submitted that the proceedings would not require the Respondent to disclose any confidential matters learned in the course of his instructions. The case involved certain payments alleged to have been taken by the Respondent and/or certain amounts which had been billed and did not concern anything he might have learned from his instructions.

63. The Tribunal noted that solicitors (and others with which it deals) are bound by duties of client confidentiality. The Tribunal was well used to taking steps to protect the identities of clients whose matters were referred to in proceedings. It had well-established procedures for anonymising client details e.g. by referring to clients by initials, removing any identifying information e.g. concerning property details. Any client information could and would be treated confidentially by the Tribunal.

64. The Tribunal noted that it had been addressed on issues concerning the law and practice of country G, together with the practice of disciplinary tribunals in G. It had seen a number of documents (in translation) and had heard the submissions of Mr B. However, it had not had expert evidence on these points and so had to exercise caution in making any comments on any issues of the law and practice of country G. It could only base its comments on what appeared on the face of the documents submitted.

65. The Tribunal noted the requirement of confidentiality set out at paragraph 54 above. The Tribunal was not satisfied that the Respondent's ability to defend himself would be impeded by that obligation. Solicitors had similar duties but were able to defend themselves properly and, as noted above, the Tribunal could take steps to protect confidential information. The Tribunal noted that the duty of confidentiality was to protect the interests of clients, not the interests of solicitors.

66. Further, it did not appear to the Tribunal that the nature of the allegations and/or the possible defence would require disclosure of confidential client information by the Respondent. The Tribunal could not be sure, but it appeared that if the Respondent was hampered in his defence before the Tribunal due to the rules on confidentiality, he would be similarly hampered in any proceedings in G. The Tribunal did not have enough evidence to determine whether these proceedings (or those in G) would be covered by the apparent provisions of Article 458 of the G Penal Code which made exceptions to the confidentiality requirements. It noted the provision in the G Judicial Code which suggested that disciplinary hearings could be in public but had no clear evidence on how this provision fitted with the requirement for confidentiality.

67. The Tribunal was satisfied that it would be possible for the Respondent to have a fair hearing at the Tribunal and in particular he would be able to defend himself properly. There was no bias or procedural unfairness in the proceedings. The Tribunal could make any necessary allowances for the fact that neither the Respondent nor his lawyer were familiar with the Tribunal's procedures, just as it did with any parties who did not have the benefit of representatives who were experienced in the Tribunal's procedures.

Delay

68. The Tribunal noted that the KPMG report which formed the basis of the allegations had been produced in June 2010, the investigation having commenced in March 2010. It was not clear when the Applicant had been notified of the issues raised, but it appeared from some correspondence within the bundles that the Applicant was aware by mid-2011. These proceedings had not been issued until August 2013.

69. There had been some delay in bringing the case, the reasons for which had not been explored in detail. In any event, there had been no delay since the proceedings had started at the Tribunal; it was right and proper that the Respondent's applications should be considered before listing a substantive hearing and so no substantive hearing had yet been possible. The G investigation, of course, had not started until after these proceedings had begun so if there were issues of delay these might also be pleaded in relation to that investigation.

70. The Tribunal noted that the nature of the allegations was not such that the possibility of a fair trial was affected by the time which had passed. It would be based largely on documents. The Respondent had been aware of the matters in issue – if not the precise allegations – by mid-2011. There did not appear to be any problem arising from documents being lost or destroyed. The Tribunal was satisfied that it would be possible to conclude the proceedings within a reasonable time of those proceedings beginning and so there was no breach of the Respondent's Article 6 Rights. More

generally, the Tribunal was satisfied that the delay between the investigation and the commencement of proceedings had not caused any prejudice to the Respondent.

Whether the proceedings were inadmissible, disproportionate, irrelevant, unwarranted and/or against the principle of subsidiarity

71. The Tribunal noted that the allegations made were more than trivial. Accordingly, it was satisfied that the proceedings were not disproportionate. The proceedings were not irrelevant as there was a legitimate public interest in who could work in or be a partner/member of a regulated body, albeit in an overseas office. There appeared to be sufficient evidence to suggest there was a case to answer, so the proceedings could not be said to be unwarranted. As the Tribunal had determined it had jurisdiction to deal with the case, the proceedings could not be described as "inadmissible". The Tribunal addressed the issues of subsidiarity and competing jurisdictions at paragraphs 34 to 39 above. As the proceedings were to continue, the Respondent could not be acquitted as was argued on his behalf. There had been no determination concerning his conduct.

The Tribunal's Decision
Determination of the application to dismiss the proceedings

72. For the reasons set out above, the Tribunal was satisfied that the Respondent was a person to whom s43 of the Solicitors Act 1974 applies. It further found that neither the Establishment Directives nor the involvement of the G Bar disturbed that conclusion on jurisdiction. It further determined that the Respondent could have a fair hearing, with appropriate safeguards in place and that the Respondent had not been prejudiced by the passage of time since the initial investigation. The Tribunal noted that the s43 jurisdiction applied to the Respondent from 31 March 2009; some consideration was required of whether events which occurred before that date could be relied on by the Applicant. As the Tribunal had jurisdiction to deal with the proceedings, there was no reason to dismiss the proceedings.

Determination of the application for a stay of the proceedings

73. For the same reasons set out at paragraph 67, the Tribunal determined that there was no reason to stay the proceedings.

74. However, in the light of the investigation by the G Bar and the possibility of double jeopardy and/or of influencing the matters to be considered in the G disciplinary proceedings it was appropriate to list this case for a Case Management Hearing ("CMH") rather than proceed to list the substantive hearing. The Tribunal would need up to date information on the investigation in G on the next occasion. The CMH should address those issues, together with whether or not any amendment to the allegations was required given that s43 of the Solicitors Act only applied to the Respondent after 31 March 2009. The Tribunal had made no determination on that issue, on which it had not been addressed, but considered that the parties ought to review this point. The CMH should have a two hour time estimate and take place on the first open date after three months.

75. The Tribunal noted that in a matter of this kind there may be an appeal, as the issue of jurisdiction which had been raised appeared to be a new point, and the CMH would

give an opportunity to review whether or not there had been an appeal and whether that had an effect on the timing of the proceedings.

Costs

76. The Applicant sought its costs of the application against the Respondent. A schedule of costs totalling £11,864 had been submitted to the Respondent on 27 February 2014 and the Applicant had provided the Respondent with a copy of SRA v Davis and McGlinchey [2011] EWHC 232 (Admin).

77. The Respondent sought his costs of the application against the Applicant and on 28 February 2014 had provided a schedule of costs totalling £29,092.39 (the amount in euros having been converted to sterling).

78. Ms Nesterchuk submitted that the Applicant should be entitled to its costs of this preliminary application as it had succeeded on each issue; there was no reason to make any reduction. It was submitted that the costs claimed were reasonable and proportionate. It was noted that the costs schedule contained some estimates of the time to be spent at the 10 March hearing, but those estimates were broadly correct. The Respondent had been alerted to the requirement to produce information about means if he wished to ask the Tribunal to take his means into account, as set out in SRA v Davis and McGlinchey [2011] EWHC 232 (Admin) but had not produced such information. In response to a question from the Tribunal, Ms Nesterchuk submitted that even if the Applicant were unsuccessful in proving the substantive matters, it should be entitled to its costs of this preliminary issue.

79. Mr B submitted that the allegations against the Respondent had not been dealt with and the Tribunal should not award costs against him simply because the issues of jurisdiction and whether the hearing should be in private had been decided in favour of the Applicant. It was submitted that the decision on costs should await the decision on the allegations. Further, there were still issues to be considered such as whether there was a risk of double jeopardy, as well as whether or not the allegations would be made out.

80. Mr B submitted that it was disproportionate for the Applicant to have both counsel and solicitor, noting that Mr Steel as well as Ms Jackson accompanied counsel. Ms Nesterchuk informed the Tribunal that no costs were claimed for Mr Steel's attendance and submitted that the use of junior counsel was justified in a matter of this kind.

81. The Tribunal considered carefully the issue of the costs of this application (including the costs of the part of the hearing which had dealt with whether the hearing should be in private).

82. The Tribunal determined that the Applicant's costs of £11,864 were reasonable and proportionate in amount. It had the advantage of having heard the application and noted the issues raised and could indicate that the time spent in dealing with this matter and counsel's fees were reasonable.

83. However, the Tribunal determined that the decision on whether or not the Respondent should pay costs, and the amount of costs, should be left to the Tribunal which dealt with the final hearing in this case. That Tribunal should also assess the amount of costs (if payable) in the light of the Tribunal's overall determination of the case. The indication of the reasonableness of the Applicant's costs was intended to be helpful but it was not binding.

Publication and Publicity matters

84. Mr B submitted that the Respondent should not be prejudiced by publication of this preliminary decision. No allegations had been proved against him and the Respondent may appeal. If publication of the decision was required, Mr B submitted that this should be done without mentioning any client information, the name of the Respondent, the name of the firm(s) in which he worked or any other information which would identify him. Mr B submitted that G had a smaller legal market than England, in which the Respondent could be identified and so it was submitted that the decision should refer, for example, to "a city in the EU" and the G Bar should not be mentioned.

85. Ms Nesterchuk for the Applicant opposed the application to anonymise the decision. The issues discussed related to jurisdiction, and the decision would make clear in any event that the allegations had not been determined.

86. The Tribunal asked if the parties had any further submissions on possible directions before it retired to consider the issue of costs and publication. Ms Nesterchuk had no further submissions but Mr B submitted that it might be useful to have the intervention of the EU Commission and/or the G Bar in these proceedings. Ms Nesterchuk submitted that it was not clear what the interest of the EU Commission would be in these proceedings; the G Bar would be informed of the progress of this case and it would be a matter for that body to decide if it wished to intervene.

87. The Tribunal noted that it routinely protected the identity of clients when preparing its decision documents and that would, of course, be appropriate here.

88. The Tribunal noted that its Judgments were generally published and named the Respondent (although in some instances e.g. where no allegations had been proved the Tribunal had been known to direct that the name of a Respondent should not be used.) In general, the presumption was against anonymising the Respondent's details and there was no restriction on the publication of a Judgment. To remove the Respondent's details from this decision document could be giving him a protection which was not normally afforded to solicitors.

89. However, the Tribunal was conscious that this was a preliminary decision, albeit a decision of some importance to the parties. Decisions made on preliminary applications were not generally published but were simply for the use of the parties. The Respondent was still working in G. The Tribunal did not know exactly what impact publication of this decision would have on the Respondent. The Tribunal was conscious that there were transnational issues under consideration. These proceedings

were regulatory, not disciplinary in nature and there was a real risk that this distinction would not be fully understood in other jurisdictions. There was a risk of unreasonable or unusual prejudice to the Respondent if this decision were published in G and/or F in such a way that the Respondent was identifiable. The Tribunal did not have any right to restrict publication in G if it did not provide for some general restriction on publication. Whilst the decision made might be of some importance to the parties, there was no necessity to identify the Respondent or where he worked/the nature of his qualification or the like.

90. The Tribunal determined that in the particular circumstances of this case, where there was a risk of disproportionate impact on the Respondent when no determination had been made on the allegations, the publication of this decision should be restricted. A version of this decision would be sent to the parties which would contain full information and names as soon as possible. Shortly thereafter, an anonymised version would be prepared and sent to the parties. The first should not be disclosed to anyone other than the parties or those closely connected to the case – although it could be used in relation to any appeal, if the parties so chose. The Tribunal did not rule out the possibility that the Respondent and/or Applicant would disclose this document to the G Bar, but would expect them to obtain assurances as to confidentiality. The second version, anonymised to prevent identification of the Respondent, could be published by the Tribunal and the parties if they wished. That document would also set out the basis for the decision in full.

Appeal and other matters

91. The Tribunal determined that it was not necessary or appropriate to make any further directions concerning the CMH other than those set out at paragraphs 69 and 70. Whilst some input from the G Bar might be of use, it was a matter for that body to consider what role, if any, it wanted to play. In any event, some contact with that body by the parties would be helpful, indeed necessary, prior to the CMH. No directions would be given concerning joinder of any party. The role of the EU Commission did not appear to the Tribunal to encompass matters of this kind, but if necessary that was something on which the CMH could be addressed.

92. The Tribunal Chair canvassed with the parties the possible routes of appeal, if contemplated by either party. It was noted that Mr B and the Respondent would not be familiar with the process of appeal from any decision of the Tribunal. The Chair referred Mr B to the Civil Procedure Rules, in particular Part 52 which dealt with appeals and noted that the two usual routes of appeal were an ordinary appeal, to the Administrative Court, or a Judicial Review application.

93. Ms Nesterchuk submitted that as this was a decision on a preliminary application, the usual process would be to apply for Judicial Review.

94. The Tribunal noted that it was not for this Tribunal to determine the appeal process, if any, but simply wanted to raise the issue so that Mr B could consider the time limits which might apply and the process. It was suggested that the parties should have some discussion to ensure clarity. The Tribunal noted that the Respondent and his representative might need to clarify rights of audience in the High Court in the event of an appeal.

Order

95. The Tribunal directed that:

95.1 The Respondent's application to dismiss and/or stay the proceedings is dismissed;

95.2 A Case Management Hearing, with a time estimate of two hours, should be listed on the first available date after 3 months, i.e. after 11 June 2014.

95.3 The parties should notify the Tribunal promptly if there was good reason to think the time estimate should be increased or reduced.

95.4 The costs of and incidental to the hearings on 10 February and 10 March 2014 are reserved to the Tribunal which deals with the final/substantive hearing.

95.5 The decision in this case should be provided to the parties as soon as possible. The document containing references to the Respondent and to his place of practice etc. should not be published by the Tribunal or the parties. An anonymised version of the decision would be provided as soon as possible thereafter and would be available for publication in the usual way.

Dated this 7th day of April 2014
On behalf of the Tribunal

D. Glass
Chairman