By Judgment of Mr Justice Leggatt agreed by Sir Brian Leveson PQBD dated 10 November 2016, the Respondent (the Solicitors Regulation Authority ("SRA")) appealed successfully in part against the decision of the Solicitors Disciplinary Tribunal following the hearing on 9-11 February 2016 (as set out in the Tribunal's Judgment dated 16 March 2016 below). The High Court (Administrative Court) gave the SRA permission to proceed with its claim for judicial review of the Tribunal's decision to revoke the order made by the SRA under section 43 of the Solicitors Act 1974, upheld the judicial review claim, and quashed the Tribunal's decision on that issue (below, page 30, paragraph 136, "revocation of S.43 Order"). The Court dismissed the SRA's appeal against the Tribunal's decision to allow Mr Arslan's appeal under section 44E of the Solicitors Act 1974 (page 30, paragraph 136, "appeal under Section 44(E)"). There was no order for costs. The Solicitors Regulation Authority v Solicitors Disciplinary Tribunal, and Arslan, and The Law Society [2016] EWHC 2862 (Admin).

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 — Case No. 11356-2015

BETWEEN:

HUSEYIN ARSLAN — Appellant

and

SOLICITORS REGULATION AUTHORITY — Respondent

Before:

Mr P. S. L. Housego (in the chair)
Mr R. Nicholas
Mrs V. Murray-Chandra

Date of Hearing: 9-11 February 2016

Appearances

The Appellant appeared in person.

Ms Heather Emmerson, Counsel, of 11KBW, 11 Kings Bench Walk, Temple, London EC4Y 7EQ, instructed by Mr Iain Miller, Solicitor of Bevan Brittan LLP, Fleet Place House, 2 Fleet Place, London, EC4Y 7RF for the Respondent.

REVIEW AND APPEAL JUDGMENT

Preliminary Matter

1. The Tribunal discussed with the parties the best way to proceed with this matter. The Appellant explained that he was not familiar with the procedure, and that he would prefer to make his submissions following those of the Respondent. The Tribunal decided that as this was his appeal/review, he could make his submissions first followed by the Respondent.

2. There were a number of preliminary legal arguments that had been advanced by both parties in the documents. Ms Emmerson submitted that it would be better to deal with those issues at the outset to avoid the parties making submissions on the law that may prove to be superfluous, depending on the Tribunal's determinations.

3. The Appellant submitted that it would be easier for him to make all his submissions throughout, and not to split them into legal and then factual submissions, as to decide the preliminary issues would be "blocking my way". Ms Emmerson did not object to this course, and was conscious of allowing the Appellant to present his case in the way that was easiest for him. The Tribunal decided that the hearing would run more smoothly if the Appellant was allowed to conduct his case in the way he had prepared it. The Tribunal was an experienced panel, and was capable of hearing all of the submissions in the knowledge that the ground rules for those submissions had not yet been decided.

Facts

4. The Appellant sought to challenge the decisions of the Respondent dated 16 January 2015. The decisions were:

   - An order made by the Solicitors Regulation Authority ("SRA") under section 43(2) of the Solicitors Act 1974 ("the Act"), restricting the Appellant from being employed or remunerated by a solicitor's practice or recognised body unless permitted by the Respondent ("the section 43 Order"). The Appellant made an application for a review of the section 43 Order under section 43(3)(a) of the Act; and

   - Decisions made by the Respondent to (i) rebuke the Appellant, (ii) direct the Appellant to pay a financial penalty of £500 and (iii) published details of the rebuke pursuant to the SRA Disciplinary Procedure Rules 2011 ("the Disciplinary Procedure Rules") (together "the Disciplinary Decisions"). The Appellant appealed against the Disciplinary Decision under section 44E of the Act.

5. The Appellant's Case invoked two separate jurisdictions of the Tribunal, namely:

   - A review of the Respondent's regulatory jurisdiction in relation to non-solicitors involved in a legal practice under section 43, and;

   - An appeal against the exercise by the Respondent of its disciplinary powers in relation to employees pursuant to the Disciplinary Procedure Rules.

Documents

6. The Tribunal reviewed all the documents submitted by and on behalf of the Appellant and the Respondent, which included:

Appellant

- Notice of Appeal dated 13 February 2015 with supporting documents
- Appellant's Skeleton Argument dated 2 February 2016

Respondent

- Amended Response to the Notice of Appeal dated 21 September 2015 and supporting documents
- Respondent's Skeleton Argument dated 1 February 2016
- Respondent's Authorities Bundle

The Legal Framework

7. The Relevant Sections of the Act, the Disciplinary Procedure Rules, and the Civil Procedure Rules ("CPR") are at Appendix 1 to this Appeal Judgment.

8. In relation to the section 43 Order, the Tribunal had power under section 43(3A)(a) to:

- Quash the Order;
- Vary the Order;
- Confirm the Order.

9. The Tribunal also had the power to make an order as to the payment of costs by any party to the application.

10. In relation to the review of the Disciplinary Decisions, the Tribunal had power under section 44E(4) to:

- Affirm the Decision;
- Revoke the Decision;
- Make an order under the Tribunal's own powers under section 43(2) of the Act.

11. Again, the Tribunal also had the power to make an order to the payment of costs by any party to the application.

12. The Appellant invited the tribunal to quash the section 43 Order, and to revoke the Disciplinary Decisions. The Respondent invited the Tribunal to dismiss the application for a review and confirm the section 43 Order, and to dismiss the Appeal and affirm the Disciplinary Decisions.

Standard of Proof

The Section 43 Order

13. The Appellant submitted that the standard of proof that should be applied in relation to any factual findings that needed to be made as part of the section 43 review, was the criminal standard of proof. He argued that the allegations against him were serious, and were akin to criminal allegations, as he was alleged to have provided false and misleading information to the Respondent, and in so doing had acted without integrity, in a manner likely to diminish the trust of the public, and had failed to co-operate with his regulator. In those circumstances, the use of the civil standard of proof was inappropriate. The Appellant relied on the case of Re A Solicitor [1993] QB 69, where Lane LJ stated:

> "…..disciplinary proceedings before the Solicitors Disciplinary Tribunal must be proved to the criminal standard certainly where…the allegations are serious and may result in suspension or disqualification".

14. The Appellant also relied on the Privy Council case of Campbell v Hamlet [2005] UKPC 19 where it was stated that "…the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession…"

15. The Appellant noted that it was unsatisfactory that there was no statutory arrangement in place in relation to the standard of proof to be applied. He submitted that the Respondent could not bind the Tribunal to the civil standard simply because it had opted to use that standard when operating the section 43 Order; there had been no approval by any judicial authority for the use by the Respondent of the civil standard in these types of proceedings.

16. Ms Emmerson submitted that the standard of proof that should be applied in relation to any factual findings that needed to be made as part of the review, was the civil standard. It was submitted that a section 43 Order was regulatory, rather than disciplinary in its nature. Ms Emmerson relied on the authorities of Ojelade v The Law Society [2006] EWHC 2210 (Admin), Gregory v The Law Society [2007] EWHC 1724 ("Gregory"), and R (SRA) v Ali [2013] 2584. Those cases provided clear authority from the High Court that a section 43 Order was regulatory rather than disciplinary nature. In Gregory, Treacy J stated that:

> "Section 43 is not punitive in nature. It is there to protect the public, to provide safeguards and to exercise control over those who work for solicitors, in circumstances where there is necessity for such control shown their past conduct. Its purpose is to maintain the good reputation of, and maintain confidence in, the solicitors' profession."

17. Ms Emmerson submitted that the operation by the Respondent of the section 43 Order was clearly and squarely distinguishable from disciplinary proceedings, and therefore distinguishable from the authorities relied upon by the Appellant. She submitted that it was regulatory, and not disciplinary. The Respondent, when considering the imposition of a section 43 Order, adopted the civil standard. Ms Emmerson accepted

that the use of the civil standard was not expressly set out in any rules, but was instead grounded in the fact that it was regulatory and not disciplinary.

18. The Respondent, when determining whether to make a section 43 order, applied the civil standard of proof. Ms Emmerson argued that it would result in an "undesirable and unprincipled" anomaly for a different standard of proof to be applied when an order made by the Respondent was reviewed by the Tribunal. It would be highly unusual for a Tribunal or Court to apply on review or appeal a higher standard of proof than that applied by the original decision maker, not least because the mere fact of pursuing an appeal to a body imposing a higher standard of proof would improve the prospects of resisting the order in any case which involved a factual dispute.

19. It was further submitted that in this particular case the Appellant was not alleged to have committed acts which constituted criminal conduct, and therefore, there was no justification for applying the criminal standard of proof.

20. Ms Emmerson submitted that if the Tribunal concluded that it was satisfied by reference to both standards that the factual allegations were made out, it might take the view that determining the standard of proof was not necessary. However, if the Tribunal concluded that it might reach different decisions on the evidence dependent upon the standard of proof applied, it would need to determine the standard. Ms Emmerson invited the Tribunal to make a decision on the standard, so as to provide clarity for this, and any future matters.

The Tribunal's Decision

21. The Tribunal noted the paradox of the use of the civil standard by the Respondent, and the criminal standard by the Tribunal, for the imposition of s43 Orders, and the lack of a regulatory framework defining the appropriate standard. The Tribunal found it illogical that a different standard of proof could be used on the same set of facts depending on whether the Respondent chose to bring matters to the Tribunal, or deal with them internally. Further, the Respondent had set the standard of proof for its internal operation of the section 43 Order in the knowledge of the standard used at the Tribunal; the common law position for the use of the criminal standard was clear and settled law. While the Respondent correctly stated that the use of the civil standard by the Respondent had been the subject of consultation, including with the Tribunal, that meant only that the civil standard had been adopted by the Respondent in the full knowledge that the Tribunal used the different and higher criminal standard. The Tribunal had regard to the authorities cited by the parties and determined that it was inappropriate for it to use a different standard of proof when reviewing the imposition of a section 43 Order made by the Applicant, than the one it uses when considering section 43 Orders at a first instance hearing. The Tribunal determined that to employ a different standard, depending upon how the matter appeared before the Tribunal (i.e. as a review or at first instance) would lead to, in the words of Ms Emmerson, an "undesirable and unprincipled" result. There was no way of "squaring the circle" and this was the one contradiction that could not be acceptable. It would lead to some Respondents not being subject to S43 orders when brought before the Tribunal rather than when brought before the Respondent. It was also a contradiction that a review should have a different standard of proof than the decision being reviewed. This meant that S43 orders entirely correctly decided by the Respondent on the civil

standard might be overturned at a review hearing conducted to a higher standard of proof. This was a conundrum, as only one of these two unsatisfactory results could be prevented. The Tribunal decided that the former was totally unacceptable, whereas the latter was a lesser evil, and – fundamentally – could not lead to injustice, whereas the former could. The person subject to a S43 order had the option to appeal. The Respondent was then in no worse position than if they had brought the case before the Tribunal in the first place.

22. The allegation against the Appellant was one of tampering with the audit trail so as to affect the investigation of a serious complaint against him. The Tribunal determined that this was tantamount to criminal conduct, and did not accept Ms Emmerson's submissions in that regard.

23. The Tribunal also had regard to the case of Harish Doshi v Southend-on-Sea PCT [2007] EWHC 1724 (Admin) where Holman J, when summarising the authorities on the standard of proof stated that:

> "…in disciplinary proceedings concerning the legal profession it is the law that the criminal standard of proof must be applied…"

24. Accordingly, the Tribunal determined that the correct standard to employ, when reviewing the decision made by the Applicant, was the criminal standard.

The Section 44E Appeal

25. The Appellant repeated the submissions made in relation to the standard for the section 43 Order. He accepted that there was provision for the use of the civil standard in the Disciplinary Procedure Rules, but argued that it did not automatically follow that the Tribunal should apply the same standard on appeal.

26. Further, as was submitted, the allegations against him were akin to criminal allegations. Notwithstanding that the statutory scheme was introduced to allow the Respondent to deal with minor matters of misconduct, the Respondent had used those powers based on the same factual circumstances in which it had imposed the section 43 Order, which was for more serious matters. Thus, the criminal standard was the correct standard, and should be applied to this case.

27. Ms Emmerson submitted that the standard of proof that should be applied in relation to any factual findings as part of the appeal against the Disciplinary Decisions should be the civil standard. The Respondent, pursuant to its rules, applied the civil standard of proof when making decisions under section 44D. Rule 7.7 of the Disciplinary Procedure Rules provided that "The Standard of Proof shall be the civil standard." The Disciplinary Procedure Rules were introduced under the procedure set out in Schedule 4, Part 3 of the Legal Services Act 2007 ("the LSA"), and formed part of the regulatory arrangements under section 21(1)(e) of the LSA. Further, the Disciplinary Procedure Rules were the subject of consultation with the Tribunal, amongst other bodies. A clear regime had been set out for the determination of matters and it had been expressly provided that disciplinary decisions must be determined by the Respondent applying the civil standard of proof. Thus, it was submitted that any appeal must follow the same standard. Ms Emmerson argued that there was no

justification for the body adopting a higher standard than the original decision-maker, and that there was no precedent for that approach.

28. Ms Emmerson highlighted that the Tribunal's own procedural rules were silent on the issue of the standard of proof, and in those circumstances the civil standard should be applied. There was no justification for the application of the criminal standard of proof for cases before the Tribunal which were not tantamount to allegations of criminal conduct, and the authorities relied upon by the Appellant were distinguishable. Ms Emmerson submitted that although it was the Tribunal's practice to apply the criminal standard across all cases, including those where the allegations were not tantamount to criminal offences, this was a completely different scheme, and the Tribunal in determining the standard, ought to go back to first principles. Ms Emmerson submitted that the authorities did not impose a requirement to adopt the criminal standard in every single disciplinary case, and further that as these proceedings were not disciplinary proceedings, the authorities could not provide any assistance in relation to the standard to be adopted, and further that the Tribunal were not bound by the authorities in relation to the appeal.

The Tribunal's Decision

29. Having found that the correct standard for a review of a section 43 Order was the criminal standard of proof, and that the conduct alleged was serious enough to merit the criminal standard, the Tribunal determined that the S44E appeal should be decided on the same standard. The Disciplinary Decisions were made on precisely the same factual matrix as the s43 Order. The Tribunal noted that the powers conferred on the Respondent under s44D were, it was submitted, to be used to "deal with less serious disciplinary offences" and gave the Respondent the ability to impose penalties where findings of misconduct had been made. In this case, the Respondent had elected to use its powers both to operate a section 43 Order and make the Disciplinary Decisions in relation to the Appellant on the same set of facts. The Tribunal determined that this was contradictory; it was nonsensical for the Respondent to find both that the alleged misconduct was serious enough to require that the Appellant be the subject of regulatory control, and minor enough for it to use its disciplinary regime. Further, in applying its disciplinary sanction on the same facts, the Respondent was, in fact, utilising the section 43 Order as a disciplinary tool, notwithstanding the submission that the s43 Order was regulatory in nature. It would be an absurdity for the same set of facts to be capable of sustaining a finding under S44E, on the civil standard, but not a S43 order to the criminal standard. This was a repugnant notion, not made less so by the smaller nature of the penalties under the S44E order. A respondent to such proceedings as these, on one set of facts faced with applications for both S43 and S44E orders could not be "a little bit guilty" such as to warrant the one sanction but not the other.

30. The Tribunal noted that the internal scheme provided for the civil standard to be employed, and that this has been approved by the Legal Services Board. The Tribunal was cognisant of the paradox of its employment of the criminal standard, and its being the appellate body for s44E appeals, and the Respondent's express provision for the determination of disciplinary decisions using the civil standard. The Tribunal determined that the decision to use the civil standard was taken by the Respondent, knowing the standard adopted by the Tribunal, and that the Tribunal was the appellate

body. That there had been consultation about this standard, including with the Tribunal, meant only that the conscious decision to create this anomaly had been an informed decision: it was not a lacuna or an unintended consequence. There had been no attendant legislative change to alter the standard of proof used by the Tribunal, which continued to adhere to the clear case law binding it as to the standard of proof it should adopt. Accordingly, the Tribunal determined that the correct standard of proof for consideration of a s44E appeal was the criminal standard.

The Respondent's Jurisdiction to make the section 43 Order and the Disciplinary Decisions

31. The Appellant submitted that he was not an employee of DL, and therefore sections 43 and 44D of the Act did not apply to him. He referred to his contract for services, which clearly stated that he was self-employed; this was an express term of his contract. Clause 4.6 of the contract specified:

> "…The Consultant will at all material times throughout this Agreement maintain self-employed status. It is [DL's] view that the Consultant is self-employed and therefore [DL] will not provide any of the standard benefits provided under a Contract of Employment…."

32. The Appellant submitted that given his status, paragraph 13(1)(d) of the SRA Code of Conduct, which applied to any persons who was an employee (as defined in the SRA Handbook Glossary ("the Handbook")) of an authorised body (also defined in the Handbook), did not apply to him. This being so, the actions taken by the Respondent were ultra vires.

33. Ms Emmerson argued that the Appellant's submissions that he was not an employee, or employed by DL were misconceived. The Appellant was (and accepted that he was) employed by DL as an immigration caseworker during the period from July 2011 – September 2013. His company Arslan v Arslan Limited was incorporated on 16 July 2013; the Appellant was the sole shareholder in that company. On 02 September 2013, the Appellant signed an agreement with DL, in which he would provide legal services to DL in the area of managed migration, for which his company was entitled to charge DL 50% of the profit costs. The contract referred to the Appellant retaining "self-employed status". The Respondent accepted that the Appellant's contract of employment was superseded by the contract for services in respect of which he was engaged as a consultant. The Respondent did not accept that this change in the contractual arrangements took the Appellant outside of the scope of the Respondent's regulatory powers under section 43 or section 44D of the Act.

34. The jurisdiction to make a section 43 order arose by reason of a person being involved in a legal practice as defined in section 43(1A) of the Act. Section 1A included a person who is either "employed or remunerated by a solicitor in connection with the solicitors practice" or "is undertaking work in the name of, or under the direction or supervision of a solicitor". The Respondent's power to impose a section 43 order was, therefore, not limited to those persons who are "employed", but also extended to those who are being remunerated by, or undertaking work in the name of or under the direction/supervision of a solicitor.

35. Therefore, it was submitted, irrespective of the conclusion reached by the Tribunal on the meaning of "employed…by a solicitor", the Appellant fell within the scope of section 43 by reason of being a person remunerated by and/or undertaking work in the name of, or under the direction of a solicitor.

Meaning of Employed and Employee under sections 43 and 44D of the Act

36. Ms Emmerson submitted that the Tribunal, in order to determine the Respondent's powers under the Act, needed to decide on the correct construction of the words "employed" and "employee", and whether they should be construed in their broader sense or under the construction given to them in employment law. The Respondent submitted that the Appellant was "employed" and was an "employee" for the purposes of the Act which should, it was submitted, interpret "employed" and "employee" with its ordinary and natural meaning, and not the master/servant interpretation as in the Employment Rights Act 1996. Further, sections 41, 43 and 44D of the Act could not be read in isolation, as they formed part of a scheme, and ought to be construed together. Section 41(1) of the Act referred to "employ or remunerate"; section 43(1A) referred to "employed and remunerated"; and section 44D(1)(a) referred to an "employee". It was submitted that in construing the terms, the Tribunal ought to have regard to the Respondent's regulatory powers in respect of non-solicitors found in the Act as a whole.

37. Ms Emmerson argued that the regulation of non-solicitors took three main forms:

- Statutory restrictions on the employment or remuneration of certain disqualified persons under section 41 of the Act;

- The making of orders that controlled the employment of non-solicitors who are, or were, involved in a legal practice where they were guilty of material misconduct under section 43 of the Act; and

- Direct disciplinary control of employees of regulated entities under section 44D of the Act, paragraph 14B of Schedule 2 to the Administration of Justice Act 1985 and section 95 of the LSA.

38. Ms Emmerson directed the Tribunal to its decision in Cunnew (6134-1992) where it accepted that:

> "As to the question of "employment" – it is well established that a master and servant relationship is not a fundamental requirement to establish that a person has acted as a solicitor's clerk. The Tribunal considered that "employment" should be construed in the wider sense of "keeping busy" or "keeping occupied". It follows from that that payment of a wage is not essential to establish employment. The intention of section 41 is that struck off solicitors be kept out of solicitor's offices save in exceptional and closely regulated cases. Although not argued before them, the Tribunal believe it is useful to add that in its view the word "remunerate" should also be interpreted in its widest sense so that it not only means "to reward" or "to pay for services" but also "to provide recompense for". The payment of out-of-pocket expenses by the respondent was therefore remuneration."

39. This approach was expressly adopted in Coxall (8401-2001) where the Tribunal stated:

> "The interpretation of "employ" and "remunerate" are to be given the widest interpretation, and in particular the word "employ" should be taken to mean "use the services of"
>
> ….
>
> The words "in connection with his practice as a solicitor" is to be interpreted widely and essentially means in connection with the solicitor's business."

40. Also, in the case of Milnes (10422-2010), the Tribunal adopted a broad interpretation of the term and held at paragraph 43 that:

> "the words "employ or remunerate in connection with his practice as a solicitor" should be broadly construed. The word "employ" also meant "use" or "utilise the services of". The objective of section 41(1) was to keep solicitors who were disqualified from practising well away from any other solicitors' practice unless the written permission of the Law Society had been granted in accordance with section 41(2)…"

41. Ms Emmerson submitted that the Tribunal should adopt a broad approach to the meaning of "employed" in section 43 and "employee" in section 44D in line with the previous Tribunal decisions above.

42. Further, it would be inappropriate to import the definition of "employee" from the field of employment law into the disciplinary powers and the construction of the Act. In the absence of a statutory definition of "employee" or "employed" it was submitted that Parliament intended that the words were to be given an ordinary, non-technical meaning rather than imposing the authorities from the employment law context.

43. The Respondent relied on the case of R v Callender [1992] QB 303 ("Callender") in support of the proposition that it was appropriate to adopt the ordinary meaning of the terms "employee" and "employed" and that the employment law definition of "employee" considerably restricted the scope of the Respondent's powers, and curtailed the Respondent's ability to effectively carry out its regulatory functions and protect the public. In Callender, the Court of Appeal held that the phrase "office or employment" in section 16(2)(c) of the Theft Act 1968 was not confined to the narrow limits of a contract of service, but was to be construed in a wider sense as a matter of ordinary language. The Court of Appeal held (at 309G-H):

> "We have come to the conclusion that Parliament, in adopting the phrase "office or employment," intended section 16(1) of the Act of 1968 to have a wider impact than one confined to the narrow limits of a contract of service. A small indication is the use of the word "remuneration," which is a wide term, and the absence of any reference to salary or wages. We take the view that the interpretation of the words in question involves the consideration of their meaning as a matter of ordinary language. That meaning, in our judgement, is not to be arrived at by reference to the more limited and

> technical interpretations given to those words in the context of the law of master and servant …..
>
> ….
>
> The Shorter Oxford English Dictionary defines "employee" as "To find work or occupation for" and in the passive sense "often merely to be occupied." "Employment" is defined as "That on which (one) is employed; business; occupation; a commission." It seems to us that it is a perfectly proper use of ordinary language and as such to be readily understood by ordinary literate men and women to say of a person in this appellant's position that his services as an accountant were "employed" by his customers, and that this state of affairs is properly to be described by the word employment." As such the facts in this case fall within the ambit of section 16(2)."

44. Miss Emmerson submitted that a narrow interpretation of the term "employee" and "employed" potentially left a wide lacuna in the Respondent's powers to impose sanctions for breaches of the rules. The difficulty with adopting a highly technical approach would be the ease with which people otherwise subject to disciplinary sanctions and proceedings could evade those consequences simply by arranging their relationship so that they were not "employees" within the narrow definition deployed in the context of employment law. Even if subject to a "sham" or "genuine relationship" test, whereby the court would "look through" any artificial arrangements, it would still be possible to carry out legal activities on a genuinely self-employed basis or through a limited liability company and therefore evade being subject to a fine or rebuke despite performing exactly the same tasks as one would if directly employed by the solicitor. This formed part of the reasoning of the Court of Appeal in Callender, where it was stated:

> "We cannot close our eyes to the fact that if the arguments advanced on behalf of the appellant in relation to this ground of appeal are soundly based, then there is, not a small lacuna, but a yawning gap in the protection for the public afforded by section 16 of the Act of 1968 through which a large number of dishonest persons can - by arranging matters so that they come within the definition of "self-employed" - escape conviction and punishment for the kind of deceitful conduct of which the jury, by their verdicts in the instant case, found this appellant to be guilty. That is a conclusion to which we would be reluctant to come unless we were constrained to do so by higher authority directly in point, of which we are satisfied there is none."

45. Thus, Ms Emmerson submitted that the term "employed by a solicitor" in section 43 should be construed in an ordinary and non-technical way in light of the purposes of the Act. The technical definition of "employee" used in the context of the Employment Rights Act 1996 and employment law should not be imported into the Act. A person could be "employed" by a solicitor where (i) a person was engaged under a contract of service by a solicitor (this question being determined by the reality of the working situation including factors such as sufficient degree of control on the part of the employer over the employee, mutuality of obligation between employer and employee and an obligation to provide work personally) and (ii) where a person engaged under a contract for services made between a firm and a company which was

wholly owned and directed by the individual not otherwise holding itself out as providing legal services. If this approach was adopted, it was submitted, then the change in the contractual position of the Appellant on 2 September 2013, was immaterial.

46. If the Tribunal did not accept this approach to the definition of the term "employed" for the purposes of section 43, this would not be determinative of the Respondent's powers under that section in relation to the Appellant, as, in any event, the Appellant was, at all material times, remunerated by a solicitor in connection with the solicitor's practice and undertaking work under the supervision of a solicitor.

47. Ms Emmerson submitted that for the reasons already espoused, the term "employee" in section 44D should be given its ordinary and non-technical meaning.

48. The Appellant's contract of services with DL provided that his company would charge 50% of the profit costs received by DL for the work undertaken by his company. In consideration of that fee, the Appellant (who was described in the contract as the Consultant) was to carry out such services as was agreed between the parties including dealing with casework and advocacy, attending clients, taking instructions and preparing cases, and dealing with correspondence. He was also subject to obligations including maintaining self-employed status. He was also required to comply with regulatory requirements.

49. Given those arrangements, Ms Emmerson submitted that the Appellant was employed within the meaning of section 43, and an employee with the meaning of section 44D and a regulated person under the Disciplinary Procedure Rules. Thus Ms Emmerson invited the Tribunal to conclude that the Respondent had not acted ultra vires, and did have the power to make the section 43 Order and impose disciplinary sanctions under section 44D.

The Tribunal's Decision

50. The Tribunal first considered section 43 of the Act to determine whether a person in the Appellant's position (i.e. a self-employed person) was governed by the provisions of that section. In making its determination, the Tribunal considered the requirements of section 43(1) to be made out (at this stage the Tribunal had made no determination in relation to the facts of this matter and the operation of the section 43 Order by the Respondent).

51. In the event that section 43 had been properly engaged, the Tribunal found that the Respondent had the jurisdiction to consider the imposition of an order, as the provisions of section 43(1A), applied to those who were involved in a legal practice, which the Appellant clearly was. The Tribunal further determined that it did not need to consider whether the Appellant was "employed" for the purposes of this section, as the legislation specifically covered people in the Appellant's position. He was clearly remunerated by a solicitor (s43(1A)(a)), and further was undertaking work under the direction and supervision of a solicitor s43(1A)(b)). The fact that the Appellant was remunerated via his company was irrelevant for the purposes of the Respondent's jurisdiction under section 43 of the Act. Further, DL would itself be in breach of its

regulatory obligations if the Appellant was undertaking work without being supervised.

52. The Tribunal then considered the correct construction of the word "employee" under section 44D. The Tribunal noted that Parliament had specifically amended section 43 of the Act to include consultants, and that this amendment had occurred prior to the insertion of section 44D. Had Parliament intended for section 44D to apply to consultants, it would have stated that expressly. Section 44D specifically stated "a solicitor or an employee of a solicitor". The Tribunal considered that Ms Emmerson had made a valiant attempt to take the word "employee" as meaning "employment" and to use the word in its generic or wider sense, which was a perfectly coherent linguistic argument. However, "employee" within section 44D was used as a noun, and was not capable of any meaning other than a person under a contract of employment. The Tribunal considered that Parliament must be presumed to have known what it was doing when inserting section 44D into the already amended Act. Thus, it determined that Parliament did not intend for the SRA to be able to operate the statutory scheme under section 44D on those that were not an integral part of the employment structure of a firm. To construe "employee" in the wider sense, as submitted by Ms Emmerson, would mean that the IT consultant and other service providers could also be subject to regulation by the Respondent, which was clearly not Parliament's intention. The Tribunal did not accept that construing "employee" in this way would lead to a "lacuna" or a "yawning gap" in the Respondent's ability to protect the public afforded by section 44D, as if there was unsatisfactory conduct, the Respondent could use the power conferred by section 43 of the Act.

Review/Rehearing

Section 43 Order

53. Ms Emmerson submitted that the challenge to the section 43 Order was by way of the Tribunal conducting a review. Ms Emmerson referred the Tribunal to paragraphs 58 - 61 of its Guidance Note on Sanctions (December 2015), which related to the review of a Section 43 Order. Paragraph 61 stated:

> "61. It is essential to recognise that the Tribunal carries out a **review** of the imposition of the Section 43 Order. **It does not rehear the original case.** The question that the Tribunal must consider – per Mr Justice Wilkie in **Solicitors Regulation Authority v Ali [2013] EWHC 284 (Admin.)** is "whether it was, in the circumstances, any longer necessary for the level of regulatory control to be imposed upon the person subject to the Section 43 Order", taking into account the purpose of the order in safeguarding the public and the reputation of the legal profession."

S44E Appeal

54. The Appellant submitted that the lack of any express legislative framework allowed the SRA too high a degree of flexibility and power, allowing the SRA to interpret the law in the way that suited it best. The Appellant submitted that the Tribunal should reject the Respondent's submissions, and conduct a:

> "fair and impartial hearing. The SRA cannot tell the Tribunal how to deal with such matter. What the SRA is saying here basically, trying to tell the Tribunal that the SRA is a judiciary body and the Tribunal should just review their decision. They try to invade the Judiciary's territories in breach the principles of the separation of powers (sic)".

55. Ms Emmerson submitted that there was no express provision in either the statutory scheme of the 2011 Rules which determined whether an appeal from the SRA to the Tribunal ought to be by way of a review or re-hearing. The correct approach, it was submitted was for the matter to be reviewed. This approach was analogous to appeals from the Tribunal to the High Court following disciplinary proceedings, and the provisions of CPR 52.11.

56. In Hafiz & Haque v SRA (11253-2014), the Tribunal stated:

> "The Tribunal was mindful that, absent any error of law, it must pay considerable respect to the decisions of the Civil Procedure Rules 52.11 (being those applied by the High Court to appeals to it from decisions of the Tribunal). An appeal would be allowed where the decision of the Adjudication Panel was (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings before the Adjudication Panel."

57. Thus, the Tribunal in that case had proceeded on the basis that the appeal should be decided by way of a review in light of the provisions of CPR52.11. Ms Emmerson submitted that this was the appropriate approach, and should be followed in the instant, and any future, appeal.

58. Further, the purpose of the legislative amendments brought into force by section 44D was to empower the SRA to deal with less serious matters itself without the need to bring proceedings before the Tribunal, thus saving expense and reducing delays. It was submitted that this purpose would be defeated if an appeal to the Tribunal resulted in a re-hearing of the case.

59. Ms Emmerson submitted that in undertaking a review of the Disciplinary Decisions, the overriding question for the Tribunal was whether the decision was (a) wrong or (b) unjust because of a serious procedural error or other irregularity. The nature of a review was submitted to be flexible enough to allow the Tribunal to deal with cases fairly and justly as determined by the facts of the case. Ms Emmerson referred the Tribunal to the case of E I Du Pont Nemours & Company v ST Dupont [2003] EWCA Civ 1368, [2006] 1WLR 2793. Finally, it was submitted that given the flexible nature of any review, the Tribunal, when considering the facts underlying the disciplinary decisions, could in exceptional circumstances, consider hearing oral evidence in order to determine for itself the factual allegations underpinning the decisions.

The Tribunal's Decision

60. The Tribunal accepted Ms Emmerson's submissions that a review was the correct approach for dealing with section 43 matters that came before the Tribunal. The Tribunal noted that the Guidance Note on Sanctions was drafted to reflect the

provisions of the Act, and did not define the way in which the review should be carried out.

61. The Tribunal also accepted the submissions made by Ms Emmerson in relation to the section 44E appeal. The Tribunal considered the authorities to which it had been referred and in particular the judgment of Aldous LJ in E I Du Pont where he stated:

> "Rule 52 of the Civil Procedure Rules draws together a very wide range of possible appeals…It encompasses not only appeals where the lower court was itself a court, but also statutory appeals from decisions of tribunals, ministers or other bodies or persons…it applies to a wide variety of statutory appeals where the nature of the decision appealed against and the procedure by which it is reached may differ substantially…..It is evident that rule 52.11 requires, and in my view contains, a degree of flexibility necessary to enable the court to achieve the overriding objective of dealing with individual cases justly…"

62. The Tribunal also relied on the determination in Hafiz v Haque (ibid) and agreed that the process of an appeal outlined in that case, should be followed in all cases involving an appeal of the Respondent's exercise of its disciplinary powers.

63. Accordingly, the Tribunal determined that the correct approach for a section 43 review and section 44E appeal was by way of a review and not a re-hearing.

Chronology Of Events

DATE	EVENT
October 2012	The Appellant was instructed by Ms K in relation to an asylum claim.
30 October 2012	The Appellant meets with Ms K.
Jan – Apr 2013	Emails between the Appellant and Ms K in relation to the progression of her case.
May 2013	Interim bill
21 May 2013	The Respondent receives an initial report made by the Children's Society on behalf of Ms K raising an allegation of sexual harassment against the Appellant. The allegation was not communicated to the Appellant or DL at that time.
11 June 2013	The Respondent receives a formal complaint from the Children's Society.
24 June 2013	DL receives a transfer request to FC. A copy of the file was sent to FC on that date. DL also retained a copy of the file.
21 July 2013	The file was billed. A checklist was completed by the Appellant in order to bill the file.
29 August 2013	DL archived the file.
2 September 2013	The Appellant becomes self-employed and enters into a contract for services with DL, having previously been employed by DL under a contract of employment.
5 December 2013	The Respondent receives a statement from Ms K.

DATE	EVENT
24 December 2013	The Respondent sends an email to the Appellant at the email address held by the SRA in relation to the Appellant. This attaches the EWW letter and witness statement of Ms K. The letter requires the Appellant to provide attendance notes in respect of meetings with Ms K.
26 December 2013	The Applicant responds to the email of 24 December from a different email address and asks the Respondent to resend the email to the new address as he was unable to open the attachments.
27 December 2013	Document A "modified on DL's case management system. Document C imported into the case management system.
30 December 3013	The Respondent resends the email and attachments to the Appellant.
06 January 2014	DL informs the Respondent that the Compliance Officer for Legal Practice is conducting an internal review.
09 January 2014	DL suspends the Appellant, and informs the Respondent that the Appellant is suspended pending the investigation.
14 February 2014	The Respondent obtained access to DL's records including a physical copy of the file sent to FC.
03 March 2014	The Respondent sends a second EWW letter asking the Appellant to explain differences between the documents on the physical file and those he provided.
20 March 2014	The Appellant responds to the second EWW letter. The Respondent receives an interim report from DL.
16 April 2014	The Respondent receives comments from DL in relation to further enquiries made.
27 June 2014	The Regulatory Manager ("the RM") sends out a report to the Appellant, attaching relevant documentation, and requesting a response within 14 days.
11 July 2014	The Appellant submits his response together with attachments.
25 July 2014	A report was prepared setting out the matters for consideration in light of the Appellant's submissions.
02 August 2014	The matter was considered by an Adjudicator who stood the matter over whilst various issues raised by the Appellant were considered.
16 October 2014	A Supplementary report was prepared by the RM, taking into account the Submissions received from the Appellant on 30 September 2014.
16 January 2015	The Adjudicator's decision.

Background

64. In October 2012, whilst the Appellant was an employee at DL, he was instructed by Ms K in relation to an asylum application. On 21 May 2013, the Children's Society, on behalf of Ms K, made a complaint of sexual harassment against the Appellant to the Respondent. Neither DL, nor the Appellant were made aware of the complaint at that time. That initial complaint was eventually closed due to a lack of evidence, and the circumstances of that complaint did not form part of the Adjudicator's decision in relation to the Appellant.

65. On 19 June 2013, the Appellant emailed the Respondent's contact centre and informed them of a change of his residential address. The email was sent from the Appellant's new email address, but he did not notify the Respondent in that change of contact details email of his new email address.

66. On 24 June 2013, Ms K's file was transferred to FC. During that process, DL took a copy of the complete file to retain for its records, and sent the physical file to her new solicitors.

67. On 02 September 2013, the Appellant's status with DL changed from his being an employee under a contract for employment, to his being a self-employed consultant.

68. On 24 December 2013, the Respondent emailed the Appellant and attached a letter with enclosures. The letter raised a number of serious sexual harassment allegations raised by the Children's Society on behalf of Ms K. The allegations concerned interactions and meetings outside of the office between the Appellant and Ms K, and in particular, where the Appellant lived and whether he had taken or invited Ms K to his home.

69. On 26 December 2013, the Appellant emailed the Respondent, from his unregistered email address and stated:

> "I wonder whether you can send me your attachments to this e-mail address as I cannot download it via mobile phone as I cannot log into my old email address via computer. This is the email address that I use"

70. On 30 December 2013, the SRA re-sent the email to the new address. This was the address used by the Respondent for all future correspondence with the Appellant in relation to this matter. The letter had provided the Appellant with seven days to submit his response, meaning that his response was required by 31 December 2013. The Appellant responded to the email on 30 December, asking for an extension of time within which to submit his response. An extension was granted, and the Appellant was given until 10 January 2014 to provide his response.

71. On 10 January 2014, the Appellant provided a substantive response, including supporting documentation to the Respondent. On 14 February 2014, the Respondent obtained access to the records and electronic file management system of DL, and the file that had been provided to FC. There were discrepancies between some of the documents provided by the Appellant and those contained on the copy file at DL, and the file sent to FC. At or around 27 February 2014, the Respondent had concluded that there was insufficient evidence to support the allegation made by the Children's Society against the Appellant. This information was not communicated to the Appellant or to DL at that time, nor for some months.

72. As a result of the discrepancies between the documents, further issues were raised with the Appellant by way of a second EWW letter dated 03 March 2014. The issues in relation to the documents in question were:

- Document A The initial attendance note dated 30 October 2012. The document provided by the Appellant was a page longer than that contained on the original file. The additional page covered some of the issues raised in the first EWW (24 December 2013).

- Document B Handwritten Attendance Note dated October 2013. This related to an attendance in 2012, which was not on the original/copy file, and was uploaded onto the system on 27 December 2013.

- Document C Telephone Attendance Note dated October 2012. This was not on the original/copy file and no time recording entry had been made for it. Further, it addressed some of the issues raised in the first EWW letter.

- Document D Attendance Note dated 15 April 2013. This was different in style, format and content to that contained on the original/copy file.

- Document E Letter dated 15 April 2013. This was created on 24 June 2013.

73. The letter raised further allegations that the Appellant, in light of the inconsistencies had created attendance notes and altered original documents; created a number of documents to provide evidence to support his response; and in failing to inform the SRA from the outset that he had created or amended the documents, he had attempted to mislead his regulator.

74. The Appellant provided a substantive response to the new matters raised on 20 March 2014. In that letter he denied altering the documents to answer the allegations raised in the EWW letter of 24 December 2013. The Respondent sent a copy of the Appellant's response to DL, who provided a response on 16 April 2014, setting out the expectation on the Appellant when billing/closing the file.

75. On 02 August 2014, the first Adjudicator stood the matter over, asking the RM to consider the various issues raised by the Appellant in his response. A second draft report was prepared and sent to the Appellant on 16 September 2014; the Appellant responded on 30 September 2014. The second report was finalised on 16 October 2014. It was identical in content to the draft report sent to the Appellant.

76. The second Adjudicator was provided with the following documents:

- The reports of the RM dated 25 July and 16 October 2014 together with supporting documents.

- The Appellant's submissions of 11 July and 30 September 2014 together with supporting documents.

- Email from Ms K dated 11 March 2013 (provided by the Appellant).

The Adjudicator's Decision

77. The Adjudicator had to consider the following:

- Whether the Appellant had provided false and misleading information during the course of an investigations and if so:

- If he had breached Principles 2, 6, 7 and failed to achieve Outcome 10.6 of the SRA Code of Conduct 2011;

- Whether the conditions for making a section 43 order against the Appellant were satisfied and if so, if the order should be published;

- Whether the conditions for rebuking and/or imposing a financial penalty against the Appellant were satisfied, and if so, whether the decision should be published.

78. In making his decisions, the Adjudicator was required to take into account the regulatory objectives, in particular promoting and protecting the public interest and interests of consumers. The evidence was assessed on the balance of probabilities. The Adjudicator made it clear that he was not considering the substantive allegations made by Ms K.

79. The Adjudicator noted that some of Ms K's allegations related to meeting with the Appellant outside of the office, the Appellant's inviting her to his home and inviting her to stay at his home. The SRA had specifically asked in their letter of 24 December 2013 for details regarding the location, time and date of all meetings between the Appellant and Ms K and for attendance notes to be provided. The Adjudicator considered individually the five documents which had been supplied by the Appellant to the SRA in response to the first EWW letter.

Document A – Typed Attendance Note dated 30 October 2012

80. The Adjudicator noted that in their letter of 24 December 2013, the SRA asked for details of where the Appellant lived, as well as details of the location, time and date of meetings between the Appellant and Ms K. Further copies of attendance notes of the meetings were to be provided.

81. The Adjudicator found that the attendance note provided by the Appellant to the SRA contained an additional page of text which had not been present in the version of the attendance note provided to FC on 24 June 2013. The additional text came after a section headed "action" and after the apparent end of the attendance note provided to FC. The additional text detailed where the Appellant lived and provided an explanation as to why the Appellant met with Ms K outside of the office. These were issues upon which the SRA sought an explanation in its letter dated 24 December 2013.

Document B – Handwritten Attendance Note dated October 2013

82. The Adjudicator noted that the handwritten attendance note had been produced by the Appellant, who informed the SRA that it was a note of the initial meeting with Ms K on 30 October 2012. The Adjudicator found that the note dealt with a number of the allegations pursued by Ms K and the questions raised by the SRA in their letter dated 24 December 2013 including: (i) that the Appellant asked whether Ms K had a boyfriend, (ii) what was said and asked about Ms K's circumcision, and (iii) why the

Appellant met Ms K outside of the office in Beckenham. The attendance note also supported some of the statements made by the Appellant to the SRA in his letter dated 10 January 2014. Further, a copy of the attendance note was not on the file provided to FC on 24 June 2013, and the note was created on DL's electronic document system on 27 December 2013 by the Appellant, and was given a date of October 2012. Therefore, an electronic version of the attendance note was created on DL's electronic document system only three days after the SRA's letter of 24 December 2013.

Document C – Electronic Telephone Attendance Note dated October 2012

83. The adjudicator noted that the Appellant's case was that this attendance note was created in October 2012 in relation to a telephone conversation which occurred in October 2012. The adjudicator found that the electronic attendance note was created on DL's system on 26 December 2013, and given a creation date of 15 November 2012. There was no copy of this attendance note on the file transferred to FC. The text of the attendance note was directly relevant to some the questions raised by the SRA in their letter dated 24 December 2013, namely why the Appellant met with Ms K out of the office in Beckenham, and includes information requested by the SRA in their letter dated 24 December 2013. The text of the attendance note was, in part, written in the past tense, which suggested it was not made contemporaneously. Further no time was recorded on the file for the call.

Document D – Attendance Note dated 15 April 2013

84. The Adjudicator made no findings in relation to this document, save that it was not provided to FC.

Document E – Letter dated 15 April 2013

85. The Adjudicator made no findings in relation to this document.

86. The Adjudicator also made the following findings of relevance to each of Documents A, B and C:

- It was the Appellant's responsibility to ensure that the file was in order when it was billed. The first bill was dated May 2013. The file should therefore have been fully up to date in May 2013, shortly before the file was transferred to FC. However, the file provided to FC contained a different version of Document A and did not include Documents B and C.

- Documents A - D were not provided to FC at any time subsequently.

- The Appellant had stated that DL goes through the files around December every year, and therefore the file should have been gone through in December 2012, and Documents A and C should have been placed on the file at that time.

- The Appellant had successfully received the SRA's email with attachments on 24 December 2013. In reaching that conclusion, the Adjudicator stated that the Appellant had provided contradictory reasons as to why he could not open the attachments to the SRA's email dated 24 December 2013.

87. In light of these findings the Adjudicator concluded on the balance of probabilities that in relation to Documents A, B and C the Appellant did provide false and misleading information to the SRA during the course of an investigation, and concluded that the Appellant had breached Principles 2, 6 and 7 and Outcome 10.6 of the SRA Code of Conduct 2011.

88. The Adjudicator concluded that Documents D and E were not, on the balance of probabilities, created by the Appellant in an attempt to mislead the SRA.

89. The Adjudicator then made the section 43 Order and imposed the Disciplinary Decisions that are the subject of this review/appeal.

Appellant's Submissions

Document A

90. The Appellant submitted that there was no evidence that he had altered the document for the investigation. The initial attendance note had been finalised to keep the electronic file management system up to date, and he had no intention to deceive or to make any gain. He submitted that the information on the last page dealt with arrangements and not the "allegations" as asserted by the Respondent further, the information contained on that last page was true and factual.

91. Further, he had provided an email from Ms K, which showed that she wanted to meet him in Beckenham. In those circumstances, there was no need for him to alter the attendance note to answer the questions posed by the Respondent, as there was independent evidence which proved what he was saying to be accurate. The additional text on the attendance note was simply a matter of internal file keeping and had nothing to do with the allegations.

Document B

92. The dating of this document 2013 instead of 2012 was simply an error. The document was uploaded onto the electronic system during the clear out of his shelves and desk. The PDF was already on the computer and it was whilst he was clearing the information on his computer that he uploaded the relevant documents to their related files. This was just one of those documents. The content of the note was accurate and truthful, and there was nothing dishonest, deceitful, or misleading about the content of the attendance note, nor the upload of it onto the system.

Document C

93. The Applicant submitted that this was again a factual, truthful and correct record of the meeting that took place. In those circumstances, it could not be dishonest, deceitful or misleading. Further, the Appellant relied on the email from Ms K dated 11 March 2013, which clearly showed that Ms K had suggested they meet in Beckenham.

Document D

94. The Appellant submitted that this document was a further example of the way in which he finalised his attendance notes. The copy on the file provided to FC was different to that provided by the Appellant to the SRA, and that contained on the electronic system. The format was different, and there was additional information contained in the notes on both provided by the Appellant to the SRA and on DL's electronic system.

Document E

95. The Appellant submitted that the letter was created in April, but not placed in the system until June.

96. The Appellant submitted that there was no difference between Documents A – C, where the Adjudicator found that he had misled the SRA, and Documents D and E where the Adjudicator did not make a similar finding.

97. The Appellant denied that he was in receipt of the email on 24 December 2013. He submitted that he had been unable to read the attachments to the email as he was unable to open them on his phone, and was therefore not aware of the allegations until 30 December 2013, when the SRA re-sent the email to him. He could see that an email had been received and from whom, and the first few words of it, but that email account was not operational and he could not open any of the emails to it. That was why he had asked the Respondent to resend it to a different address. Given those circumstances, he could not have amended the attendance notes in order to answer the questions in the EWW letter of 24 December 2013, as he was not aware of the content of that letter until after he had finalised and uploaded his notes. He was keen to do this fully at that time as he was to have an extended absence in order to study for and to sit exams.

98. The Appellant further submitted that Documents A, B and C should be excluded as evidence as "there is no evidence of alteration". Further "…the attendance notes cannot be used as evidence of 'false and misleading information'. The fact has been misrepresented by the SRA to make an unlawful gain on it……the SRA has provided false and misleading information to the Adjudication Panel and breached the evidence rule as part of their breach of the rule of natural justice. The SRA has no power to question the attendance notes because the initial allegations were fabricated…the SRA has no power to investigate such issue and its actions are ultra vires, unconstitutional and racist." The Appellant sought to exclude Documents A, B and C under section 78 of the Police and Criminal Evidence Act 1984 ("PACE") and Article 8 of the European Convention on Human Rights("the ECHR").

99. In summary, the Appellant invited the Tribunal to reject the findings of the Adjudicator and uphold the appeal and revoke the decisions of the Adjudicator.

Respondent's Submissions

100. Ms Emmerson submitted that the attendance notes relating to meetings and conversations with Ms K were either created or amended by the Appellant once he became aware of the allegations being pursued by Ms K. The Respondent considered that the Appellant was aware of the allegations by 26 December 2013 at the latest by virtue of the SRA's email dated 24 December 2013.

Document A

101. Ms Emmerson submitted that the attendance note was amended by the Appellant following notice of the complaint made by Ms K and was amended for the purposes of supporting the Appellant's response to the allegations. In support of this Ms Emmerson highlighted that:

- A contemporaneous attendance note was created on DL's system on 30 October 2012. However, this document was opened on the case management system on 27 December 2013 at 02:20am, just 3 days after the first EWW letter. DL's system did not permit checking of whether or not the file was electronically modified on that date, however, the Adjudicator inferred from the evidence that it had been;

- The Appellant did not provide a coherent explanation as to when and why he accessed the attendance note on 27 December 2013;

- The additional text appeared to have been added after the attendance note was originally drafted and did not logically follow on from it, but rather appeared to be a discreet addition which responded directly to the questions posed by the SRA in the first EWW letter and supported the assertions made by the Appellant in his response to those questions;

- The amended attendance note was not included in the file provided to FC in June 2013, nor was it supplied at any later stage; and

- On the Appellant's own case, he would have audited the file in December 2012 to ensure it was complete and updated, and the "finalised" attendance note should have been placed on the file at that time.

102. Ms Emmerson submitted that the Appellant's claim that the contents of the note were true entirely missed the point in that even if the text was factually correct, the addition of that text were a purportedly contemporaneous record, and the subsequent provision of this to the SRA, seeking to pass off the document as a contemporaneous record, was unacceptable.

Document B

103. The Respondent contended that Document B was created in December 2013 in response to the first EWW letter. In support of this Ms Emmerson highlighted that:

- The document was first uploaded onto DL's electronic system on 27 December 2013 at 14.56. Prior to this time it was not on the electronic case management system;

- The contents of the note addressed some of the queries raised by the SRA and supported the Appellant's submissions to the SRA. The content differed in some respects from Document A (which the Appellant claimed amounted to a typed up version of Document B), including in relation to matters which were material to the questions posed by the SRA;

- No physical copy of the handwritten note had ever been found;

- The amended attendance note was not included in the file provided to FC in June 2013, nor was it supplied at any later stage; and

- On the Appellant's own case, he would have audited the file in December 2012 to ensure it was complete and updated, and the attendance note was not uploaded to the system at that stage.

Document C

104. Ms Emmerson submitted that there was a dispute as to when this document was created, and the purpose for which it was created. The SRA contended that Document C was created in December 2013. In support of that contention it was submitted that:

- The document was first created on DL's electronic system on 26 December 2013 at 10:22;

- The Appellant gave this file an electronic creation date of 15 November 2012;

- It was not in the file transferred to FC and was at no time supplied to them;

- There was no corresponding time entry for the call and there was no good reason why this call would be conducted pro bono;

- The attendance note specifically addressed questions raised by the SRA in the first EWW letter, and supported the Appellants response to the SRA; and

- The content of the note suggested that it was not a contemporaneous record.

Documents D and E

105. The Adjudicator found that, on the balance of probabilities, these documents were not created by the Appellant in an attempt to mislead the SRA. Further, Document D differed to Documents A, B and C as there was no electronic evidence of the creation date, and the additional information that was available in relation to Documents A, B and C, were not available for Document D. Document E differed completely from Documents A - D, as it was a letter and not an attendance note.

106. Ms Emmerson submitted that the Appellant's application to exclude Documents A, B and C under section 78 of PACE and Article 8 of the ECHR, was fundamentally misconceived; this was not a criminal process to which PACE applied, and Article 8 was not engaged in relation to the Documents. The privilege in those documents belonged to the client and not to the Appellant or DL. Further, those documents had originally been provided to the SRA by the Appellant in his response to the first EWW letter.

107. In relation to receipt of the email dated 24 December 2013, the Adjudicator found on the balance of probabilities that the email and attachments had been received by the Appellant. Ms Emmerson submitted that whilst there was some evidence that the Appellant was having difficulties accessing his email account in and around December 2012, there was no evidence that this continued through to December 2013. Further, when the Appellant emailed the SRA updating his contact information on 19 June 2013, he did not seek to update his email address. The Appellant had responded to the Respondent's email within 48 hours of it being sent, notwithstanding the fact that he claimed that the email address had been "hacked" and/or he was not using it.

108. Given all of the above, Ms Emmerson submitted that the decisions of the Adjudicator were not wrong or vitiated by a procedural irregularity, and, although not binding on the Tribunal, should be given considerable respect.

109. In summary, Ms Emmerson invited the Tribunal to uphold and/or accept the findings of fact of the Adjudicator and conclude that the Appellant deliberately created and amended documents after receiving notice of a complaint by Ms K, and sought to pass them off as contemporaneous records in responding to the first EWW letter sent by the SRA. In amending and creating documents in this way, the Appellant had failed to deal with his regulator in an open and cooperative manner, had demonstrated a lack of integrity and failed to behave in a way that maintained the trust the public places in him and in the provision of legal services.

The Tribunal's Decision on the Review/Appeal

110. The Tribunal had due regard to the Appellant's right 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 ("ECHR"). The Tribunal took careful note of all the oral and written submissions, including those that do not appear in this judgment.

111. The Appellant's case was that he had not created or amended documents in response to notification of allegations of sexual harassment, and that he had not provided false or misleading information to the SRA. The Respondent's case was that attendance notes had either been created and/or amended by the Appellant so as to answer those allegations. The Appellant, having made and/or altered the notes, then sought to pass them off as contemporaneous notes in an attempt to mislead the SRA. The Tribunal considered that there was a key factual dispute between the parties; in order to review the section 43 Order and consider the appeal of the Disciplinary Decisions, it would need to undertake a detailed consideration of the facts underpinning both decisions.

Receipt of the First EWW Letter dated 24 December 2013

112. The Tribunal determined that the Adjudicator failed to properly take into account the Appellant's explanation that he was unable to open the attachments to the email. In paragraph 6.12 of the Decision of the Adjudicator, he considered the submissions made by the Appellant in his various responses to the SRA. However, the Adjudicator failed to consider fully the Appellant's explanation that he was unable to open the attachments, and came to the conclusion that the Appellant's explanation was inherently implausible, without properly considering that explanation. The Adjudicator's decision on this point was made on an assumption that was not supported by any evidence. The Tribunal determined that the Adjudicator was right to find that the Appellant successfully received the email of 24 December 2013, but was wrong, without any evidence, to conclude that he was able to open the attachments to that email, and was therefore aware of the contents of the first EWW letter. The Tribunal found that the Adjudicator's decision was wrong on both the civil and the criminal standards. Given these findings, the Appellant's appeal and review were successful; as the Appellant was not aware until 30 December 2013 at the earliest of the content of the first EWW letter, he could not have amended or created documents to provide false or misleading information to the SRA during the course of their investigation. However, notwithstanding its findings in relation to the Appellant's knowledge of the content of the first EWW letter, the Tribunal considered the Adjudicator's findings in relation to Documents A - E.

Document A

113. The Appellant accepted that he had amended the note at a later date, but submitted that this was not done with the intention of misleading the SRA, or to defend himself against the allegations made by Ms K. The amendments made were to finalise the note, so that it was a complete and accurate reflection of matters discussed at that meeting. The Tribunal examined the content of the additional text carefully and found that the subject matter contained in the additional text was only tangentially relevant to the questions posed in the first EWW letter; it did not bear on the substance of the allegations fully. It also dealt with issues not pertaining to the first EWW letter. The Tribunal considered that if the Appellant was trying to construct a justificatory document, he could and would have done better than the document that had been produced. The Tribunal determined that the additional text was less likely to have been added in order to rebut the allegations.

114. The Tribunal also determined that the Appellant had no need to rebut the allegations by way of amending the attendance note, as the email from Ms K clearly showed that she initiated meeting the Appellant in Beckenham. The Tribunal accepted the Appellant's submission that he was updating all of his files between September and December 2013. Further, there was no evidence from the SRA to rebut this.

115. The Tribunal noted that the SRA did not submit that the content of the note was factually incorrect. The Tribunal were concerned that, given the Appellant's responses to the SRA, there was no investigation as to whether the Appellant had done this on any other files he was running at the time; this was something that could have easily been checked. If it had been found that this was the only file where these

types of amendments had been made, the SRA's contentions would have had considerably more weight.

116. Given the Adjudicator's lack of a proper consideration of the Appellant's explanation, the failure of the SRA to properly investigate the Appellant's explanation and the email from Ms K, the Tribunal could not find, either on the civil or the criminal standard, that Document A had been amended by the Appellant to mislead the Respondent.

Document B

117. The Tribunal noted that it was the SRA's case that this document was created after the EWW letter was sent. However, there was no evidence of the date of the creation of the document. The evidence before the Tribunal and the Adjudicator was the date that the PDF was uploaded onto DL's electronic case management system. No checks were made with DL or on the Appellant's computer to see when the PDF was saved to his computer, and the explanation provided by him was simply discounted. The Tribunal considered that the uploading of the document into the case management system, was not, and could not, be deemed to be direct evidence of the date of the creation of the document. The Respondent was unable to provide any evidence of when the document was created, and the upload date was circumstantial at its best. The Tribunal found that it could not be ascertained that this was not a contemporaneous written record of the meeting between the Appellant and Ms K in October 2012.

118. The Tribunal determined that the act of uploading the document in and of itself could not be misleading, where that document was a contemporaneous note of the meeting. By uploading the document, the Appellant was filing the document in the electronic file as he should have done when it was created.

119. The Adjudicator highlighted some of the content of the note as pertaining to the first EWW letter. Given the nature of Ms K's case, the Tribunal determined that the questions asked by the Appellant of her were right and proper in the circumstances.

120. Given the lack of evidence of the date of the creation of this document, the Tribunal did not find, either on the civil or the criminal standard, that Document B had been created by the Appellant to mislead the Respondent. Thus the Adjudicator was wrong to find that the Appellant had provided false and misleading information to the SRA during the course of an investigation in relation to this document.

Document C

121. The Tribunal identified that the issues with Document C were similar to Documents A and B in that the Appellant had independent evidence of Ms K's willingness to meet in Beckenham for her convenience, and therefore the Appellant did not need to create this document to defend himself from the allegations. Further, the Tribunal had already determined that they could not find, to either standard of proof, that the Appellant had accessed the attachment to the email of 24 December 2013 prior to 30 December 2013.

122. The Tribunal did not consider the Adjudicator's finding in relation to part of the document written in the past tense to be evidence of any wrong doing by the Appellant. Unless the attendance note was written as the event being recorded was unfolding it could well be written in the past tense. Even a contemporaneous note could be written in that tense. No regard was had to the fact that English is not the Appellant's first language, and while he demonstrated a very good command of English during the hearing, it was also apparent that English was not his mother tongue. The Respondent argued that Document C was false and misleading on the face of it, as it was put in to create a paper trail, albeit of true matters. The Tribunal considered that for it to be misleading, the document would have to mislead; it did not. Further, the Tribunal noted that there was no time recording of the call. The Tribunal did not accept that the Appellant had chosen to work pro-bono, but determined that when he uploaded the note onto the system, it was too late to time record it.

123. The Tribunal did not see any evidence to confirm that Document C was not a true record of the telephone conversation it purported to note. The Tribunal determined that the Adjudicator was wrong to find that Document C was created or amended to provide false or misleading information to the SRA. Further, the Tribunal did not find to the civil or criminal standard that Document C was created to mislead the SRA.

Documents D and E

124. The Tribunal noted that the Adjudicator provided no reasons for his determination that Documents D and E were not created/amended to mislead the SRA. The Tribunal determined that Document D was similar to Document A, in that the copy on the electronic system was contained more information than the copy of that document on the original file provided to FC. Having examined the content of Document D the Tribunal concluded that it was not relied upon as the additional information contained in that document did not bear directly or tangentially on the allegations contained in the first EWW letter. The Tribunal considered that the amendment of this attendance note provided evidence that the Appellant was prone to amending documents after they had been created, and supported his contention that the additional information contained in the documents was due to his 'finalising' the notes. The Tribunal considered that the Adjudicator had been inconsistent in his treatment of the documents; it seemed that the Adjudicator had found that contemporaneous records could be innocently and acceptably amended after the event (as per Document D), as long as those amendments did not seemingly relate to the issues in the first EWW letter (as per Documents A and C). Document E was a letter, so different in nature to the other documents.

125. Given the Tribunal's findings, it did not consider whether the conduct amounted to a breach of the SRA Code of Conduct 2011.

126. The Tribunal considered that the Adjudicator took insufficient account of the evidence available to him, and did not fully explore the gaps in the evidence or the Appellant's explanations. There was no evidence of bias on the part of the Adjudicator, but his decisions were wrong on the facts, and where indicated, in law.

127. The Tribunal therefore quashed the section 43 Order and revoked the Disciplinary Decisions of the Adjudicator dated 16 January 2015.

128. The Appellant, having been accused in December 2013 of sexually harassing a vulnerable client, was not informed until August 2014, at the earliest, that that allegation was no longer being investigated due to a lack of evidence. This was despite the decision to close the matter having been taken in or around 27 February 2014. The Tribunal observed that this was an entirely unsatisfactory situation, however, this had no bearing on their decisions. Further, the Tribunal found that it was inappropriate for the SRA to operate its powers to impose a section 43 Order and make disciplinary decisions under the statutory framework on the same set of underlying facts, when the use of its disciplinary powers was said to be for minor matters, whereas a section 43 Order was for serious matters of misconduct.

129. The Tribunal found that the matters were not proved to the civil or the criminal standard, however it accepted the submissions from both parties that it was necessary to have a defined standard in relation to section 43 reviews, and section 44E appeals. The Tribunal's determination on the standard to be applied is at paragraphs 21-24 above.

Costs

130. Ms Emmerson submitted that costs needed to be considered in two parts. Firstly, an application for costs for the disclosure hearing that took place on Tuesday 09 February 2016, which was a discrete application, and the costs generally of the matter.

131. In relation to the disclosure hearing costs, Ms Emmerson submitted that the Respondent received an application for disclosure which essentially included seven disclosure requests. Two of the items were not in the Appellant's possession and were voluntarily provided by the Respondent prior to the hearing. The Appellant pursued his disclosure request at a full hearing where all the outstanding requests were denied. Ms Emmerson accepted that in principle, there should be a reduction in the costs of that application to take account of the additional disclosure provided by the Respondent. Ms Emmerson suggested that an award of 75% of the costs for the preparation for the hearing, and the full amount of the costs of the hearing would be an accurate and fair reflection of the Appellant's partial success. The amount claimed for the disclosure hearing, taking into account the reductions was £10,654.50.

132. In regard to the general costs, it was submitted that the usual practice of the Tribunal, on a review of a section 43 order, was to award costs to the SRA irrespective of whether the order was revoked. In this case there was also the section 44E costs to consider. Ms Emmerson submitted that there was no dividing line between the costs of the review and the appeal, as they were based on the same underlying facts. Ms Emmerson suggested that a fair way to apportion the costs would be to divide the costs into two, and make an order for half the general costs claimed. Ms Emmerson accepted that the Tribunal might need to approach costs in a 'broad-brush' manner. The amount claimed for the general costs, taking into account the deduction was £21,147.00.

133. The Appellant submitted that the SRA had spent a lot of money on costs, having instructed counsel and a city firm in this matter. The Appellant explained that as a result of the investigation and order, he had been unable to work since 09 January 2014, and had been borrowing money from his family to pay his rent. He estimated that his costs were approximately £20,000, and that he was seeking a reasonable sum in costs from the Respondent.

134. The Tribunal determined that the Appellant should not be liable for the costs of the preparation of the appeal, and agreed that the general costs should be divided to take account of this. Further, the Appellant was not entitled to recover the costs of preparing and presenting the case when he had not instructed lawyers, and had represented himself throughout the proceedings. The Tribunal also considered that the usual order for costs against an Appellant seeking a review of a section 43 order did not apply in this case. Ordinarily matters of that nature that came before the Tribunal were those where there was no dispute that the order was necessary. In this case, the Tribunal had found that the Respondent was wrong to impose the section 43 Order. The Tribunal considered that the costs in this matter had escalated due, in part, to the way that the Appellant had conducted his appeal. For this reason, the Tribunal did not consider that it was appropriate to make no order for costs, and awarded general costs to the Respondent. Further, the Tribunal accepted in full Ms Emmerson's submissions on the costs of the disclosure hearing. Having taken all matters into account, the Tribunal assessed the sum of £20,000 to be appropriate in all the circumstances.

135. The Tribunal took account of the Appellant's means, and determined that he was not in a position to pay any costs for the foreseeable future. The Appellant had no capital assets and no income. He had been borrowing money from his family, and had not worked since the section 43 Order was imposed. Given his particular circumstances the Tribunal determined that the order for costs should not be enforced without leave of the Tribunal.

Statement of Full Order

136. The Tribunal Ordered that the application of HUSEYIN ARSLAN, for revocation of a S.43 Order be **GRANTED** with effect from 11 February 2016, and also Ordered that his appeal under Section 44(E) of the Solicitors Act 1974 (as amended) be UPHELD.

The Tribunal further Ordered that he do pay the costs of the response of the Solicitors Regulation Authority to this application fixed in the sum of £20,000.00, such costs not to be enforced without leave of the Tribunal.

DATED this 16th day of March 2016
On behalf of the Tribunal

P. S. L. Housego
Chairman

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11356A-2015

BETWEEN:

HUSEYIN ARSLAN Appellant

and

SOLICITORS REGULATION AUTHORITY Respondent

Before:

Mr P. S. L. Housego (in the chair)
Mr R. Nicholas
Mrs V. Murray-Chandra

Date of Hearing: 9-11 February 2016

APPENDIX

Section 41 of the Solicitors Act 1974

(1) No solicitor shall, except in accordance with a written permission granted under this section, employ or remunerate in connection with his practice as a solicitor any person who to his knowledge is disqualified from practising as a solicitor by reason of the fact that—

(a) his name has been struck off the roll, or
(b) he is suspended from practising as a solicitor, or
(c) his practising certificate is suspended while he is an undischarged bankrupt.

(1A) No solicitor shall, except in accordance with a written permission granted under this section, employ or remunerate in connection with his practice as a solicitor any person if, to his knowledge, there is a direction in force under section 47(2)(g) in relation to that person.

(1B) Where—

(a) a solicitor ("the employed solicitor") is employed by another solicitor in accordance with a written permission granted under this section, and
(b) the employed solicitor is disqualified from practising as a solicitor by reason of a fact mentioned in subsection (1)(b) or (c),

section 20(1) does not apply in relation to anything done by the employed solicitor in the course of that employment.]

(2) The Society may grant a permission under this section for such period and subject to such conditions as the Society thinks fit.

(3) A solicitor aggrieved by the refusal of the Society to grant a permission under subsection (2), or by any conditions attached by the Society to the grant of any such permission, may appeal to the **[**High Court which**]** may—

(a) confirm the refusal or the conditions, as the case may be; or
(b) grant a permission under this section for such period and subject to such conditions as it thinks fit.

(4) If any solicitor acts in contravention of this section or of any conditions subject to which a permission has been granted under it, the Tribunal or, as the case may be, the High Court may—

(a) order that his name be struck off the roll,
(b) order that he be suspended from practice for such period as the Tribunal or court thinks fit, or
(c) make such other order in the matter as it thinks fit.]

(4A) In relation to an appeal under subsection (3) the High Court may make such order as it thinks fit as to payment of costs.

(4B) The decision of the High Court on an appeal under subsection (3) shall be final.

Section 43 of the Solicitors Act 1974

(1) Where a person who is or was involved in a legal practice but is not a solicitor—

(a) has been convicted of a criminal offence which is such that in the opinion of the Society it would be undesirable for the person to be involved in a legal practice in one or more of the ways mentioned in subsection (1A), or

(b) has, in the opinion of the Society, occasioned or been a party to, with or without the connivance of a solicitor, an act or default in relation to a legal practice which involved conduct on his part of such a nature that in the opinion of the Society it would be undesirable for him to be involved in a legal practice in one or more of the ways mentioned in subsection (1A),

the Society may either make, or make an application to the Tribunal for it to make, an order under subsection (2) with respect to that person.

(1A) A person is involved in a legal practice for the purposes of this section if the person—

(a) is employed or remunerated by a solicitor in connection with the solicitor's practice;
(b) is undertaking work in the name of, or under the direction or supervision of, a solicitor;
(c) is employed or remunerated by a recognised body;
(d) is employed or remunerated by a manager or employee of a recognised body in connection with that body's business;
(e) is a manager of a recognised body;
(f) has or intends to acquire an interest in such a body.

(2) An order made by the Society or the Tribunal under this subsection is an order which states one or more of the following—

(a) that as from the specified date—

(i) no solicitor shall employ or remunerate, in connection with his practice as a solicitor, the person with respect to whom the order is made,
(ii) no employee of a solicitor shall employ or remunerate, in connection with the solicitor's practice, the person with respect to whom the order is made,
(iii) no recognised body shall employ or remunerate that person, and
(iv) no manager or employee of a recognised body shall employ or remunerate that person in connection with the business of that body,

except in accordance with a Society permission;

(b) that as from the specified date no recognised body or manager or employee of such a body shall, except in accordance with a Society permission, permit the person with respect to whom the order is made to be a manager of the body;

(c) that as from the specified date no recognised body or manager or employee of such a body shall, except in accordance with a Society permission, permit the person with respect to whom the order is made to have an interest in the body.

(2A) The Society may make regulations prescribing charges to be paid to the Society by persons who are the subject of an investigation by the Society as to whether there are grounds for the Society—

(a) to make an order under subsection (2), or
(b) to make an application to the Tribunal for it to make such an order.

(2B) Regulations under subsection (2A) may—

(a) make different provision for different cases or purposes;
(b) provide for the whole or part of a charge payable under the regulations to be repaid in such circumstances as may be prescribed by the regulations.

(2C) Any charge which a person is required to pay under regulations under subsection (2A) is recoverable by the Society as a debt due to the Society from the person.**]**

(3) Where an order has been made under subsection (2) with respect to a person by the Society or the Tribunal—

(a) that person or the Society may make an application to the Tribunal for it to be reviewed, and
(b) whichever of the Society and the Tribunal made it may at any time revoke it.

(3A) On the review of an order under subsection (3) the Tribunal may order—

(a) the quashing of the order;
(b) the variation of the order; or
(c) the confirmation of the order;

and where in the opinion of the Tribunal no prima facie case for quashing or varying the order is shown, the Tribunal may order its confirmation without hearing the applicant.]

(4) The Tribunal, on the hearing of any application under this section, may make an order as to the payment of costs by any party to the application.

(5) Orders made under subsection (2) by the Society, or made, varied or confirmed under this section by the Tribunal and filed with the Society, may be inspected. . . during office hours without payment.

(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 Legal Services Act 2007 (see section 207 of that Act);
- "recognised body" means a body recognised under section 9 of the Administration of Justice Act 1985;

- "specified date" means such date as may be specified in the order;
- "Society permission" means permission in writing granted by the Society for such period and subject to such conditions as the Society may think fit to specify in the permission.

(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 Legal Services Act 2007 (see sections 72 and 109 of that Act).]

(6) ……

(7) For the purposes of this section an order discharging a person absolutely or conditionally in respect of an offence shall, notwithstanding anything in section 14 of the Powers of Criminal Courts (Sentencing) Act 2000, be deemed to be a conviction of the offence for which the order was made.

Section 44D (1) – (4) of the Solicitors Act 1974

"Where the Society is satisfied:-

1(a) that a solicitor or an employee of a solicitor has failed to comply with a requirement imposed by or by virtue of this Act or any rules made by the Society, or

(b) that there has been professional misconduct by a solicitor

(2) The Society may do one or both of the following:-

(a) give the person a written rebuke
(b) direct the person to pay a penalty not exceeding £2,000

(3) The Society may publish details of any action it has taken under subsection (2)(a) or (b) if it considers it to be in the public interest to do so.

(4) Where the Society takes action against a person under subsection (2)(b), or decides to publish under subsection (3) details of any action taken under subsection (2)(a) or (b), it must notify the person in writing that it has done so.

…

(6) The Society may not publish under subsection (3) details of any action under subsection (2)(a) or (b):-

(a) during the period within which an appeal against:-

(i) the decision to take the action
(ii) in the case of action under subsection (2)(b), the amount of the penalty, or
(iii) the decision to publish the details,
may be made under section 44E, or

(b) if such an appeal has been made, until such time as it is determined or withdrawn.

(7) The Society must make rules:-

(a) prescribing the circumstances in which the Society may decide to take actions under subsection (2)(a) or (b);
(b) about the practice and procedure to be followed by the Society in relation to such an action;
(c) governing the publication under subsection (3) of details of action taken under subsection (2)(a) or (b)

and the Society may make such other rules in connection with the exercise of its powers under this section as it considers appropriate.

(8) Before making rules under subsection (7), the Society must consult the Tribunal.

Section 44E of the Solicitors Act 1974

Section 44E of the Solicitors Act 1974 provides:-

(1) A person may appeal against:-

(a) a decision by the Society to rebuke that person under section 44D (2)(a) if a decision is also made to publish details of the rebuke;
(b) a decision by the Society to impose a penalty on that person under section 44D(2)(b) or the amount of that penalty
(c) a decision by the Society to publish under section 44D(3) details of any action taken against that person under section 44D(2)(a) or (b)

(2) Subsections (9)(b), (10)(a) and (b), (11) and (12) of section 46 (Tribunal rules about procedure for hearings etc) apply in relation to appeals under this section as they apply in relation to applications or complaints, except that subsection (11) of that section is to be read as if for "the applicant" to "application" there were substituted "any party to the appeal"

(3) Rules under section 46(9)(b) may, in particular, make provision about the period during which an appeal under this section may be made.

(4) On an appeal under this section, the Tribunal has power to make such order as it thinks fit, and such an order may in particular:-

(a) affirm the decision of the Society;
(b) revoke the decision of the Society;
(c) in the case of a penalty imposed under section 44D(2) (b), vary the amount of the penalty;
(d) in the case of a solicitor, contain provision for any of the matters mentioned in paragraphs (a) to (d) of section 47(2);
(e) in the case of an employee of a solicitor, contain provision for any of the matters mentioned in section 47(2E)

(f) make such provision as the Tribunal thinks fit as to payment of costs.

(5) Where by virtue of subsection (4)(e) an order contains provision for any of the matters mentioned in section 47(2E)(c), section 47(2F) and (2G) apply as if the order had been made under section 47(2E)(c).

(6) An appeal from the Tribunal shall lie to the High Court, at the instance of the Society or the person in respect of whom the order of the Tribunal was made.

(7) The High Court shall have power to make such order on an appeal under this section as it may think fit.

(8) Any decision of the High Court on an appeal under this section shall be final.

(9) This section is without prejudice to any power conferred on the Tribunal in connection with an application or complaint made to it.

Section 47(2) of the Solicitors Act 1974

Section 47(2) of the Solicitors Act 1974 provides:

(2) Subject to [subsections (2E)] and (3) and to section 54, on the hearing of any application or complaint made to the Tribunal under this Act, other than an application under section 43, the Tribunal shall have power to make such order as it may think fit, and any such order may in particular include provision for any of the following matters:-

(a) the striking off the roll of the name of the solicitor to whom the application or complaint relates;
(b) the suspension of that solicitor from practice indefinitely or for a specified period;

(ba) the revocation of that solicitor's sole solicitor endorsement (if any);
(bb) the suspension of that solicitor from practice as a sole solicitor indefinitely or for a specified period
(c) the payment by that solicitor or former solicitor of a penalty…, which shall be forfeit to Her Majesty
(d) in the circumstances referred to in subsection (2A), the exclusion of that solicitor from [criminal legal aid work] (either permanently or for a specified period)
(e) the termination of that solicitor's unspecified period of suspension from practice;
(ea) the termination of that solicitor's unspecified period of suspension from practice as a sole solicitor;
(f) the restoration to the roll of the name of a former solicitor whose name has been struck off the roll and to whom the application relates;
(g) in the case of a former solicitor whose name has been removed from the roll, a direction prohibiting the restoration of his name to the roll except by order of the Tribunal;

(h) in the case of an application under subsection (1)(f), the restoration of the applicant's name to the roll;
(i) the payment by any party of costs or a contribution towards costs of such amount as the Tribunal may consider reasonable.

(2A) An order of the Tribunal may make provision for the exclusion of a solicitor from [criminal legal aid work] as mentioned in subsection [(2)(d)] where the Tribunal determines that there is good reason for doing so arising out of:-

(a) his conduct, including conduct in the capacity of agent for another solicitor, in connection with the provision for any person of services [provided under arrangements made for the purposes of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012]; or

(b) his professional conduct generally.

(2B) Where the Tribunal makes such an order as is referred to in subsection (2A) in the case of a solicitor who is a member of a firm of solicitors, the Tribunal may, if it thinks fit, order that any other person who is for the time being a member of the firm shall be excluded (either permanently or for a specified period) from [criminal legal aid work].

(2C) The Tribunal shall not make an order under subsection (2B)…unless an opportunity is given to him to show cause why the order should not be made.

(2D) Any person excluded from [criminal legal aid work] by an order under this section may make an application to the Tribunal for an order terminating his exclusion.

(2E) On the hearing of any complaint made to the Tribunal by virtue of section 34A(2) or (3), the Tribunal shall have power to make one or more of the following:-

(a) an order directing the payment by an employee to whom the complaint relates of a penalty to be forfeited to Her Majesty;
(b) an order requiring the Society to consider taking such steps as the Tribunal may specify in relation to that employee;
(c) if that employee is not a solicitor, an order which states one or more of the matters mentioned in paragraphs (a) to (c) of section 43(2);
(d) an order requiring the Society to refer to an appropriate regulator any matter relating to the conduct of that employee.

(2F) Subsections (1) to (1C), (3) and (4) of section 44 apply in relation to an order under subsection (2E)(c) as they apply in relation to an order under section 43(2).

(2G) Section 44(2), paragraph 16(1)(d) and (1A)(d) of Schedule 2 to the Administration of Justice Act 1985 and paragraph 15(3A) of Schedule 14 to the Courts and Legal Services Act 1990 apply in relation to an order under subsection (2E)(c) as they apply in relation to an order under section 43(2).

(2H) For the purposes of subsection (2E)(d) an "appropriate regulator" in relation to an employee means:-

(a) if the employee is an authorised person in relation to a reserved legal activity (within the meaning of the Legal Services Act 2007), any relevant approved regulator (within the meaning of that Act) in relation to that employee, and
(b) if the employee carries on activities which are not reserved legal activities (within the meaning of that Act), any body which regulates the carrying on of such activities by the employee.

Section 9 of the Administration of Justice Act 1985

(1) The Society may make rules—

(a) making provision as to the management and control of legal services bodies;
(b) prescribing the circumstances in which such bodies may be recognised by the Society as being suitable bodies to undertake the provision of any solicitor services or other relevant legal services**]**;
(c) prescribing the requirements which (subject to any exceptions provided by the rules) must at all times be satisfied by bodies . . so recognised if they are to remain so recognised; and
(d) regulating the conduct of the affairs of such bodies.

(1A) Where the Society makes rules under subsection (1), it must by rules under subsection (1)(c) prescribe the requirement that (subject to any exceptions provided by the rules) recognised bodies must not provide services other than—

(a) solicitor services, or
(b) solicitor services and other relevant legal services.

(1B)"Relevant legal services" means—

(a) solicitor services, and
(b) where authorised persons other than solicitors or registered European lawyers are managers or employees of, or have an interest in, a recognised body, services of the kind provided by individuals practising as such authorised persons (whether or not those services involve the carrying on of reserved legal activities within the meaning of the Legal Services Act 2007).

(1C) The Society may by rules under this section provide that services specified, or of a description specified, in the rules are not to be treated as solicitor services or other relevant legal services.

(2) Rules made by the Society may also make provision—

(a) for the manner and form in which applications for recognition under this section, or for the renewal of such recognition, are to be made, and requiring such applications to be accompanied by a fee of such amount as the Society may from time to time determine;
(aa) for the manner and form in which other applications under the rules are to be made, and requiring such applications to be accompanied by a fee of such amount as the Society may from time to time determine;]

(b) for regulating the names that may be used by recognised bodies;

(c) about the time when any recognition, or renewal of recognition, takes effect and the period for which it is (subject to the provisions made by or under this Part) to remain in force;

(d) for the suspension or revocation of any such recognition, on such grounds and in such circumstances as may be prescribed by the rules;

(e) about the effect on the recognition of a partnership or other unincorporated body ("the existing body") of any change in the membership of the existing body, including provision for the existing body's recognition to be transferred where the existing body ceases to exist and another body succeeds to the whole or substantially the whole of its business;

(ea) for the keeping by the Society of a register containing the names and places of business of all bodies which are for the time being recognised under this section, and such other information relating to those bodies as may be specified in the rules;

(eb) for information (or information of a specified description) on such a register to be made available to the public, including provision about the manner in which, and times at which, information is to be made so available;]

(f) for rules made under any provision of the 1974 Act to have effect in relation to recognised bodies with such additions, omissions or other modifications as appear to the Society to be necessary or expedient;

(fa) about the education and training requirements to be met by managers and employees of recognised bodies;

(fb) for rules made under any provision of the 1974 Act to have effect in relation to managers and employees of recognised bodies with such additions, omissions or other modifications as appear to the Society to be necessary or expedient;

(fc) requiring recognised bodies to appoint a person or persons to monitor compliance, by the recognised body, its managers and its employees, with requirements imposed on them by or by virtue of this Act or any rules applicable to them by virtue of this section;**]**

(g) ……

(h) for the manner of service on recognised bodies of documents authorised or required to be served on such bodies under or by virtue of this Part.

(2A) If rules under this section provide for the recognition of legal services bodies which have one or more managers who are not legally qualified, the rules must make provision—

(a) for the recognition of such bodies to be suspended or revoked, on such grounds and in such circumstances as may be prescribed by the rules;

(b) as to the criteria and procedure for the Society's approving, as suitable to be a manager of a recognised body, an individual who is not legally qualified (and for the Society's withdrawing such approval).

(2B) Rules under this section may make provision for appeals to the High Court against decisions made by the Society under the rules—

(a) to suspend or revoke the recognition of any body;

(b) not to approve, as suitable to be the manager of a recognised body, an individual who is not legally qualified (or to withdraw such approval).

(2C) The rules may provide for appeals against decisions within subsection (2B)(b) to be brought by the individual to whom the decision relates (as well as the body).

(2D) In relation to an appeal under rules made by virtue of subsection (2B), the High Court may make such order as it thinks fit as to payment of costs.

(2E) The decision of the High Court on such an appeal shall be final.

(2F) Where the Society decides to recognise a body under this section it must grant that recognition subject to one or more conditions if—

(a) the case is of a kind prescribed for the purposes of this section by rules made by the Society, and
(b) the Society considers that it is in the public interest to do so.

(2G) While a body is recognised under this section, the Society—

(a) must direct that the body's recognition is to have effect subject to one or more conditions if—
  (i) the case is of a prescribed kind, and
  (ii) the Society considers that it is in the public interest to do so;
(b) may, in such circumstances as may be prescribed, direct that the body's recognition is to have effect subject to such conditions as the Society may think fit.

"Prescribed" means prescribed by rules made by the Society.

(2H) The conditions which may be imposed under subsection (2F) or (2G) include—

(a) conditions requiring the body to take specified steps that will, in the opinion of the Society, be conducive to the carrying on by the body of an efficient business;
(b) conditions which prohibit the body from taking any specified steps except with the approval of the Society;
(c) if rules under this section provide for the recognition of legal services bodies which have one or more managers who are not legally qualified, a condition that all the managers of the body must be legally qualified.

"Specified" means specified in the condition.

(2I) Rules made by the Society may make provision about when conditions imposed under this section take effect (including provision conferring power on the Society to direct that a condition is not to have effect until the conclusion of any appeal in relation to it).

(2J) Section 86A of the 1974 Act applies to rules under this section as it applies to rules under that Act.

(2K) Rules under this section may contain such incidental, supplemental, transitional or transitory provisions or savings as the Society considers necessary or expedient.

(3) Despite section 24(2) of the 1974 Act, section 20 of that Act (prohibition on unqualified person acting as solicitor) does not apply to a recognised body; and nothing in section 24(1) of that Act applies in relation to such a body.]

(4) ……

(5) A certificate signed by an officer of the Society and stating that any body is or is not, or was or was not at any time, a recognised body shall, unless the contrary is proved, be evidence of the facts stated in the certificate; and a certificate purporting to be so signed shall be taken to have been so signed unless the contrary is proved.

(6) Schedule 2 (which makes provision with respect to the application of provisions of the 1974 Act to recognised bodies and with respect to other matters relating to such bodies) shall have effect.

(7) Subject to the provisions of that Schedule, the Lord Chancellor may by order made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament provide for any enactment or instrument passed or made before the commencement of this section and having effect in relation to solicitors to have effect in relation to recognised bodies with such additions, omissions or other modifications as appear to the Lord Chancellor to be necessary or expedient.

(8) In this section—

- "the 1974 Act" means the **M1**Solicitors Act 1974;
- "the Society" has the meaning given by section 87(1) of the 1974 Act;. . .
- "legally qualified" and "legal services body" have the meaning given by section 9A;
- "manager", in relation to a body, has the same meaning as in the Legal Services Act 2007 (see section 207 of that Act);
- "authorised person" means an authorised person in relation to an activity which is a reserved legal activity (within the meaning of the Legal Services Act 2007);
- "multi-national partnership" means a partnership whose members consist of one or more registered foreign lawyers and one or more solicitors;
- ……..
- "recognised body" means a body. . . for the time being recognised under this section.
- "registered European lawyer" means a person who is registered with the Law Society under regulation 17 of the European Communities (Lawyers's Practice) Regulations 2000.
- "solicitor services" means professional services such as are provided by individuals practising as solicitors or lawyers of other jurisdictions;

and a person has an interest in a body if the person has an interest in the body within the meaning of Part 5 of the Legal Services Act 2007 (see sections 72 and 109 of that Act).

(9) ……

Paragraphs 14B and 14C of Schedule 2 of the Administration of Justice Act 1985

14B

(1) This paragraph applies where the Society is satisfied that a recognised body, or a manager or employee of a recognised body, has failed to comply with a requirement imposed by or by virtue of this Act or any rules applicable to that person by virtue of section 9 of this Act.

(2) The Society may do one or both of the following—

(a) give the person a written rebuke;
(b) direct the person to pay a penalty not exceeding £2,000.

(3) The Society may publish details of any action it has taken under sub-paragraph (2)(a) or (b), if it considers it to be in the public interest to do so.

(4) Where the Society takes action against a person under sub-paragraph (2)(b), or decides to publish under sub-paragraph (3) details of such action under sub-paragraph (2)(a) or (b), it must notify the person in writing that it has done so.

(5) A penalty imposed under sub-paragraph (2)(b) does not become payable until—

(a) the end of the period during which an appeal against the decision to impose the penalty, or the amount of the penalty, may be made under paragraph 14C, or
(b) if such an appeal is made, such time as it is determined or withdrawn.

(6) The Society may not publish under sub-paragraph (3) details of any action under sub-paragraph (2)(a) or (b)—

(a) during the period within which an appeal against—
(i) the decision to take the action,
(ii) in the case of action under sub-paragraph (2)(b), the amount of the penalty, or
(iii) the decision to publish the details,
may be made under paragraph 14C, or
(b) if such an appeal has been made, until such time as it is determined or withdrawn.

(7) The Society must make rules—

(a) prescribing the circumstances in which the Society may decide to take action under sub-paragraph (2)(a) or (b);
(b) about the practice and procedure to be followed by the Society in relation to such action;
(c) governing the publication under sub-paragraph (3) of details of action taken under sub-paragraph (2)(a) or (b);

and the Society may make such other rules in connection with the exercise of its powers under this paragraph as it considers appropriate.

(8) Before making rules under sub-paragraph (7), the Society must consult the Tribunal.

(9) A penalty under this paragraph may be recovered as a debt due to the Society, and is to be forfeited to Her Majesty.

(10) The Lord Chancellor may, by order, amend paragraph (b) of sub-paragraph (2) so as to substitute for the amount for the time being specified in that paragraph such other amount as may be specified in the order.

(11) Before making an order under sub-paragraph (10), the Lord Chancellor must consult the Society.

(12) An order under sub-paragraph (10) is to be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(13) This paragraph is without prejudice to any power conferred on the Society, or any other person, to make an application or complaint to the Tribunal.

14C

(1) A person may appeal against

(a) a decision by the Society to rebuke that person under paragraph 14B(2)(a) if a decision is also made to publish details of the rebuke;
(b) a decision by the Society to impose a penalty on that person under paragraph 14B(2)(b) or the amount of that penalty;
(c) a decision by the Society to publish under paragraph 14B(3) details of any action taken against that person under paragraph 14B(2)(a) or (b).

(2) Subsections (9)(b), (10)(a) and (b), (11) and (12) of section 46 of the 1974 Act (Tribunal rules about procedure for hearings etc) apply in relation to appeals under this paragraph as they apply in relation to applications or complaints, except that subsection (11) of that section is to be read as if for "the applicant" to "application)" there were substituted any party to the appeal.

(3) Rules under section 46(9)(b) of the 1974 Act may, in particular, make provision about the period during which an appeal under this paragraph may be made.

(4) On an appeal under this paragraph, the Tribunal has power to make an order which—

(a) affirms the decision of the Society;
(b) revokes the decision of the Society;
(c) in the case of a penalty imposed under paragraph 14B(2)(b), varies the amount of the penalty;
(d) in the case of a recognised body, contains provision for any of the matters mentioned in paragraph 18(2);
(e) in the case of a manager or employee of a recognised body, contains provision for any of the matters mentioned in paragraph 18A(2);
(f) makes such provision as the Tribunal thinks fit as to payment of costs.

(5) Where, by virtue of sub-paragraph (4)(e), an order contains provision for any of the matters mentioned in sub-paragraph (2)(c) of paragraph 18A, sub-paragraphs (5) and (6) of that paragraph apply as if the order had been made under sub-paragraph (2)(c) of that paragraph.

(6) An appeal from the Tribunal shall lie to the High Court, at the instance of the Society or the person in respect of whom the order of the Tribunal was made.

(7) The High Court shall have power to make such order on an appeal under this paragraph as it may think fit.

(8) Any decision of the High Court on an appeal under this section shall be final.

(9) This paragraph is without prejudice to any power conferred on the Tribunal in connection with an application or complaint made to it.

Civil Procedure Rules 52.11

Civil Procedure Rules 52.11 provides:

"Hearing of appeals

(1) Every appeal will be limited to a review of the decision of the lower court unless:-

(a) a practice direction makes different provision for a particular category of appeal' or
(b) the court considered that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

…

(3) The appeal court will allow an appeal where the decision of the lower court was:-

(a) wrong; or
(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court

(4) The appeal court may draw any inference of fact which it considered justified on the evidence"

Part 1 (3.1) of the Solicitors Disciplinary Procedure Rules 2011

3.1 The circumstances in which the SRA may make a disciplinary decision to give a regulated person a written rebuke or to direct a regulated person to pay a penalty are when the following three conditions are met:

(a) the first condition is that the SRA is satisfied that the act or omission by the regulated person which gives rise to the SRA finding fulfils one or more of the following in that it:

(i) was deliberate or reckless;
(ii) caused or had the potential to cause loss or significant inconvenience to any other person;
(iii) was or was related to a failure or refusal to ascertain, recognise or comply with the regulated person's professional or regulatory obligations such as, but not limited to, compliance with requirements imposed by legislation or rules made pursuant to legislation, the SRA, the Law Society, the Legal Ombudsman, the Tribunal or the court;
(iv) continued for an unreasonable period taking into account its seriousness;
(v) persisted after the regulated person realised or should have realised that it was improper;
(vi) misled or had the potential to mislead clients, the court or other persons, whether or not that was appreciated by the regulated person;
(vii) affected or had the potential to affect a vulnerable person or child;
(viii) affected or had the potential to affect a substantial, high-value or high-profile matter; or
(ix) formed or forms part of a pattern of misconduct or other regulatory failure by the regulated person;

(b) the second condition is that a proportionate outcome in the public interest is one or both of the following:

(i) a written rebuke;
(ii) a direction to pay a penalty; and

(c) the third condition is that the act or omission by the regulated person which gives rise to the SRA finding was neither trivial nor justifiably inadvertent.

Part 3 (7.7) of the Solicitors Disciplinary Procedure Rules 2011

Part 3 (7.7) of the Solicitors Disciplinary Procedure Rules 2011 provides that:

"The Standard of Proof shall be the civil standard."

Extract from the Solicitors Code of Conduct 2011

The Principles

The Code forms part of the Handbook, in which the 10 mandatory *Principles* are all-pervasive. They apply to all those we regulate and underpin all aspects of *practice.* They define the fundamental ethical and professional standards that we expect of all *firms* and individuals (including owners who may not be lawyers) when providing legal services. You should always have regard to the *Principles* and use them as your starting point when faced with an ethical dilemma.

Where two or more *Principles* come into conflict the one which takes precedence is the one which best serves the public interest in the particular circumstances, especially the public interest in the proper administration of justice. Compliance with the *Principles* is also subject to any overriding legal obligations.

You must:

2. act with integrity

6. behave in a way that maintains the trust the public places in you and in the provision of legal services

7. comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner

Outcome 10.6

O(10.6) you co-operate fully with the *SRA* and the *Legal Ombudsman* at all times including in relation to any investigation about a *claim.*