The Respondent appealed to the High Court (Divisional Court) against the Tribunal's decision dated 21 June 2016 in respect of findings and sanction. The Applicant (the Solicitors Regulation Authority) cross-appealed against sanction. The appeal was heard by Lord Justice Beatson and Mr Justice Nicol on 27 January 2017 and Judgment handed down on 9 February 2017. The Respondent's appeal was dismissed. The Applicant's appeal was allowed, and the amount of the fine imposed by the Tribunal was increased from £2,500 to £6,000. Ballard v Solicitors Regulation Authority [2017] EWHC 164 (Admin.)

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11397-2015

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

TERRENCE BALLARD Respondent

Before:

Mr A. G. Gibson (in the chair)
Mr G. Sydenham
Mr S. Hill

Date of Hearing: 17 & 18 May 2016

Appearances

Mr Iain Miller, solicitor, of Bevan Brittan LLP, Fleet Place House, 2 Fleet Place, London EC4Y 7RF, for the Applicant.

The Respondent, Mr Terrence Ballard, appeared and represented himself.

JUDGMENT

Allegations

1. The allegations against the Respondent, made on behalf of the SRA, in a Rule 5 Statement dated 16 June 2015, were that:

1.1 During and/or before August 2013 the Respondent acted in breach of his Practising Certificate Conditions imposed on his 2012/2013 Practising Certificate when acting on his own account for Mr DE in criminal proceedings, contrary to Principles 6 and/or 7 of the SRA Principles 2011;

1.2 During and/or before August 2013 the Respondent was operating a separate business/consultancy and provided a prohibited separate business activity in breach of Outcome 12.1 of the SRA Code of Conduct 2011;

1.3 In acting for Mr DE in a private capacity from June 2013, the Respondent failed to act in the best interest of his client and/or failed to set out the terms and scope of his instructions and/or failed to provide a proper standard of service to his client in breach of Principles 4 and/or 5 and/or 6 of the SRA Principles 2011;

1.4 The Respondent breached Principle 7 of the SRA Principles 2011 in that failed he to comply with directions from the Legal Ombudsman to pay monies to Mr DE within a certain time as directed by the Ombudsman and/or to comply with subsequent orders made by the Court.

Documents

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

Applicant

- Application dated 16 June 2015
- Rule 5 Statement, with exhibit "IGM1", dated 16 June 2015
- Schedule of costs dated 16 June 2015
- Schedule of costs dated 10 May 2016
- Bundle of authorities

Respondent

- Respondent's statement, with exhibits "TB/1" and "TB/2", dated 20 July 2015
- Respondent's amended statement (not dated)
- Correspondence between the Applicant and Respondent 25 to 29 April 2015
- Skeleton argument dated 12 May 2016
- Invoice dated 18 April 2013 to Mr DE (handed up during the hearing)

Tribunal documents:

- Memorandum of directions made on 6 October 2015

Other:

- Two business cards, handed up in the course of the hearing

Factual Background

3. The Respondent was born in 1960 and was admitted as a Solicitor in 1997. The Respondent's name remained on the Roll of Solicitors at the date of the hearing. Whilst the Respondent had previously worked as a sole practitioner at Terry Ballard & Co Solicitors, this practice had closed following his bankruptcy on 27 September 2011.

4. At the material time, in 2013, the Respondent was an employee of CR Burton & Co ("the Firm"). For the purposes of his 2012/2013 Practising Certificate ("PC") application the Respondent was subject to Regulation 3.1 of the SRA Practising Regulations 2011. His PC for 2012/2013 was granted and approved by the SRA, on 4 June 2013, subject to the condition that he was "**not a sole practitioner or sole director of a recognised body**". The Authorised Officer, in imposing conditions on the Respondent's 2012/13 PC (page 6) stated:

> "It is noted that since his bankruptcy, [the Respondent] has been an employed solicitor.
>
> There is no evidence available to me to bring into question [the Respondent's] legal work and accordingly I am satisfied that it is appropriate for the condition previously imposed on [the Respondent's] practising certificate that he may act as a solicitor in employment only, to be relaxed. However, his past financial mismanagement, as evidenced by the debt to HMRC and subsequent bankruptcy, is an indication that the Respondent may pose a potential risk to the interests of the public were he permitted to practise as a sole practitioner in future.
>
> In light of [the Respondent's] financial history, which took place when he was on his own account, I am satisfied that he should practise in an environment that can offer an increased level of support and where the responsibility of managing a firm would not rest solely with [the Respondent].
>
> By imposing this [PC] condition I consider the individual concerned unsuitable to undertake certain activities in relation to a legal practice, either at all or save as specified in the condition, and that imposing the condition will, in the public interest, limit, restrict, halt or prevent the involvement of the individual concerned in those activities…
>
> …I am satisfied that, in the light of [the Respondent's] recent disciplinary history, the above [PC] conditions are necessary, reasonable and proportionate in the interests of protection of the public."

5. The Respondent's employment with the Firm was subsequently terminated, in 2014, and he was later engaged as a solicitor at H Solicitors as a "consultant/locum", as stated on his PC application for 2014/15. The Respondent's PC for 2013/2014 had the same restrictions as for the previous year. The Authorised Officer, in imposing conditions on the Respondent's 2013/14 PC, stated:

> "I am satisfied that [the Respondent] should practise in an environment that can offer an increased level of support and where the responsibility of managing a firm would not rest solely with him"
>
> and
>
> "I am satisfied that given [the Respondent's] regulatory history, that for the purposes of Regulation 7.1(a) and (c) of the SRA Practising Regulations 2011, it remains necessary, proportionate and reasonable in the public interest for the restriction to be continued on [the Respondent's] 2013/2014 [PC] for the time being."

6. In a response to the SRA dated 4 December 2014, the Respondent stated that at the end of September 2014 he had set up Firebird Legal Services Ltd ("Firebird") but it was "currently dormant and inactive pending the setting up of bank accounts, insurance arrangements and of course any necessary SRA authorisation."

Acting for Mr DE

7. The allegations in this case arose initially from a complaint made to the SRA about the Respondent's conduct by Mr DE on 6 September 2013. In or about June 2013 Mr DE had instructed the Respondent to act for him in relation to criminal proceedings which had been brought against him. The Respondent acted for Mr DE privately for a fee and outside the arrangements he had with the Firm. The Firm confirmed to the SRA that the Respondent's contractual position allowed him to work for third parties and that there was no breach of contract should he work for other firms. He was not, however, permitted to use the firm's name or reputation, banking facilities or insurance when working for other firms.

8. The Respondent asserted that he acted for Mr DE in the capacity of a McKenzie Friend or Exempt Person.

9. Mr DE provided a witness statement to the Applicant dated 5 May 2015. A complaint was also made by Mr DE to the Legal Ombudsman ("the Ombudsman").

10. On or around 20 January 2013 Mr DE had been arrested under section 4 of the Public Order Act 1986 and charged with a Section 4 of the Public Order Act offence, Common Assault and Criminal Damage. Mr DE was recommended to the Respondent by a mutual friend, Mr KB. Mr DE's position was that he understood the Respondent to be a solicitor, which he said was confirmed by the card that the Respondent provided to Mr DE. The card read:

> "Terry Ballard – locum solicitor/higher Courts advocate/legal consultant'.

The card went on to state:

> "Show me another lawyer of Terry's quality whose fees are based on what I can afford, what's fair. Not what the industry says I should pay." A Davies, client 2003-onwards."

11. Mr DE's evidence in his witness statement was that the Respondent had initially told him that he could represent him in the Magistrates or Crown Court and that the Respondent said that he was working for a solicitor's practice but could not work out of that Firm. At some point prior to any work being carried out, the Respondent explained to Mr DE that before he could act for him he would need to find another solicitor's practice through which he could do the work. Mr DE's evidence was that he did not feel comfortable in this regard and informed the Respondent that he had not found a firm from which the Respondent could work.

12. The Applicant's position was that the Respondent then agreed to represent Mr DE on a private basis but, according to Mr DE, whilst he mentioned he would continue to act as a "friend" he did not explain that it was in the capacity of a "McKenzie Friend" and what that entailed, nor did the Respondent provide anything in writing about the scope of his services. The Respondent charged Mr DE £750 as a fixed fee for his services.

13. The Applicant's position was that Mr DE met the Respondent five or six times. Mr DE's evidence in his statement was that although the Respondent gave general legal advice and looked at Court documents he did not draft Court documents nor put his name on the record as acting. Mr DE's evidence was that he understood that the Respondent was a solicitor. The Applicant's case was that the Respondent did not take adequate steps to scope out or clarify the capacity in which he was acting, nor take sufficient steps to show that he was not acting in this instance in the capacity of solicitor.

14. A hearing of Mr DE's case was listed for 5 August 2013. Mr DE's evidence was that he set up in advance a direct debit to pay £750 the day after the hearing, i.e. on 6 August 2013, as he was told that the fee was payable, win or lose. On 3 August 2013 Mr DE made payment of £500 via bank transfer, with a promised £250 to follow; it was his written evidence that he had forgotten about the direct debit.

15. The Respondent attended the hearing on 5 August 2013 at Brighton and Hove Magistrates Court with Mr DE. It was the Applicant's case that he did so as Mr DE's representative and it was the Respondent's case that he informed the usher that he was acting as a McKenzie Friend. The Memorandum of Entry which was provided by Brighton & Hove Magistrates Court recorded in the section "Attending solicitor" the name "Mr Ballard". The Respondent's position was that he fully explained his status to the usher and that if that person misunderstood or mis-recorded the situation, he "can hardly be responsible for that."

16. Mr DE's witness statement stated that the Respondent sat in the place reserved for Counsel and addressed the Judge, albeit briefly, as the Judge informed both parties at the outset that the hearing would need to be adjourned in light of another hearing which had overrun. It was Mr DE's evidence that the Respondent addressed the Court to say he agreed to the adjournment, on behalf of Mr DE. The hearing was adjourned and did not proceed substantively on 5 August 2013.

17. Mr DE's statement stated that following the hearing, he said he would transfer the remaining £250 to the Respondent's account within an hour; the Respondent had seemed to accept that arrangement. As the money was not forthcoming within the

hour, the Respondent asked Mr DE via text message where the remaining monies were. The text, timed at 13.49, read:

> "Still waiting mate. Technically, the funding agreement was breached some time ago, but I decided to let it go. Really don't want to impose any deadlines, but a deal's a deal. If you want a fresh deal, obviously let me know but it won't be nearly as favourable."

There followed a telephone call where it appeared, from Mr DE's evidence, that the discussion was heated. During the call the Respondent informed Mr DE that he would not represent him further.

18. Mr DE stated in his witness statement:

> "In relation to payment, I forgot about the direct debit I had set up and I had paid [the Respondent] £500 by bank transfer on 3 August 2013 shortly prior to the hearing but I believed I still owed him £250. On the morning of the hearing I had gone to a cashpoint near where I lived but I was unable to get any cash out. I explained after the hearing that I could go to another cashpoint there and then or could transfer £250 cash to him and he seemed relaxed about it and said that a transfer was fine. I left the Court on what I considered to be good terms with [the Respondent].
>
> That afternoon I received a text [as set out at paragraph 17 above]. I found the text quite threatening and rather out of character. I decided to telephone [the Respondent] who was irrationally angry and said he would no longer represent me: I was telling him that the monies would be paid and could he send me an invoice following payment of the remainder of the monies.
> The following day I realised that the payment of £750 had come out of my account and I recalled the direct debit. I realised that I had therefore overpaid [the Respondent] by £500. I requested the return of the monies. He was discourteous on the email but did return £500 on 9 August 2013. I also received an invoice stating:
>
> > "Received from [Mr DE] £750 as an agreed fixed fee for all legal services arising from criminal proceedings in Brighton Magistrates' Court."
>
> Before 5 September 2013 I carried out some investigations into [the Respondent's] practice and determined that he had conditions on his [PC] which meant he should not have been acting for me in a private capacity. Upset with the service I had received, on 5 September 2013 I decided to make a report to the SRA."

19. The criminal case against Mr DE was re-listed for a hearing in November 2013. Mr DE instructed alternative representation for the November hearing at additional cost. Mr DE stated in his witness statement that at the November hearing the Respondent attended and sat in the public gallery to observe the proceedings. The Respondent had been notified by that time that Mr DE had made a complaint to the

Ombudsman and his position was that he attended Court to check whether the Respondent was going to say anything derogatory about him.

The Legal Ombudsman

20. Mr DE reported the Respondent's conduct to the Ombudsman on 9 September 2013. The Respondent communicated with the Ombudsman, denying any wrongdoing. During the correspondence, the Respondent provided the Ombudsman with a schedule of work done in relation to Mr DE's matter. This included:

> "Consideration of documents:
>
> 34 pages of evidence; tape of interview; ten character references; correspondence from [W LLP], case management form; numerous emails and text messages from [Mr DE];
>
> Preparation for trial 4/8/13 (sic)
>
> Researching the relevant law and procedure; preparing application for 'exempt' person etc. status; re-reading evidence and preparing for cross-examination of witnesses".

In this document, the Respondent stated that "No client care letter was sent because I was not advising and assisting Mr DE as a solicitor in practice but as a friend on an informal basis (albeit if Mr DE ever had ever requested such a letter or anything approximating to it, it would have been provided)."

21. In a response to an email from the Ombudsman dated 4 November 2013, in which the Ombudsman had requested a copy of the client care letter, a breakdown of costs and a copy of the time recording ledger in relation to Mr DE's matter, the Respondent stated, by reply dated 10 November 2013, that he had been granted "exempt person"' status at the Magistrates Court, Crown Court and Court of Appeal previously and that "on each occasion the Court was fully aware that [he] was a practising solicitor unable to appear in that capacity because of the restrictions on [his] [PC]". The Respondent also stated:

> "My status was NOT that of a solicitor but a friend who was approached for help and who provided advice and the offer of advocacy assistance subject to the Court's approval. I was NOT on the Court record OR acting through my former firm of Terry Ballard & Co, which you seem determined to assume….
> …I was never an approved person carrying out a reserved legal activity. If I was, I broke the law in not only this case but all the others and will have to report myself to the relevant authorities, who will then have to adjudicate on the issues."

22. On 2 January 2014 (letter incorrectly dated 2013), the Ombudsman considered whether there had been a poor service by the Respondent and decided that there had been. The Ombudsman, in the reasons for his decision, stated:

"[Mr DE] got to know [the Respondent], a solicitor through a mutual friend who introduced the two. Mr DE was looking for some help with a criminal case and the Respondent agreed to help. [The Respondent] is a solicitor who has a restricted [PC] according to the SRA record. Though there is no documentation there is no dispute that a fee of £750 was agreed. Mr DE paid £500 to the bank on 3 August 2013. There was a Court hearing on 5 August where [the Respondent] is on the record as representing Mr DE. The case was adjourned until 4 November. But sometime that day there was an exchange between the two where the Respondent indicated he did not want to represent Mr DE anymore. There was some disagreement about funding.

A few days later Mr DE sent, by mistake some £750 to Mr Ballard's account. £500 was returned the next day but [the Respondent] kept £250. Effectively £1,250 had been paid over. Mr DE complained the next day and there does not seem to have been any satisfactory response.

Mr DE complained to this office on 10 October.

In response to the investigation, [the Respondent] claims he was not acting as a regulated person when he offered his services to Mr DE. As I understand it, [the Respondent] is a solicitor and has a practising (or had) certificate at the time he dealt with Mr DE. Therefore, I am satisfied that he comes within the jurisdiction of this scheme. Though he claims that he was not offering legal advice I am satisfied he was and I might add clearly charging for advice suggests strongly he was doing it in his professional capacity and not some philanthropic favour.

Regardless of how the relationship arose it seems clear that [the Respondent] was offering to provide legal services for a fee. The normal way of doing business should have followed but that does not appear to have happened. Mr DE was entitled to expect that he would be dealt with fairly and professionally. When [the Respondent] withdrew it does not seem credible that he did so for the failure of Mr DE to pay fees, as clearly he had and was willing to pay. Whatever the reason in my opinion the service provided was very poor and effectively worthless to Mr DE.

At the adjourned hearing in November [the Respondent] was at Court but took no part in the process, watching from the gallery. This upset Mr DE and given that [the Respondent] played no part, one has to wonder why he was there.

In my view there is little else to be said as the report sets out the case fairly. Mr DE accepts the recommendation and [the Respondent] did indicate that he would comment and went as far as to say he was not happy with the report but would give detailed comments by 10 December, we have received none. Therefore, in my view the reason there are no comments is that there can be nothing that can be said that can justify the poor service that was provided here.

In my opinion the legal service provided to Mr DE was woefully inadequate and was not to the standard that should have been provided. I agree that the

fees paid should be returned and in addition for the distress and inconvenience suffered by Mr DE in being left to fend for himself in a criminal case and an additional sum of £250 should be made to compensate for this."

23. The Ombudsman directed that the Respondent repay the £750 already paid and to also pay Mr DE compensation in the sum of £250 for distress and inconvenience. The deadline to pay was 17 January 2014. On 20 January 2014 Mr DE confirmed to the Ombudsman's office that the payment of £1,000 had not been received from the Respondent. On 21 January 2014 Ms SD at the Ombudsman's office wrote to the Respondent to inform him that he had until 28 January 2014 to pay the amount directed.

24. The Respondent refused to the pay the monies as directed, arguing that he was not acting in the capacity of a solicitor/regulated person when he represented Mr DE and that he consequently did not fall under the Ombudsman's jurisdiction. A pre-action letter was sent to the Respondent on 17 March 2014 by the Ombudsman's office, stating that proceedings would be issued if he failed to comply with the Ombudsman's direction or if the office did not receive representations by 31 March 2014. The Respondent still refused to comply and a Court Order was made at the County Court at Eastbourne on 14 May 2014, allowing the Ombudsman to enforce the award in the sum of £1,109.50 (the amount directed together with the Court fee and solicitor's costs). The Respondent again refused to comply with the Order and on 30 September 2014 the Ombudsman notified the SRA that formal enforcement action was being issued against the Respondent.

25. A hearing was scheduled for 14 January 2015 at the County Court at Eastbourne for the Respondent to be questioned as to his current financial position, in view of his failure to comply with the order to make payment of the amount directed by the Ombudsman. The Ombudsman subsequently applied for and was granted a suspended committal order which was eventually served on the Respondent at H Solicitors. The Respondent was directed to attend the Court on 6 May 2015 to be questioned as to his financial standing. The Respondent wrote to the SRA Panel's Solicitors regarding a possible adjournment of the Court proceedings. The SRA Panel's solicitors stated that this was a matter for the Court and the Ombudsman. It was understood from the Applicant's enquiries of the Ombudsman, that the Respondent attended the Court on 6 May 2015 as directed and answered questions about his financial position but put forward no proposals in relation to settlement of the debt.

SRA Correspondence

26. On 14 March 2014 an initial Explanation with Warning ("EWW") letter was sent to the Respondent by the Applicant. It requested an explanation in relation to allegations of failing to comply with practising conditions, practising without professional indemnity insurance and failing to act in Mr DE's best interests.

27. The Respondent replied initially by email dated 31 March 2014 and then substantively by email on 18 April 2014, denying the allegations but admitting that he acted for Mr DE as a McKenzie Friend and for a fee.

28. In the email dated 31 March 2014 the Respondent stated:

> "I was never practising as a solicitor for the purposes of the Solicitors Act 1974 and the Legal Services Act 2007."

29. In an email of 18 April 2014, the Respondent stated:

> "Mr DE was fully aware that since the closure of my firm, I was running a legal consultancy aimed at assisting those who were facing a risk of injustice but were also unable to get either legal aid or afford to pay privately for a solicitor.
>
> I made it clear to Mr DE from the outset that my position was analogous to that of a barrister in that I had to be instructed by a solicitor before I could exercise any right of audience or conduct litigation (hence the fact that I never liaised directly with either the Court or CPS, both of whom regarded Mr DE as a litigant in person);
>
> Mr DE informed me that he had not been able to find a solicitor to instruct me and enquired as to whether there was an alternative approach that would enable me to represent him. It was at this point that I advised him about the 'exempt person/McKenzie Friend' route which I had deployed successfully in other cases, explaining the risk of the Court refusing to grant audience rights, leaving him unrepresented at the hearing;
>
> Mr DE assumed the risk of the Court refusing to grant me EP/MF status and asked for me to assist accordingly. I therefore carried out all of the work already described to the Ombudsman and attended Court willing and able to represent Mr DE subject to the Court's approval (which in the end was not sought due to the case being adjourned because another matter took priority).
>
> I charged Mr DE the modest sum of £750 for my efforts because he did not qualify for pro bono assistance through my consultancy (there being no risk of Mr DE suffering an injustice and Mr DE being more than financially able to instruct a solicitor privately);
> Due to Mr DE's repeated breach of payment terms and the verbal abuse he directed towards me when I pointed this out, I terminated the agreement with him and confirmed the reasons in writing;
>
> Following this termination and in desperate and panic-stricken attempt to retain my services, Mr DE electronically transferred £750 into my account (albeit he claims with breathtaking implausibility that he entered my name, sort code and account number into his on-line banking facility 'by mistake')."

30. In relation to the issue of jurisdiction, the Respondent stated:

> "To practice (sic) as a solicitor, one must be retained on one of the following bases:

i. Sole Practitioner. As you rightfully say (and as the Ombudsman has had such difficulty in understanding), the firm of Terry Ballard & Co (no. 405737) closed and therefore ceased to exist in September 2011;
ii. Partnership. [The Firm] had absolutely no involvement in or knowledge of this matter and at no time did I assist Mr DE through my part-time employment with them;
iii. LLP etc. I have no association with any other regulated body through which I could have been acting in the capacity of a solicitor.

The Solicitors Act 1974 deals with situations where non-qualified persons act as solicitors, but does not envisage the converse scenario, namely, a solicitor acting in a non-qualified/EPMF capacity;

The fact that the current regulatory regime does not cover the novel situation described in (paragraph 3b i.e. the paragraph above) does not mean that my actions were unlawful or a breach of the conditions on my [PC], as long as I did not carry out a regulated legal activity as defined by the Legal Services Act 2007;

The Ombudsman's decision in this point (which is effectively 'once a solicitor – always a solicitor'), is just plain wrong and a misstatement of the current legal and regulatory position which totally disregards the fact that to practice as a solicitor, one must act in that capacity. Indeed, if the Ombudsman's position is correct, it would amount to an implicit criticism of those Courts (including the Court of Appeal) which have granted me EPMF status in the full knowledge that I was a practising solicitor;

Mr DE specifically and deliberately opted out of the regulated legal market because he found it too expensive, but now seeks to opt back in because he is dissatisfied with the outcome. Some would say that he 'wants his cake and eat it'. I say that it is the equivalent of cancelling a policy of insurance, having an accident, and then seeking to make a claim under the cancelled policy."

31. In a follow up email the Respondent stated:

"For the avoidance of doubt, I will repeat that I did not breach the condition on my [PC] or practice without PII, because at no time in my dealings with Mr DE was I acting in the capacity of a solicitor/regulated person. Furthermore, I maintain that throughout, I advised and assisted Mr DE to the best of my ability and the only reason I terminated the arrangement was because of his repeated and flagrant breaches to the payment terms."

32. On 4 July 2014 a second EWW letter was sent to the Respondent about his non-compliance with the direction of the Ombudsman. The Respondent replied by email of 16 July 2014, stating:

"I have already explained to the ombudsman clearly and repeatedly that any attempt to enforce their so-called 'decision' prior to the exhaustion of the domestic procedures will be vehemently resisted. What do they (or indeed you) think will happen – that they'll get the money out of me and I will then

> quietly disappear into the night??? Of course I won't! I will pursue every avenue to get it back, which will only result in unnecessary and costly satellite litigation. If they and/or you are so concerned about Mr DE's 'distress' etc., the solution is quite simple – he can issue a small claim and face me in 'open combat' before the district judge, when I will have an opportunity to cross-examine him in a way not possible under the ombudsman's parody of a judicial proceeding."

33. A third EWW letter was sent by the Applicant on 19 November 2014. In this letter the SRA requested a response to the allegation that the Respondent had been running a prohibited separate business by virtue of this consultancy.

34. In his reply on 4 December 2014, the Respondent stated that:

34.1 There was no formal start-up date to the consultancy as he had not been running it as a business but as an ad hoc arrangement to assist those who could not afford private representation or secure public funding but yet find themselves in a vulnerable situation;

34.2 That his other services included primarily advising and assisting but also included drafting and researching;

34.3 That he had provided pro bono advocacy services for a number of people since his firm "ceased to exist" on each occasion with the full permission of the Court.

35. The Respondent informed the SRA that he ran a legal consultancy where he acted as a professional McKenzie Friend for clients. The Respondent informed the Ombudsman that he acted in the Magistrates Court, Crown Court and Court of Appeal under this guise of McKenzie Friend.

Statutory Scheme

36. Section 1 of the Solicitors Act 1974 provides:

> "Qualifications for practising as solicitor
>
> No person shall be qualified to act as a solicitor unless—
>
> (a) he has been admitted as a solicitor, and
> (b) his name is on the roll, and
> (c) he has in force a certificate issued by the Society in accordance with the provisions of this Part authorising him to practise as a solicitor (in this Act referred to as a "practising certificate")."

37. Section 1A of the Solicitors Act 1974 provides:

> "A person who has been admitted as a solicitor and whose name is on the roll shall, if he would not otherwise be taken to be acting as a solicitor, be taken for the purposes of this Act to be so acting if he is employed in connection with the provision of any legal services—

(a) by any person who is qualified to act as a solicitor;
(b) by any partnership at least one member of which is so qualified; . . .
(c) by a body recognised . . . under section 9 of the Administration of Justice Act 1985 (incorporated practices) [;] [or
(d) by any other person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which is a reserved legal activity (within the meaning of that Act)].]"

38. Section 12(1)(a) of the Legal Services Act 2007 states that the exercise of a right of audience is a reserved legal activity. The exercise of a right of audience is defined in Schedule 2, section 12(3) as:

"(1) A "right of audience" means the right to appear before and address a Court, including the right to call and examine witnesses.

(2) But a "right of audience" does not include a right to appear before or address a Court, or to call or examine witnesses, in relation to any particular Court or in relation to particular proceedings, if immediately before the appointed day no restriction was placed on the persons entitled to exercise that right."

39. Pursuant to section 12(1) of the Legal Services Act 2007 states that "reserved legal activity", means:

(a) The exercise of a right of audience;
(b) The conduct of litigation;
(c) Reserved instrument activities;
(d) Probate activities;
(e) Notarial activities;
(f) The administration of oaths.

Only sub-sections (a) and (b) were relevant to this case.

40. The conduct of litigation is defined in Schedule 2 to the Legal Services Act 2007, section 12(4) as:

"(a) the issuing of proceedings before any Court in England and Wales,
(b) the commencement, prosecution and defence of such proceedings, and
(c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions).
(2) But the "conduct of litigation" does not include any activity within paragraphs (a) to (c) of sub-paragraph (1), in relation to any particular Court or in relation to any particular proceedings, if immediately before the appointed day no restriction was placed on the persons entitled to carry on that activity."

41. Pursuant to Section 12 (3) of the Legal Services Act, "legal activity" means—

(a) "an activity which is a reserved legal activity within the meaning of this Act as originally enacted, and

(b) any other activity which consists of one or both of the following—

(i) the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes;
(ii) the provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes."

42. Section 13 of the Legal Services Act 2007 provides:

(1) "The question whether a person is entitled to carry on an activity which is a reserved legal activity is to be determined solely in accordance with the provisions of this Act.
(2) A person is entitled to carry on an activity ("the relevant activity") which is a reserved legal activity where –

a) The person is an authorised person in relation to the relevant activity; or
b) The person is an exempt person in relation to that activity."

43. Section 14 of the Legal Services Act 2007 provides:

"It is an offence for a person to carry on an activity ("the relevant activity") which is a reserved legal activity unless that person is entitled to carry on the relevant activity."

44. Section 15 of the Legal Services Act 2007 provides:

"This section applies for the interpretation of references in this Act to a person carrying on an activity which is a reserved legal activity.

(2) References to a person carrying on an activity which is a reserved legal activity include a person ("E") who—

(a) is an employee of a person ("P"), and
(b) carries on the activity in E's capacity as such an employee.

(3) For the purposes of subsection (2), it is irrelevant whether P is entitled to carry on the activity.

(4) P does not carry on an activity ("the relevant activity") which is a reserved legal activity by virtue of E carrying it on in E's capacity as an employee of P, unless the provision of relevant services to the public or a section of the public (with or without a view to profit) is part of P's business.

(5) Relevant services are services which consist of or include the carrying on of the relevant activity by employees of P in their capacity as employees of P."

45. Schedule 3 of the Legal Services Act 2007, "exempt person" is defined as follows:

> "(1) This paragraph applies to determine whether a person is an exempt person for the purpose of exercising a right of audience before a Court in relation to any proceedings (subject to paragraph 7).
>
> (2) The person is exempt if the person—
>
> (a) is not an authorised person in relation to that activity, but
> (b) has a right of audience granted by that Court in relation to those proceedings.
>
> (3) The person is exempt if the person—
>
> (a) is not an authorised person in relation to that activity, but
> (b) has a right of audience before that Court in relation to those proceedings granted by or under any enactment.
>
> (4) [not relevant]
>
> (5) [not relevant]
>
> (6) The person is exempt if the person—
>
> (a) is a party to those proceedings, and
> (b) would have a right of audience, in the person's capacity as such a party, if this Act had not been passed."

46. Rule 1.1 of the Practice Framework Rules 2011 provides:

> "You may practise as a solicitor from an office in England and Wales in the following ways only:
>
> (a) as a recognised sole practitioner or the employee of a recognised sole practitioner;
> (b) as a solicitor exempted under Rule 10.2 from the obligation to be a recognised sole practitioner;
> (c) as a manager, employee, member or interest holder of an authorised body provided that all work you do is:
> (i) of a sort the body is authorised by the SRA to carry out; or
> (ii) done for the body itself, or falls within Rule 4.1 to 4.11, and where this sub-paragraph applies, references in Rule 4 to "employer" shall be construed as referring to that body, accordingly;
> (d) as a manager, employee, member or interest holder of an authorised non-SRA firm, provided that all work you do is:
> (i) of a sort the firm is authorised by the firm's approved regulator to carry out; or
> (ii) done for the firm itself, or falls within Rule 4.1 to 4.11, and where this sub-paragraph applies, references in Rule 4 to

"employer" shall be construed as referring to that firm, accordingly;

(e) as the employee of another person, business or organisation, provided that you undertake work only for your employer, or as permitted by Rule 4 (In-house practice)."

47. Section 125 of the Legal Services Act 2007, entitled "Jurisdiction and operation of the Ombudsman Scheme" provides:

"(1) A complaint which relates to an act or omission of a person ("the respondent") in carrying on an activity is within the jurisdiction of the ombudsman scheme if—

(a) the complaint is not excluded from the jurisdiction of the scheme by section 126, or by scheme rules made under section 127,

(b) the respondent is within section 128, and

(c) the complainant is within section 128 and wishes to have the complaint dealt with under the scheme.

(2) In subsection (1) references to an act or omission include an act or omission which occurs before the coming into force of this section.

(3) The right of a person to make a complaint under the ombudsman scheme, and the jurisdiction of an ombudsman to investigate, consider and determine a complaint, may not be limited or excluded by any contract term or by notice."

48. Section 128 of the Legal Services Act 2007, entitled 'parties', provides:

"(1) The respondent is within this section if, at the relevant time, the respondent was an authorised person in relation to an activity which was a reserved legal activity (whether or not the act or omission relates to a reserved legal activity).

(2) The complainant ("C") is within this section if C—

(a) meets the first and second conditions, and
(b) is not excluded by subsection (5).

(3) The first condition is that C is—

(a) an individual, or
(b) a person (other than an individual) of a description prescribed by order made by the Lord Chancellor in accordance with a recommendation made under section 130.

(4) The second condition is that—

(a) the services to which the complaint relates were provided by the respondent to C;
(b) the services to which the complaint relates were provided by the respondent to an authorised person who procured them on C's behalf."

McKenzie Friends

49. The Applicant set out its position in relation to McKenzie Friends:

49.1 McKenzie Friends are, at present, unregulated. As such, anyone unauthorised can act as a McKenzie Friend and charge a fee provided they do not undertake any of the reserved legal activities under the Legal Services Act 2007 (unless, in the case of advocacy or conduct of litigation, they have permission to do so) or hold themselves out as being a member of one of the legal professions.

49.2 A Practice Guidance Note in relation to McKenzie Friends assisting in the Civil and Family Courts was published by Lord Neuberger (at the material time, Master of the Rolls) and Sir Nicholas Wall, (President of the Family Division) on 12 July 2010. It was understood that whilst the Practice Note relates to civil and family proceedings, the guidance may be considered by those being represented in relation to criminal hearings in the Magistrates and the Crown Court (see the Legal Defence and Monitoring Group Guidance dated 26 July 2014 and the reference to Regina v Leicester City ex parte Barrow). The Practice Guidance Note states**:**

"What a McKenzie friend may do:

- Provide moral support for litigants
- Take notes
- Help with case papers
- Quietly give advice on every aspect of the conduct of the case.

What a McKenzie friend may not do:

- Act as the litigants' agent in relation to the proceedings
- Manage the litigants' cases outside Court, for example by signing Court documents; or
- Address the Court, make oral submissions or examine witnesses."

49.3 In relation to rights of audience and rights to conduct litigation, the Practice Note stated:

"McKenzie Friends do not have a right of audience or a right to conduct litigation. It is a criminal offence to exercise rights of audience or to conduct litigation unless properly qualified and authorised to do so by an appropriate regulatory body, or in the case of an otherwise unqualified or unauthorised

individual (i.e. a lay individual including a McKenzie Friend), the Court grants such rights on a case-by-case basis.

Courts should be slow to grant any application from a litigant for a right of audience or a right to conduct litigation to any lay person, including a McKenzie Friend. This is because a person exercising such rights must ordinarily be properly trained, be under professional discipline, (including an obligation to insure against liability for negligence) and be subject to an overriding duty to the Court. These requirements are necessary for the protection of all parties to litigation and are essential to the proper administration of justice.

Any application for a right of audience or a right to conduct litigation to be granted to any lay person should therefore be considered very carefully. The Court should only be prepared to grant such rights where there is good reason to do so taking into account all the circumstances of the case, which are likely to vary greatly. Such grants should not be extended to lay persons automatically or without due consideration. They should not be granted for mere convenience.

Examples of the type of special circumstances which have been held to justify the grant of a right of audience to a lay person, including a McKenzie Friend, are: i) that person is a close relative of the litigant; ii) health problems preclude the litigant from addressing the Court, or conducting litigation, and the litigant cannot afford to pay for a qualified legal representative; iii) the litigant is relatively inarticulate and prompting by that person may unnecessarily prolong the proceedings.

It is for the litigant to persuade the Court that the circumstances of the case are such that it is in the interests of justice for the Court to grant a lay person a right of audience or a right to conduct litigation.

The grant of a right of audience or a right to conduct litigation to lay persons who hold themselves out as professional advocates or professional McKenzie Friends or who seek to exercise such rights on a regular basis, whether for reward or not, will however only be granted in exceptional circumstances. To do otherwise would tend to subvert the will of Parliament.

If a litigant wants a lay person to be granted a right of audience, an application must be made at the start of the hearing. If a right to conduct litigation is sought such an application must be made at the earliest possible time and must be made, in any event, before the lay person does anything which amounts to the conduct of litigation. It is for litigants to persuade the Court, on a case by case basis, that the grant of such rights is justified.

Rights of audience and the right to conduct litigation are separate rights. The grant of one right to a lay person does not mean that a grant of the other right has been made. If both rights are sought their grant must be applied for individually and justified separately.

> Having granted either a right of audience or a right to conduct litigation, the Court has the power to remove either right. The grant of such rights in one set of proceedings cannot be relied on as a precedent supporting their grant in future proceedings."

49.4 In relation to the payment of McKenzie Friends by individuals requiring representation, the Court Practice Guidance Note of 12 July 2010 provided an indication of what might be regarded as acceptable practices:

> "Litigants can enter into lawful agreements to pay fees to McKenzie Friends for the provision of reasonable assistance in Court or out of Court by, for instance, carrying out clerical or mechanical activities, such as photocopying documents, preparing bundles, delivering documents to opposing parties or the Court, or the provision of legal advice in connection with Court proceedings. Such fees cannot be lawfully recovered from the opposing party.
>
> Fees said to be incurred by McKenzie Friends for carrying out the conduct of litigation, where the Court has not granted such a right, cannot lawfully be recovered from either the litigant for whom they carry out such work or the opposing party.
>
> Fees said to be incurred by McKenzie Friends for carrying out the conduct of litigation after the Court has granted such a right are in principle recoverable from the litigant for whom the work is carried out. Such fees cannot be lawfully recovered from the opposing party.
>
> Fees said to be incurred by McKenzie Friends for exercising a right of audience following the grant of such a right by the Court are in principle recoverable from the litigant on whose behalf the right is exercised. Such fees are also recoverable, in principle, from the opposing party as a recoverable disbursement."

<u>Other statutory provisions and guidance notes</u>

50. The Respondent referred the Tribunal to the following statutory provisions and guidance notes:

50.1 Section 1(1) of the Legal Services Act 2007 which sets out the following regulatory objectives:

> protecting and promoting the public interest;
> (b) supporting the constitutional principle of the rule of law;
> (c) improving access to justice;
> (d) protecting and promoting the interests of consumers;
> (e) promoting competition in the provision of services within subsection (2);
> (f) encouraging an independent, strong, diverse and effective legal profession;
> (g) increasing public understanding of the citizen's legal rights and duties;
> (h) promoting and maintaining adherence to the professional principles."

50.2 Section 1(3), which provided that the professional principles are:

> that authorised persons should act with independence and integrity;
> (b) that authorised persons should maintain proper standards of work;
> (c) that authorised persons should act in the best interests of their clients,
> (d) that persons who exercise before any Court a right of audience, or conduct litigation in relation to proceedings in any Court, **by virtue** of being authorised persons should comply with their duty to the Court to act with independence in the interests of justice, (Respondent's emphasis) and
> (e) that the affairs of clients should be kept confidential."

50.3 Section 13A of the Solicitors Act 1974 provides that:

> "(1) Subject to the provisions of this section, the Society may in the case of any solicitor direct that his practising certificate for the time being in force (his "current certificate") shall have effect subject to such conditions as the Society may think fit.
>
> (2) The power conferred by subsection (1) is exercisable in relation to a solicitor at any time during the period for which the solicitor's current certificate is in force if—
>
> (a) under section 13ZA the Society grants a sole solicitor endorsement, or
> (b) it appears to the Society that the case is of a prescribed description.

50.4 The Law Society Guidance Note on Unbundling Civil Legal Services, dated 4 April 2016, under the heading "McKenzie Friends" states at paragraph 6.2:

> "As an alternative to traditional advocacy you may wish to consider providing your client with a professional McKenzie Friend service in appropriate cases.
>
> The role of a McKenzie Friend is to provide advice and support to a litigant in person during the course of a hearing, but a McKenzie Friend has no right to address the Court, save for exceptional circumstances where the Court sees fit to grant leave.
>
> Further information about the role of McKenzie Friends in the civil Courts can be found in the Practice Guidance dated July 2010 by the Master of the Rolls and the president of the Family Division.
>
> A suitably trained paralegal member of your firm could enable you to provide a McKenzie Friend service for a modest fee compared to the cost of providing advocacy at the hearing. As with other services described in this practice note, you must clearly define the limits of the service, and address considerations such as your client's ability to benefit from the service."

Witnesses

51. Mr DE, gave evidence on behalf of the Applicant. He confirmed that his witness statement dated 5 May 2015 was true to the best of his knowledge, information and belief and was cross examined by the Respondent. The cross examination took place before certain points had been put into evidence by the Respondent, as the Respondent had not provided a witness statement dealing with the factual background. For example, questions were put to Mr DE on the basis that Mr DE had telephoned the Respondent "in a rage" in response to a text message on 5 August 2013, but there was no evidence from the Respondent in his witness statement about that. The Tribunal nevertheless permitted the cross examination. Relevant points of evidence, considered in determining the allegations, will be referred to below in the "Findings of Fact and Law" section.

52. The Respondent gave evidence on his own behalf. He confirmed that his witness statement dated 15 July 2015 was true to the best of his knowledge, information and belief and that it was this statement on which he relied. It was noted by the Tribunal that the witness statement (like the Respondent's skeleton argument) dealt primarily with legal submissions rather than an account of the facts surrounding the Respondent's dealings with Mr DE. The Tribunal allowed the Respondent to give his account of factual matters before being cross examined on those matters by Mr Miller for the Applicant. Again, relevant facts and matters will be set out below in relation to the findings on each allegation.

Findings of Fact and Law

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

54. The evidence referred to below is set out in summary form only, to avoid unnecessary repetition, and concentrates on those points of evidence which were disputed.

55. **Allegation 1.1 - During and/or before August 2013 the Respondent acted in breach of his Practising Certificate Conditions imposed on his 2012/2013 Practising Certificate when acting on his own account for DE in criminal proceedings contrary to Principles 6 and/ or 7 of the SRA Principles 2011**

55.1 This allegation was denied by the Respondent. The allegation related to the manner and circumstances in which the Respondent acted for Mr DE in the summer of 2013. As noted at paragraph 4 above, at the relevant time the Respondent was subject to the following condition on his PC:

> "he is not a sole practitioner or sole director of a recognised body".

<u>Applicant's General Submissions</u>

55.2 Principle 6 of the SRA Principles 2011 states:

> "You must behave in a way that maintains the trust the public places in you and in the provision of legal services".

Principle 7 of the SRA Principles 2011 states:

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

55.3 The Respondent had specific practising conditions placed on his [PC] which meant he was not authorised to act as a sole practitioner or sole director of a recognised body. He was permitted to work out of the Firm but in this instance did not; he acted in a private capacity for Mr DE. Practising conditions are placed on an individual's certificate to protect the public. There was clear reasoning given in the Authorised Officers' decisions as to why the practising conditions were attached to the Respondent's PC and these were not challenged by the Respondent.

55.4 The Respondent acted contrary to Principles 6 and/ or 7 of the SRA Handbook in doing so and acted contrary to his regulatory duties. The scheme for imposing practising conditions on solicitors is based on statute and is undermined if a solicitor acts contrary to the regulatory controls imposed and seeks to circumvent the duties.

Applicant's Submissions on the legal position

55.5 It was common ground that the Respondent was not acting in his capacity as an employee of the Firm. It was submitted that the Tribunal would need to consider the following questions, prior to making determinations on the allegations:

- Was the Respondent acting as a solicitor? and, in any event
- Was the Respondent in breach of his obligations as a solicitor in the services he provided to Mr DE?

Acting as a solicitor

55.6 The Respondent was (and is) a practising solicitor with a current practising certificate, albeit subject to conditions. The Respondent provided Mr DE with a card stating:

> "Terry-Ballard – locum solicitor/higher Courts advocate/legal consultant".

The card went on to state:

> '"Show me another lawyer of Terry's quality whose fees are based on what I can afford, what's fair. Not what the industry says I should pay.' A Davies, client 2003-onwards".

55.7 It followed from this that Mr DE was led to believe the Respondent was acting for him as a solicitor. In any event it was the SRA's primary submission that when someone who is on the Roll provides legal services there is, at its lowest, a presumption they are acting as a solicitor and the Respondent took inadequate steps to override this presumption.

Not acting as a solicitor

55.8 Even if the Tribunal were to determine that the Respondent was not acting in the capacity of a solicitor, the SRA would still submit that as he was a solicitor he had an obligation to explain clearly to Mr DE the limits of his role. His failure to do this put him in breach of Principle 6 (maintaining public trust) and Principle 7 (compliance with regulatory obligations).

55.9 The Respondent claimed he was acting as a McKenzie Friend and not as a solicitor and therefore he was entitled to act in the way that he has. The Applicant's position was:

55.9.1 On the facts of this case the Respondent was acting as a solicitor in respect of the client and therefore was acting in breach of his practising certificate conditions;

55.9.2 Alternatively, if the Respondent was not acting as a solicitor the statutory framework and also the separate business provisions in the Code of Conduct were directed at ensuring that clients were clear as to when they are receiving regulated legal services and unregulated legal services. The Respondent was not entitled to act in the way that he did and/or he failed to discharge his obligation to make sure that his client was clear as to the nature of the services provided.

55.10 In so far as the Respondent alleged he was acting as a McKenzie Friend when he appeared before a Court on behalf of the client this did not have any impact on the matters set out above as they arose from the Respondent's status as a solicitor. In any event, the Respondent was not entitled to act as a McKenzie Friend/exempt person for the purposes of otherwise reserved legal activities. The role of McKenzie Friend for such purposes is only available to those who are not authorised persons (see Schedule 3 of the Legal Services Act 2007, in particular paragraph 1(2) - set out at paragraph 45 above). As a solicitor the Respondent was an authorised person.

Respondent's Submissions on the legal position

55.11 The Respondent denied that he had acted for Mr DE as a practising solicitor in the proceedings against him at Brighton and Hove Magistrates Court. It was submitted that he therefore did not act as a sole practitioner in breach of the PC condition. The Respondent specifically denied that he advised and assisted Mr DE through a regulated entity, or that his advice and assistance depended on him being a solicitor (as opposed to a person with legal know-how). The Respondent further submitted that a sole practitioner was the single owner/proprietor of an SRA regulated entity, firm or practice and that he had ceased to be a sole practitioner on 27 September 2011 when his former practice closed. The Respondent further submitted that the Applicant was trying to extend its powers into the unregulated legal market by extending the meaning of "sole practitioner" to include an individual solicitor who provided non-reserved advice, assistance and advocacy support to litigants in person, other than through an SRA regulated entity. The Respondent accepted that under the Solicitors Act 1974 (as amended) a solicitor may not practise as a sole practitioner

unless the solicitor had in force a practising certificate and authority from the Law Society to practise as a sole practitioner.

55.12 The Respondent further submitted that there was no allegation against him of practising without insurance in place; such insurance would be required if he were a sole practitioner.

55.13 The Respondent also submitted that it was implicit that a solicitor could not act as a sole practitioner, unless authority was given. It was submitted that the Applicant had conflated "sole practitioner" with "individual solicitor", the former being an entity with a firm number and the latter a natural person with a Roll number. The Respondent submitted that there was a lacuna in section 52 of the Legal Services Act 2007 in that although it recognised the potential for conflict between approved regulators, as well as regulated individuals and entities, it did not envisage conflicts between approved regulators (such as the SRA) and authorised individuals (e.g. solicitors) carrying out non-reserved activities other than through regulated entities.

55.14 The Respondent submitted that if he advised and assisted Mr DE in a personal/private capacity, he could not have been practising as a solicitor, and vice versa. The Respondent submitted that the SRA did not own his law degree or the knowledge, expertise and skills he had acquired during his long career in the law (from 1978). The Respondent submitted that if he wished to hire that experience out to a person who was fully aware of his status and what activities he could not perform, that was a matter between that individual and the Respondent.

55.15 In addition, the Respondent submitted that the Applicant (and the Ombudsman with regard to allegation 1.4) had failed to identify and distinguish criminal offences and regulatory breaches. It was a criminal offence to act or pretend to be a solicitor under sections 20 and 21 of the Solicitors Act 1974, but there was no offence of a solicitor pretending to be an unadmitted person. It would be a regulatory breach to carry out a reserved legal activity without authority from an approved regulator (under section 14 of the Legal Services Act 2007). The Respondent submitted that he did not so act on behalf of Mr DE, due to the restrictions on his PC, as a result of which he was a non-authorised person in relation to the proceedings at Brighton and Hove Magistrates Court.

55.16 The Respondent further submitted that Schedule 3 to the Legal Services Act 2007 (see paragraph 45 above) should not be interpreted as imposing a prohibition on persons authorised by an approved regulator to carry out reserved legal activities (e.g. a solicitor authorised by the SRA) from being an exempt person or McKenzie Friend in particular proceedings. The Respondent submitted that the terms of the legislation could not be interpreted in that way; to do so would be a wide and irrational interpretation. The Respondent referred to the Courts and judges, at all levels, who had granted him exempt person or McKenzie Friend status in full knowledge that he was also a solicitor. On this point, the Respondent referred to a hearing in the Court of Appeal on 18 January 2013 in which he was described as "an exempted person" on the front sheet of the transcript of judgment, where the Respondent was referred to as a solicitor and it was noted that he had appeared "by way of concession". Such a concession was necessary, it was submitted, as he was not exercising a right of audience.

55.17 The Respondent submitted that there was no provision for a sanction for breach of these provisions. He submitted that although he had a general authority to practise as a solicitor, and the potential to exercise that ability on behalf of Mr DE, he was unable to do so in relation to the Court proceedings for Mr DE; he was unable to go on the Court record or go on the Court record. It was submitted that Mr DE had chosen to instruct the Respondent to provide a "silver medal" service. Nothing in the Legal Services Act 2007 restricted the power of Courts to hear from any individual if the interests of justice required this. The Respondent submitted that "exempt person" was a synonym for McKenzie Friend. In addition, the Respondent submitted that solicitors who did not hold a practising certificate (but whose name was on the Roll) and unemployed solicitors were also not authorised by the SRA to perform reserved legal activities. The Respondent submitted that if the Tribunal determined that the Courts which had allowed him to speak as an exempted person had been acting unlawfully, it would have a damaging effect on access to justice.

The Factual Position

55.18 The Tribunal noted that before it needed to analyse any of the law or submissions, it first needed to determine the facts in this particular case and then apply any relevant legal principles.

Mr DE's evidence

55.19 The written evidence of Mr DE is summarised above, in particular at paragraph 18.

55.20 Mr DE told the Tribunal that he had known the Respondent for several years before the events in question, through a mutual friend and former colleague of the Respondent, Mr KB. Mr DE knew that the Respondent was a solicitor who no longer had his own firm.

55.21 Mr DE was arrested in January 2013 and instructed a duty solicitor, from W LLP, initially. The Respondent handed up an invoice to Mr DE from W LLP dated 18 April 2013 which referred to Court representation on three occasions from January to April 2013, and was for the sum of £660 including VAT. Mr DE confirmed that he had received that invoice. He denied that he had contacted the Respondent after receipt of the invoice because he was concerned about costs. Mr DE told the Tribunal that the Respondent seemed keen to take on the case, and he wanted the Respondent to take the case through to the end, having been recommended by Mr KB.

55.22 Mr DE told the Tribunal that whilst costs were of some concern, he had not been clear about what the Respondent would be charging. Mr DE accepted that he had had several meetings with the Respondent and that there had been a regular exchange of emails. It was put to Mr DE that in those emails, the Respondent had given full and detailed advice about the options open to him about representation in the case, and that Mr DE had been informed that the Respondent could not go on record for him. Mr DE told the Tribunal that the Respondent had not told him to inform the CPS that he was a litigant in person, but told him to contact other firms to see if the Respondent could "work out of" their practices. Mr DE was referred to an email he sent to the Respondent on 14 May 2013, which read:

> "Once again, thanks for meeting yesterday.
> You've got my email address now.
> I have written to the CPS, informing that [W LLP] is no longer representing me – acting in person.
> I have also requested a copy of the interview tapes.
> I will review all statements and draw up my comments and get this to you asap. I will also copy [Mr KB] in."

Mr DE told the Tribunal that it was clear that he had contacted the CPS, but did not revise his answer that the Respondent had advised him to do so.

55.23 It was put to Mr DE that the Respondent told him he could not exercise a right of audience, and would need the Court's permission to speak for Mr DE. Mr DE told the Tribunal that he did not recall the Respondent saying that, but recalled the Respondent asking him to contact other solicitors from which the Respondent could work. Mr DE told the Tribunal that he had been uncomfortable in contacting other local solicitors. It was put to Mr DE that the Respondent told him that it was necessary for other solicitors to engage the Respondent to act on his behalf. Mr DE denied this and told the Tribunal that the Respondent had said he could not do the work through the Firm. It was put to Mr DE that this was because the Firm would not charge less than £1,500; Mr DE denied that the arrangement reached was to do with the amount of legal costs. Mr DE accepted that payment had been discussed at meetings with the Respondent, and told the Tribunal that the Respondent had suggested that Mr DE should pay what he thought the Respondent was worth. Mr DE accepted that he had had to push the Respondent to come up with a figure; he had understood that the Respondent was happy with the £750 agreed, which figure was a fixed fee which had been suggested by the Respondent.

55.24 It was put to Mr DE that it was agreed the fee would be paid before the hearing, not after it. Mr DE told the Tribunal that he did not recall if it had been agreed he would pay in advance. When the fee had been agreed, Mr DE had set up a direct debit, prior to the hearing, to pay the fee on 6 August 2013, the day after the hearing. Mr DE told the Tribunal that he had not known when the case would end – it may have been adjourned, as in fact happened – and the fixed fee was for all of the work in the case. Mr DE told the Tribunal that he was uncomfortable as the arrangements about the fee had not been put in writing.

55.25 Mr DE told the Tribunal that he had paid £500 in advance of the hearing; he could not explain why he had paid part at that point, but told the Tribunal that he did not know the whole payment was expected before the hearing. Mr DE told the Tribunal that he had forgotten about the direct debit, which had been set up some time before, as it was a very stressful time for him. Mr DE also told the Tribunal that he did not recall any urgency about when the payment was to be made, until the day of the hearing.

55.26 Mr DE was referred to the Respondent's text, set out at paragraph 17 above, which Mr DE described as being "passive aggressive". It was put to Mr DE that after the breach of the terms of the funding agreement was pointed out in the text, Mr DE had telephoned the Respondent in a rage. Mr DE denied this, and told the Tribunal that he could not understand why the Respondent had turned on him. Mr DE told the Tribunal that he thought he told the Respondent he would pay the remaining money

when he got home from Court. It was put to Mr DE that the text was polite but firm; Mr DE denied this, or that he had messed the Respondent around. Mr DE told the Tribunal that the Respondent had seemed calm, until they went to Court on 5 August 2013; the text had seemed out of character. It was put to Mr DE that the Respondent had "bent over backwards" to help him. Mr DE did not accept this, and pointed out that some of their meetings had been in public houses.

55.27 Mr DE told the Tribunal that on the day of the hearing, the Respondent had advised him to plead guilty to the charges. Mr DE told the Tribunal that he had not been told that the Respondent would need the Court's permission to represent him at the hearing.

55.28 It was accepted by Mr DE that the case could not proceed on 5 August 2013. Mr DE accepted he had not paid the Respondent in full before the text mentioned above was received but denied he had telephoned the Respondent in a state of rage. It was put to Mr DE that it was because of abuse from Mr DE that the Respondent had not been prepared to assist him further. Mr DE told the Tribunal that the Respondent had been unwilling to assist further. It was preposterous to suggest that the £750 had been transferred in a state of panic, to try to get the Respondent to act for him again. Mr DE told the Tribunal that he could not recall when he had set up the direct debit. The overpayment made to the Respondent (of £500) had been returned 3 days after the payment was made.

55.29 Mr DE told the Tribunal that the Respondent had attended Court for him on 5 August 2013 as his legal representative. It was put to Mr DE that whilst the Respondent may or may not have referred to being a McKenzie Friend or exempt person, Mr DE had been prepared to take the risk that the Respondent would not be allowed to represent him. Mr DE described this proposition as a complete lie.

55.30 In response to questions from the Tribunal, Mr DE stated that he believed he communicated with the Respondent on an open level. They were not friends in the sense of spending any personal time together, but there had been no bad feeling between them.

55.31 Mr DE told the Tribunal that when he attended the Magistrates Court on 5 August 2013 he became aware that the case would not go ahead as another case took priority. There had been discussions with the bench, in which it became clear that Mr DE's case would not be heard. Mr DE told the Tribunal that a number of cases had been called into Court together.

55.32 In re-examination, Mr DE told the Tribunal that he had met the Respondent several times before January 2013. He could not recall if the email of 14 May 2013 referred to their first meeting about this case. With regard to the reference in that email to "acting in person", Mr DE told the Tribunal that this was not intended to be a permanent arrangement. His understanding was that he had to tell the CPS that W LLP were no longer acting for him. It was not intended that he would go to Court on his own. Mr DE told the Tribunal that he had not actually contacted any firms in the area to ask if the Respondent could act "out of" those firms, as he did not know how one was supposed to do this. Mr DE told the Tribunal that his understanding was that the Respondent would be his legal representative, not just an advocate. The

Respondent was given permission by the Tribunal to raise issues in relation to his comment that Mr DE's credibility was in issue, as an email dated 2 July 2013 indicated that he had tried to contact firms with a view to them instructing the Respondent, but he had said in oral evidence that he had not made such contact. This line of possible questioning was not pursued by the Respondent.

55.33 The Tribunal referred Mr DE to emails in November 2013 which suggested he was making further enquiries of the CPS and the Court about the Respondent's position when he attended at Court on 5 August 2013. Mr DE told the Tribunal that he had not received any response from the CPS. The Magistrates' Court had sent him the Memorandum of Entry document on which the Respondent was described as the "attending solicitor".

55.34 In response to questions from the Tribunal, Mr DE stated that he had attended at Court on 5 August 2013 with a friend. The Respondent had spoken to various people in the Court building. When the case was called, the Respondent sat on the same row as counsel or solicitors, in any event in the front part of the Court. The Respondent had sat on the same row as the CPS representative, with one of them on each side of the Court. Mr DE told the Tribunal that so far as he could recall there was no-one else on that row. When the case was called, the CPS representative made submissions to the bench. It seemed to Mr DE that the Respondent knew the CPS representative, as they spoke to each other. The Respondent had spoken to the Magistrates on behalf of Mr DE. When asked in what terms the Respondent had spoken, Mr DE told the Tribunal that it was in legal terms. The Respondent had said who he was, but did not say he was just there as a friend; he had addressed the bench as a legal representative, and the Court record confirmed that. Mr DE could not recall if the Respondent had been consulted about his availability for the hearing on the adjourned date.

<u>The Respondent's Evidence</u>

55.35 As noted above, the Respondent had not set out in his witness statement his position with regard to the factual matters underlying this (or the other allegations). The Respondent had produced in his bundle emails dated 14 May, 2, 3, 9 and 10 July between himself and Mr DE but no other emails or texts. The Respondent was permitted to give evidence in chief, on which he was then cross examined.

55.36 The Respondent told the Tribunal about how and in what circumstances he had met Mr DE, and about their mutual friend Mr KB. Having received an approach from Mr KB in April 2013, the Respondent agreed in principle that he may be able to assist Mr DE. The Respondent told the Tribunal that Mr KB was aware that the Respondent was employed by the Firm, on what was in effect a "zero hours" contract.

55.37 The Respondent stated that at the first meeting with Mr DE, a Mr H (the Respondent's accountant) was also present. The Respondent told the Tribunal that he made clear to Mr DE what his professional constraints were, and Mr DE understood. The Respondent stated that he told Mr DE that he would make enquiries of the Firm and a Mr B to see if he could act on the basis of being an advocate. The Respondent told the Tribunal that Mr DE was unconcerned about the professional niceties of the proposed arrangements. Mr B had declined the proposed arrangement. The Firm had indicated that it was prepared in principle to accept the instruction, but on the basis of

standard fees which would be £1,500 on account. The Respondent told the Tribunal that he had met Mr DE again, and had kept in contact with him by email. Mr DE had stated that he wanted the Respondent as his advocate, as Mr KB had recommended him very highly.

55.38 The Respondent told the Tribunal that he had explained to Mr DE that if he wanted the Respondent as his advocate, he (Mr DE) would need to "shop around" to get another solicitor to instruct him, in a way analogous to instructing a barrister. Whilst he had not gone through the Legal Services Act 2007 in detail, he had explained the outline of the regulatory position. The Respondent told the Tribunal that he had told Mr DE that he could not go on the Court record as acting for him and that to guarantee being represented by the Respondent Mr DE would need to find a solicitor who would instruct the Respondent. The Respondent told the Tribunal that he had advised Mr DE to contact the Court. As Mr DE was determined not to instruct W LLP any further, the Respondent told Mr DE he would have to be a litigant in person until other solicitors were instructed; Mr DE would need to inform the CPS of this. The Respondent told the Tribunal that Mr DE had done this, and that he knew why it was necessary.

55.39 The Respondent told the Tribunal about a long meeting with Mr DE in Falmer in which Mr DE had asked lots of questions including the likely sentence for the offences with which he had been charged. The Respondent told the Tribunal that he did not think Mr DE had a substantive defence, as he simply hoped that the complainant(s) would not attend Court. On the Respondent's advice, Mr DE had obtained some character evidence.

55.40 The Respondent told the Tribunal that fees had not really been discussed; Mr DE had insisted that he wanted to pay the Respondent something. The Respondent told the Tribunal that he felt that he should be paid, as Mr DE could afford to pay and there was no risk of injustice in his case; he did not feel disposed to undertake this case on a pro bono basis. The Respondent told the Tribunal that he would have turned the case down, but had been doing a favour for Mr KB. The Respondent told the Tribunal that he had now learned an important lesson about the dangers of mixing business with pleasure.

55.41 The Respondent told the Tribunal that Mr DE had accepted in his evidence that he had had to apply a degree of pressure to agree a fee. The fee had been agreed. The Respondent told the Tribunal that this had been at the last meeting before the trial was due to take place, in a meeting in Mr DE's garden. The Respondent told the Tribunal that he had taken at face value Mr DE's statement that he had tried to find a solicitor, but now knew that Mr DE had not done so.

55.42 In response to a question from the Chair, the Respondent stated that he had not previously undertaken a matter on the basis of being instructed by another firm of solicitors in a criminal matter. The Respondent told the Tribunal that he had done pro bono work in civil matters and that he wanted to offer legal services through an entity called Firebird Legal Services Limited ("Firebird"), which had been set up in about 2014. The Respondent told the Tribunal that in a matter before the Court of Appeal he had appeared as an advocate, in a case he had dealt with throughout. He had been granted exempt person status and told the Tribunal that a Court could grant an exempt

person the right to be a McKenzie Friend with the ability to represent a party. The Respondent told the Tribunal that he had also appeared before the Court of Appeal in a criminal matter and had been granted exempt person status. The Chair asked if the Respondent had been instructed by other firms of solicitors in those or other matters. The Respondent told the Tribunal that he had only appeared as a solicitor in connection with work for the Firm or H Solicitors. He hoped to obtain freelance advocacy work. The Respondent told the Tribunal that if Mr DE had found a solicitor to instruct, that solicitor would carry out work in the normal way but Mr DE would ask the firm to instruct the Respondent as the trial advocate. If the firm did not want to instruct the Respondent, the proposed arrangement would fail. The Respondent told the Tribunal that he had never actually had such an arrangement. The Respondent told the Tribunal that he would expect any firm of solicitors who accepted instructions in the matter to act in the usual way.

55.43 The Respondent told the Tribunal that after the discussion about not finding other solicitors to instruct, Mr DE had asked if there was any other way of dealing with matters. The Respondent told the Tribunal that he had explained to Mr DE the status of McKenzie Friend and/or exempt person, and that he had explained the risk that Mr DE may have to represent himself if permission were not granted by the Court. The Respondent told the Tribunal that Mr DE understood the position. Mr DE had instructed him not to make an application in advance of the hearing date for exempt person status, as if permission were refused Mr DE would have to represent himself at trial.

55.44 The Respondent told the Tribunal that the discussion about the fee had been awkward. The Respondent told the Tribunal that the amount of the bill from W LLP for what appeared to be minimal work led to Mr DE being afraid of the costs of the case. He had been very happy with the agreed fee of £750. The Respondent told the Tribunal that Mr DE had agreed to pay that sum before the hearing.

55.45 The Respondent told the Tribunal that on 5 August 2013 the case was not selected to be heard. Four cases had been called into Court together, to select which would be effective and the parties submitted reasons why the case should or should not be adjourned.

55.46 The Respondent told the Tribunal that he made clear to the usher and to the prosecutor that he was attending as a McKenzie Friend and would apply to be a McKenzie Friend if the case were called. The Respondent told the Tribunal that he was asked if the case was ready to proceed and he said that it was. The Respondent queried whether he should have referred to his status at that point. The Respondent stated that the Guidance on McKenzie Friends indicated that the application should be made at the start of the hearing and reiterated that he had made his status clear to the usher and the prosecutor.

55.47 The Respondent told the Tribunal that Mr DE had paid £500 a few days before the hearing; he should have done so earlier. The Respondent told the Tribunal that he had taken Mr DE's word that he would pay the remainder within the hour. As the money did not arrive, the Respondent had been irritated and sent the text already referred to; it was intended to be polite but firm. The Respondent told the Tribunal that soon after the text was sent Mr DE telephoned him, incandescent with rage. The Respondent

told Mr DE that he was not prepared to deal with him any further. The Respondent confirmed that he was aware that Mr DE would have a full three months to prepare for the adjourned trial.

55.48 The Respondent told the Tribunal that the next day £750 appeared in his bank account, which he was not expecting; he had been surprised to receive £750 on top of the £500 already paid. The Respondent told the Tribunal that his assumption was that Mr DE had panicked and tried to "buy him back". The Respondent told the Tribunal that he had returned the extra £500 to Mr DE.

55.49 In cross examination, the Respondent told the Tribunal that he understood the condition on his PC as meaning that he could only work as a solicitor if employed, either under a contract of service or a contract for services. The Respondent told the Tribunal that he had not taken advice on his position, but had spoken to friends and colleagues about it. The Respondent told the Tribunal that he understood that his position was analogous to that of a barrister, albeit not on all fours with that position. The Respondent told the Tribunal that he understood he only had a right of audience if he was instructed or engaged by an entity regulated by the SRA; in such a situation, he would not be in breach of his PC condition. The Respondent told the Tribunal that he understood he could only act as a solicitor if employed. The Respondent queried if it was suggested that if he was not employed, he was acting as a sole practitioner; he understood that expression to mean the sole owner of a SRA-regulated entity.

55.50 The Respondent told the Tribunal that he was pretty confident that the meeting referred to in the email of 14 May 2013 was not his first meeting about the case with Mr DE. At the first meeting, Mr DE wanted advice and information as he was considering disinstructing W LLP. The Respondent told the Tribunal that he had laid out all the options to Mr DE. He had almost certainly not advised on plea at the first meeting as he had not seen the evidence at that point. Later, he had advised Mr DE about evidence and procedure. In due course, the Respondent had told Mr DE that he was "in difficulties" with his defence.

55.51 The Respondent told the Tribunal about steps he had taken to find someone who would instruct him on behalf of Mr DE. The Respondent was referred to his email to Mr DE dated 10 July 2013 in which he had said, "I'm working on something else which we'll discuss at our next meeting". He told the Tribunal that this may have been a reference to trying to persuade the Firm to reduce the fees it would charge to Mr DE, or possibly the McKenzie Friend/exempt person route. The Respondent had been hoping to be employed as the solicitor acting for Mr DE.

55.52 It was put to the Respondent that by that stage Mr DE had received his business card, with the wording set out at paragraph 10 above. The Respondent told the Tribunal that he did not recall giving Mr DE his card; the Respondent had had cards printed as the Firm would not provide cards in his name. The Respondent told the Tribunal that cards had been printed by August 2013, and the quote from Mr Davies on the card had been included without the Respondent's permission. The Respondent stated that Mr DE did not need the business card as he knew that the Respondent was working for the Firm and had previously had his own firm. The Respondent accepted that Mr DE knew that he was qualified to act as a solicitor, subject to the qualification that

the requisite conditions were met. Mr DE had not minded what title the Respondent had, he just wanted him to act for him.

55.53 It was put to the Respondent that there was nothing in writing explaining the proposed McKenzie Friend arrangement. The Respondent told the Tribunal that it had been explained to Mr DE in a meeting. The Respondent told the Tribunal that Mr DE was not his client; Mr DE had approached the Respondent and only wanted the Respondent to act, no-one else. The proposed McKenzie Friend formula was intended to keep Mr DE and Mr KB happy.

55.54 It was put to the Respondent that he had advised on case procedure and on plea, had charged Mr DE some money and was a solicitor but appeared to be saying that Mr DE was not a client. The Respondent told the Tribunal that Mr DE had been advised on plea by W LLP and did not want to change the plea. The Respondent told the Tribunal that Mr DE had insisted on paying him; it was not that the Respondent had charged Mr DE for his services. Rather, the Respondent had agreed to accept payment, at Mr DE's insistence.

55.55 The Respondent confirmed that Mr DE knew that he happened to be a solicitor, but denied he had been retained by Mr DE in the way a client would retain a firm. The Respondent accepted that the payment of £750 was taxable and was not a gift; the Respondent described some difficulties he said he had experienced in declaring that sum for tax purposes, which appeared to be linked to the establishment of Firebird some time later.

55.56 The Respondent told the Tribunal that he was present to resist the allegations and to be able to work, rather than to be condemned to working on a zero hours' contract. It was put to the Respondent that if he wanted to provide unregulated services, he could remove himself from the Roll of Solicitors. The Respondent told the Tribunal that he would not do that; he should not have to make the choice, so long as he observed all the relevant requirements. The Respondent told the Tribunal that there were solicitors on the Roll who were providing professional McKenzie Friend services, and it did not appear there was any objection to that. It was put to the Respondent that he was trying to have his cake and eat it (by choosing to opt in or out of being regulated). The Respondent told the Tribunal about cases he had or was conducting in various Courts in which he had appeared, having been given McKenzie Friend and/or exempt person status. The Respondent told the Tribunal that on only one occasion had he been confined to the "traditional" McKenzie Friend role of assisting a litigant; in most cases, he had been allowed full advocacy rights. The Respondent told the Tribunal that there had been examples of such hearings both before and after Mr DE's case, albeit before Mr DE's case the hearings had been in the County Court. The Respondent told the Tribunal about a case in Croydon Magistrates Court which may have overlapped with Mr DE's case in which he had been given exempt person status.

55.57 The Respondent told the Tribunal that his understanding was that even without a condition on his PC, he would not be able to exercise rights of audience in the higher Courts as a solicitor or without professional indemnity insurance cover. The permission of the Court would be needed. The Respondent told the Tribunal that the condition on his PC had no practical value as he would be unable to carry out a reserved legal activity without authority. The Respondent told the Tribunal that the

other cases in which he had appeared as a McKenzie Friend/exempt person had been carried out pro bono.

55.58 The Respondent confirmed that the fee agreement with Mr DE was on the basis of a fixed fee, whether the case was heard on 5 August 2013 or adjourned to a later date. The Respondent told the Tribunal that the arrangement broke down because of Mr DE's abusive telephone call on 5 August. At that point, the Respondent felt he had discharged his obligation to Mr KB and pulled the plug on acting for Mr DE. The Respondent told the Tribunal that he had attended the hearing in November 2013, when Mr DE had changed his plea. The Respondent told the Tribunal that he made no apology for attending, as the hearing was in a local Court and he wanted to make sure that nothing derogatory or untrue was said about him. The Respondent did not accept that Mr DE would have found his presence in Court intimidating.

55.59 The Respondent told the Tribunal that, on Mr DE's instructions, he had not done what he usually did which was to make an application in writing in advance for McKenzie Friend/exempt person status, as Mr DE was worried that the application would not be granted. The Respondent told the Tribunal that Mr DE understood the risk that the application would not be granted.

55.60 The Respondent told the Tribunal that he had discharged his duty to the Court on 5 August 2013 by speaking to the usher, who knew the Respondent, and making it clear to the usher and the prosecutor that he was there as McKenzie Friend/exempt person.

55.61 It was put to the Respondent that during the hearing he had sat in the position of a solicitor. The Respondent told the Tribunal that the whole Court was packed out. He had been on the advocates' bench, but had not been pretending to be there as a solicitor. If the Court had taken the case, he would have made the application to appear for Mr DE.

55.62 It was put to the Respondent that he had addressed the Magistrates' Court without making an application for the status to allow him to do so. The Respondent told the Tribunal that it would have been premature to do so as the Court was deciding on the priority of the various cases. Mr DE had been at risk if the case had been called and the application was not granted. The Respondent told the Tribunal that it was not relevant to say he was a McKenzie Friend when the Court was deciding on issues of priority.

55.63 The Respondent told the Tribunal that he had informed Mr DE that the prosecution witnesses were present in Court, which Mr DE had not expected; he had advised Mr DE to consider changing his plea, which he chose not to do. Advice of this kind was not a reserved legal activity but was important. The Respondent told the Tribunal that the allegation did not relate to giving advice and Mr DE had not said the advice was flawed. The Respondent told the Tribunal that he had tried to help Mr DE and had given him the best he could.

55.64 The Respondent could not explain why after the conversation with the usher, he had been noted as the "attending solicitor" in the case. The Respondent told the Tribunal that there were standard forms to fill in; he had said he was not there for a solicitors' firm and that he would apply for McKenzie Friend status.

55.65 The Respondent told the Tribunal that his business card said he could not carry out reserved legal activities. To clarify this point, Mr Miller asked Mr DE if he had the business card available. Mr DE passed to the Tribunal two documents. One, on black card, bore the words included within the exhibit to the Rule 5 Statement. The second, on white card, stated:

> "Terry Ballard
> Civil law/criminal law
> [Address (crossed through by hand), telephone number and email address redacted]
> The services provided by Terry as a consultant are not reserved activities for the purpose of s12 of the Legal Services Act 2007."

The Respondent told the Tribunal that the black card, a copy of which appeared in the hearing bundle, was not his card. The Respondent expressed concern about the provenance of the cards, particularly if it was suggested that as a result of such a card Mr DE had been misled.

55.66 It was put to the Respondent that he had indicated he was not particularly bothered about the fee, but had then sent the text beginning, "Still waiting mate…" The Respondent told the Tribunal that it was a matter of principle, as he had taken a day out to attend Court; he was being messed about by someone he had trusted. Mr DE had reneged on the deal and the text was intended to be a gentle prompt. It was put to the Respondent that the text indicated that if he was messed around, the cost of his services would go up. The Respondent told the Tribunal that he "wanted out". He could have put the price up, but did not do that. Mr DE had broken the original agreement and he had given him the opportunity to do what had been agreed; he had tried to be fair for Mr KB's sake. The Respondent told the Tribunal it was because of the abuse he received on the telephone that he stopped acting for Mr DE.

55.67 The Respondent told the Tribunal that he could not recall when he found that he had been paid too much by Mr DE; he had been surprised, as he had not expected to receive any money from Mr DE. The Respondent was referred to a text from Mr DE on 8 August 2013 which read, "I have just left you a voice mail, can you please give me a call to discuss two payments that have been made into your account. Thanks." It was put to the Respondent that he knew at that stage that the extra money was in the account. The Respondent told the Tribunal that he could not remember; he may or may not have known he had received an extra £500. When he found out, he knew he had to return the £500. The Respondent was referred to his reply by text to Mr DE which read, "No chance. Send an email." The Respondent told the Tribunal that he was not prepared to talk to Mr DE on the phone, after the abuse he had received previously; he wanted to communicate in writing.

55.68 In response to questions from the Tribunal, the Respondent told the Tribunal that had started working in law in 1978, had qualified as a solicitor in 1997 and had become a Higher Courts advocate in 2002. The Respondent accepted that the usher at Court was not the Court, and neither was the prosecutor. The Respondent told the Tribunal that there had been a lay bench on 5 August 2013. The usher would normally communicate with the legal adviser, and he had not communicated with the legal adviser directly. The Respondent told the Tribunal that he had told the usher and the prosecutor that he was present as a McKenzie Friend and he assumed this would be conveyed to the legal adviser. The Respondent told the Tribunal that in his experience it was not always the litigant in person who applied for someone to be a McKenzie Friend. More than once, he had written to a Court in advance making the application for exempt person/McKenzie Friend status. The Respondent told the Tribunal that sometimes the procedure was informal; it depended on the Court and the case. The Respondent was asked if he had prepared a written application, ready for use at Court. The Respondent told the Tribunal that Mr DE had said that he did not want a written application in advance, in case it was refused. The Respondent told the Tribunal that he was familiar with the bench which was sitting, and he planned to do as he had in other cases and explain that he wanted exempt person/McKenzie Friend status. The Respondent accepted that it would be for the Court to determine if he should be granted such status. The Respondent told the Tribunal that Mr DE was aware that the Court may refuse permission.

55.69 The Respondent told the Tribunal that Firebird was set up after the events of August 2013, probably about a year later. The Respondent told the Tribunal that he had drafted the terms and conditions document for Firebird, which set out in detail the proposed roles and that the Respondent would not be acting as a solicitor, so the entity was unregulated. The Respondent was asked about how a lay client would understand the distinction between a solicitor, a McKenzie Friend and a McKenzie Friend appearing as an advocate unless it was carefully set out. The Respondent confirmed that the Firebird document, which explained these points, did not exist when he dealt with Mr DE. The Respondent told the Tribunal that he had gone into detail with Mr DE in his meetings. Although there had been an intention to create legal relations with Mr DE, there had also been a degree of informality.

55.70 The Respondent was referred to the receipt he gave to Mr DE for the amount paid, which read, "Received from [Mr DE] £750 as an agreed fixed fee for all legal services arising from criminal proceedings in Brighton Magistrates Court." The Respondent was asked if "all legal services" included advocacy and/or preparatory work. The Respondent told the Tribunal that it included everything he did for Mr DE from when they first met to discuss the case until they left Court on 5 August 2013. The Respondent was referred to an email he sent to Mr DE on 1 September 2013 concerning Mr DE's complaint against him, in which the Respondent wrote that Mr DE had said he wanted help with three matters: complaint against and return of fee from W LLP; preparation of the defence, in particular regarding disclosure, evidential and procedural issues; and representation at the trial. The Respondent told the Tribunal that the agreement to provide advocacy services was subject to the Court's agreement. The Respondent accepted that advocacy services could only be provided by an authorised person (e.g. a solicitor) unless the Court granted representation rights. The Respondent told the Tribunal that he had explained to Mr DE that he could not act as a solicitor as he did not have his own firm and without

instructions from a firm he would need the permission of the Court. The Respondent was asked if he had approached the SRA to seek permission to carry out this work pro bono, as the condition on his PC related to financial matters, not his work as a solicitor. The Respondent told the Tribunal that he did not think he had considered that; if he had, he had rejected the idea particularly as he had had a "mixed" relationship with the SRA.

55.71 The Respondent was referred to the SRA Practice Framework Rules 2011, which at Rule 9.2, concerning practising certificates states:

> "You will be practising as a solicitor if you are involved in legal practice and:
> a) Your involvement in the firm or the work done depends on your being a solicitor;
> b) You are held out explicitly or implicitly as a practising solicitor;
> c) You are employed explicitly or implicitly as a solicitor; or
> d) You are deemed by section 1A of the Solicitors Act to be acting as a solicitor."

and at Rule 9.3 stated:

> "In 9.2 above "legal practice" includes not only the provision of legal advice or assistance, or representation in connection with the application of the law or resolution of legal disputes, but also the provision of other services such as are provided by solicitors…"

The Respondent told the Tribunal that he was not in a SRA regulated practice in relation to the work he did for Mr DE and did not hold himself out as an advocate. Mr DE knew that the Respondent was a solicitor and that he could not act in that capacity for him; if he wanted the Respondent as his advocate, the Court's permission would be needed. The Respondent told the Tribunal that he thought Rule 9.2(b) referred to the situation where one was not authorised but allowed a client to think one was; it was an offence to pretend to be a solicitor.

<u>The Tribunal's Findings of Fact</u>

55.72 In setting out its notes of the evidence above, the Tribunal was careful not to go into certain aspects of the matters with which Mr DE had been charged. Some of the evidence heard in relation to that matter may well have been privileged and in any event was not relevant in any way to the Tribunal's consideration of the allegations against the Respondent.

55.73 On the basis of the evidence read and heard from Mr DE and the Respondent, the Tribunal was satisfied that from about April/May 2013, and in particular after June 2013, the Respondent had provided advice and assistance to Mr DE in relation to criminal proceedings he was facing in Brighton and Hove Magistrates Court. The Tribunal was also satisfied – indeed, it was not disputed – that the Respondent was at all material times a practising solicitor, who held a PC subject to just one condition, namely that he could not be a sole practitioner or sole director of a recognised body. There was no restriction on the Respondent's employment, for example he did not need prior approval from the Applicant to accept employment; he was, in all practical

respects, in the same position as any solicitor who held a PC who did not have authorisation to be a sole practitioner or sole principal of a recognised body.

55.74 The Tribunal was further satisfied that Mr DE was aware that the Respondent was a solicitor who had previously had a legal practice which had closed. The Tribunal accepted the evidence of both witnesses that the approach for assistance was made through a mutual friend, Mr KB. It was also accepted that the Respondent and Mr DE had agreed a fixed fee of £750 for the services the Respondent was to provide throughout the case, whether the case was concluded at the hearing in August 2013 or later.

55.75 The Tribunal noted that the Respondent had raised an issue during the hearing about the provenance of two business cards which were passed up during the Respondent's cross examination as the Respondent had stated he did not recall giving Mr DE his card. There had been no challenge at any stage by the Respondent to the authenticity of the document copied in the Rule 5 bundle, which read, "Terry Ballard – locum solicitor/higher Courts advocate/legal consultant". The second card handed up, on white card, contained the statement the Respondent referred to having had on his business card, namely, "The services provided by Terry as a consultant are not reserved activities for the purposes of s12 of the Legal Services Act 2007". The Tribunal found that nothing at all turned on the business cards and whether they had or had not been given to Mr DE. The Respondent had failed to raise any concerns he had about the document within the bundle, and he appeared to accept that the second card (which was not in the bundle) contained wording which noted that the services he provided were restricted. The Tribunal noted that a lay client would be unlikely to understand the wording in relation to s12 of the Legal Services Act 2007 without proper explanation; the words on the card alone were not sufficient to make clear the Respondent's status. There was no dispute that Mr DE knew the Respondent was a solicitor, whether or not a business card had been provided.

55.76 The Tribunal found that in the period prior to 5 August 2013 the Respondent provided Mr DE with legal and procedural advice. Such work was not in itself a reserved activity, although it fell with the sort of work which was conducted by solicitors and could properly be described as "legal activity", as defined at s12(3) of the Legal Services Act 2007 (as set out at paragraph 41 above).

55.77 The Tribunal found so that it was sure that the Respondent had not set out the terms of his arrangement with Mr DE in writing. In particular, there was nothing in writing to explain to Mr DE that the Respondent may not have a right of audience in the Magistrates' Court; it was asserted by the Respondent that he could not exercise a right of audience in the Magistrates' Court unless he was doing so in his capacity as an employee of the Firm or was engaged by a regulated firm of solicitors to appear as an advocate. Although the Respondent had put it to Mr DE in cross examination (see paragraph 55.22 above) that he had been given full advice on the options, including as to representation, the Respondent had not produced to the Tribunal any emails which contained such advice.

55.78 There was a conflict of evidence between the Respondent and Mr DE on the issue of what had been discussed about the Respondent's role or proposed role. The Respondent's position was that he had explained fully that he needed to "work out of"

another firm and, when that was no longer an option, that he would have to apply for permission to assist Mr DE as a McKenzie Friend and/or exempt person. The Respondent had also told the Tribunal that Mr DE had instructed him not to make an application for McKenzie Friend/exempt person status prior to the hearing on 5 August 2013, because of the risk the application would not be granted. The Tribunal noted that the Respondent had not stated this in any documents submitted to the Tribunal, nor had he put it to Mr DE that Mr DE had decided the application should not be made in advance.

55.79 In this situation, where the Respondent was a solicitor who held a PC, and that was known by Mr DE, the Tribunal found that Mr DE had not been informed that the Respondent proposed to act in a capacity other than that of a solicitor/authorised person. If that had been discussed, it was clear that Mr DE had not understood the finer points of the services the Respondent proposed to supply. He did not understand the distinction between reserved legal activities and activities which were not reserved, and did not understand that the Respondent proposed to act in a limited capacity. Mr DE specifically denied that he knew the Respondent would not be able to go on the Court record as acting for him and he said he could not recall the Respondent saying he would need the Court's permission in order to address the Court. Mr DE specifically denied that he had been prepared to take the risk that the Respondent would not be able to represent him at the trial in the Magistrates' Court. The Tribunal found that the position had not been adequately explained to Mr DE and that to avoid any confusion the Respondent should have confirmed his proposed arrangement to Mr DE in writing.

55.80 The Tribunal found as facts that on 5 August 2013 the Respondent attended Court with Mr DE. Instead of sitting beside him, as would be expected of a McKenzie Friend, the Respondent sat on one of the rows of seating used by advocates. The Tribunal accepted that the Respondent spoke to the usher and the prosecutor; Mr DE confirmed in his evidence that the Respondent spoke to several people at Court and that those people appeared to know him. The Tribunal also found as a fact that the Respondent addressed the Magistrates, without prefacing his remarks by indicating he needed permission to do so. The Tribunal found that the Respondent did not communicate with the legal adviser to the Magistrates to explain that he needed to make an application to address the bench. The Tribunal was satisfied that the Court, in determining the priority of cases and which case would be heard that day, was exercising a judicial function and not merely an administrative function. The Tribunal also found that when the Respondent addressed the Magistrates he did not do so as an employee of the Firm, or as an agent of another firm, but on his own account arising from the arrangement he had made with Mr DE. The Tribunal also noted and found it compelling that the record of the hearing at the Magistrates' Court noted that the Respondent was present as Mr DE's "attending solicitor".

<u>The Tribunal's Findings on legal issues</u>

55.81 The Tribunal noted that the Respondent indicated in his oral submissions that the Tribunal's decision was of great importance, including outside the confines of this case. The Respondent had indicated that he had not previously heard it submitted that if one was an authorised person one was prohibited from being a McKenzie Friend and/or exempt person. The Respondent had also addressed the Tribunal, both in

writing and in his oral submissions, on matters concerning access to justice for individuals who could not afford the services of solicitors.

55.82 The Tribunal noted these submissions and determined that its role was simply to determine the allegations which had been made against this particular Respondent arising from a particular set of facts. It did not need to make any findings of law which would be of general application, and did not purport to do so. The Tribunal's findings on each of the allegations were based on the facts and circumstances of this case and were specific to those facts.

55.83 The Tribunal noted and determined in particular that it was not obliged to make any findings in relation to Firebird, the entity established by the Respondent after the events in issue in this case, and none of its comments and decisions should be read as expressing a conclusive or binding view on the legality or propriety of that proposed business.

55.84 That said, the Tribunal had been invited by the Respondent to make findings in relation to the law and in particular whether an authorised person (in this instance a solicitor) could offer unregulated legal services, including advocacy through seeking and obtaining the permission of a Court for McKenzie Friend/exempt person status. On that point, the Tribunal noted that the Legal Services Act 2007 did not appear to limit the jurisdiction of any Courts to determine whether the Court would or would not grant permission to any individual to address the Court. It could not be said, therefore, that those Courts which had permitted the Respondent to act as a McKenzie Friend or, indeed, to address the Court as an "exempt person" had been wrong to give that permission. The Courts could regulate their own procedures and direct who could or could not appear in relation to particular cases.

55.85 However, it appeared to the Tribunal that the correct reading of Schedule 3 of the Legal Services Act 2007 together with the Solicitors Act 1974 (as amended) suggested that a solicitor was an authorised person and therefore could not correctly be described as an exempt person if granted specific permission by a Court to appear as an advocate (or, indeed, to assist as a McKenzie Friend). Further, the Guidance Note on McKenzie Friends set out at length at paragraph 49 above suggested that McKenzie Friends were not, or were not likely to be, authorised persons. The Law Society Guidance Note on Unbundling Legal Services was of no assistance to the Tribunal in this case. Firstly, the Note post-dated the events in this case by almost three years. Secondly, it related to civil and not criminal proceedings. Further, the Note clearly indicated that a firm might offer "McKenzie Friend" services through unqualified but suitably trained staff; there was nothing to suggest it would be appropriate for a solicitor to attend Court as a McKenzie Friend rather than as a solicitor. These comments should be read as being in the nature of obiter dicta comments, as nothing in the Tribunal's findings on the allegations turned on the Tribunal's interpretation of these points.

55.86 What the Tribunal had to consider was whether or not the Respondent had breached the condition on his PC for 2012/13. There was no doubt that the Respondent had been acting for Mr DE "on his own account", as he received payment directly; he had not been instructed by a regulated entity to represent Mr DE.

55.87 The Tribunal noted the Respondent's submission that he could not be practising as a sole practitioner as he was not authorised by the Applicant to do so. This was an argument which was rather back to front; it would suggest that a solicitor could set up an unregulated business through which legal work was done but then claim to have avoided the obligations which came with a properly regulated legal practice. On its face that would be an undesirable outcome from the point of view of protecting the public.

55.88 In any event, what the Tribunal had to consider was whether or not the Respondent had been acting as a solicitor, not the mechanism by which he did so. In any event, the provisions of Rule 9.2 and 9.3 of the Practice Framework Rules 2011 included a wide definition of "legal practice" and there was no doubt that the Respondent had been and was held out to be a solicitor.

The Tribunal's Findings on the allegation

55.89 In the period prior to 5 August 2013, the Respondent advised Mr DE on evidence and procedure in relation to the criminal proceedings. He had considered papers in the case, but there was nothing to indicate he had communicated with the Court or the CPS and it could not be said with certainty that the Respondent had had the conduct of litigation. The Tribunal was not satisfied to the higher standard that any of the work done in that period constituted reserved legal activities, although it clearly fell within the description of "legal activity", as set out above. The Tribunal was not satisfied to the required standard that this work was done in the Respondent's capacity as a solicitor, as it was not necessary to be a solicitor in order to advise on the law. Whilst it was of concern that it was not clear to Mr DE in what capacity the Respondent was carrying out this legal activity, the Tribunal was not sure that the circumstances in which the Respondent advised Mr DE amounted to a breach of the condition on his PC.

55.90 At the Magistrates' Court on 5 August 2013, the Respondent had taken a seat on the same row as the prosecutor and had addressed the Court in relation to the adjournment of Mr DE's case. Whilst he had spoken to the usher and to the prosecutor before the hearing, the Respondent had not spoken to the legal adviser and, more particularly, did not inform the bench at the outset that he needed their permission in order to address them in relation to whether or not the case should be adjourned. The Respondent had been noted on the Court record as the attending solicitor and had produced no rebuttal evidence to indicate that there had been a misunderstanding about what he had told the usher. Whilst the Respondent had told the Tribunal that the matter of his status had not been relevant to determining the priority of the cases listed that day, it appeared to the Tribunal that the Court might reasonably have wanted to consider if a party was represented and was ready to proceed or whether there would be preliminary issues to consider such as whether or not to allow a defendant to have someone speak on his behalf. In any event, the clear impression given to the Court – and to Mr DE – was that the Respondent was attending the Court as a solicitor. That impression may have been reinforced by the fact that the Respondent was well-known in the Court; he told the Tribunal that he was familiar with the bench which sat that day.

55.91 It was clearly the position, even on the Respondent's case, that he attended Court on 5 August 2013 either as a solicitor or as a would-be McKenzie Friend/exempt person. He could not become either of the latter unless and until granted permission by the Court. The Respondent had not produced in evidence any written application in the form he intended to apply to the Court, despite mentioning in the schedule of work he had prepared in relation to the complaint to LeO that he had prepared an "an application for "exempt person" etc. status." As he did not obtain the permission of the Court, when he addressed it he must have done so as a solicitor. The matter on which the Respondent addressed the Court, albeit briefly, was one which required a judicial decision. There could be no doubt that the Respondent had acted as a solicitor at Court on 5 August 2013; there was no other capacity in which he could have acted unless and until the Court ordered otherwise.

55.92 Further, there was no doubt that the Respondent had acted on his own account, as the arrangement made with Mr DE was that Mr DE would pay the Respondent personally a sum of money. The Respondent had accepted that that sum would be taxable as part of his personal income. The Respondent had not acted through a regulated entity. He must, therefore, have acted as a de facto sole practitioner; the fact he was not authorised so to act added to the gravity of the matter rather than providing a defence. This was a breach of his PC condition.

55.93 In considering whether this conduct constituted a breach of Principles 6 and/or 7, as alleged, the Tribunal had regard to all of the circumstances. There could be no doubt that acting in breach of conditions on a PC amounted to a failure to comply with the Respondent's legal and regulatory obligations; the breach of Principle 7 was proved to the required standard.

55.94 The Tribunal noted that the Guidance Note issued by the Master of the Rolls in 2010, as quoted extensively above, noted that Courts should be slow to grant rights of audience to those who were not authorised, for the protection of Court users and to help ensure that those who appeared as representative understood their duties to the Court. It was not for this Tribunal to comment on the either the desirability or legality of solicitors such as the Respondent offering unregulated services, if permitted by the Court. However, when considering the professional obligation of a solicitor to act in a way which would maintain the trust the public would place in that solicitor and the provision of legal services, the Tribunal found that providing services in a way which was not spelled out with great clarity to a lay client would damage that trust. In this instance, Mr DE had not fully understood what the Respondent could or could not do for him. Of particular concern, Mr DE had been running the risk of the trial commencing and not obtaining permission for the Respondent to speak on his behalf or cross examine witnesses. The public would rightly regard the lack of clarity about the arrangement as a matter of concern. Further, and more directly related to the allegation, the Tribunal noted that the Respondent had addressed the Court on 5 August 2013, and been noted on the record as the "attending solicitor". The public would be concerned that someone who asserted he had no right to address the Court without permission had nevertheless done just that.

55.95 In all of the circumstances, the Tribunal was satisfied to the required standard that this allegation had been proved with regard to the events of 5 August 2013 but not the events prior to that date.

56. **Allegation 1.2 - During and/or before August 2013 the Respondent was operating a separate business/consultancy and provided a prohibited separate business activity in breach of Outcome 12.1 of the SRA Code of Conduct 2011**

56.1 This allegation was denied by the Respondent.

Applicant's Submissions

56.2 The Applicant submitted that prohibited separate business activities included, for the purpose of Chapter 12 of the SRA Code of Conduct:

> "(i) the conduct of any matter which could come before a Court, whether or not proceedings are started;
> (ii) advocacy before a Court."
> (iii) - (vii) [not relevant to this matter]
> (viii) providing legal advice or drafting legal documents not included in (i) to (vii) above where such activity is not provided as a subsidiary but necessary part of some other service which is one of the main services of the separate business."

56.3 Outcomes 12.1-12.3 of the SRA Code of Conduct 2011 stated:

> "You must achieve these outcomes:
> O (12.1) you do not:
> (a) own; or
> (b) actively participate in,
>
> a separate business which conducts prohibited separate business activities."

56.4 The Respondent handed Mr DE a card which stated that the Respondent was acting as a locum solicitor and/or consultant and advocate. The Respondent stated that he had acted in private on more than one occasion. The Respondent charged Mr DE £750 for services provided to him and invoiced accordingly for those services. He was not authorised to do this, nor had he made any application to become authorised by the SRA. There were no non-legal services being provided by the Respondent as part of his consultancy or, alternatively, the legal services provided were not subsidiary to any such services. It was further submitted that this allegation was made all the more serious by the fact he had restrictions on his Practising Certificate not to act as a sole director or sole practitioner.

Respondent's Submissions

56.5 The Respondent submitted in relation to this allegation that the Applicant would have to prove that he operated two businesses – one regulated and one which was prohibited. The Respondent further submitted that the prohibition on separate businesses applied to firms rather than individuals such as the Respondent. The Respondent further submitted that charging a fee to Mr DE did not in itself constitute running a business, whether prohibited or otherwise. The Respondent's submissions relating to Firebird are not set out here, as they could not be relevant to the allegation.

The Respondent finally submitted that this allegation and allegation 1.1. were mutually exclusive.

The Tribunal's Findings

56.6 The Tribunal found that this allegation could be dealt with quite simply, without making many detailed findings other than the factual matters already set out above (or below).

56.7 The Tribunal had heard from the Respondent that he had not charged any clients other than Mr DE for any activities he had undertaken as a McKenzie Friend and/or exempt person. Rather, he had told the Tribunal, he had acted on a pro bono basis at the relevant times. Whilst he may intend to deal with matters on a commercial basis in the future, there was nothing to gainsay the Respondent's evidence that Mr DE was the only client he charged for work done outside of either the Firm or H Solicitors. The arrangement with Mr DE had been a commercial one, of the type which might be made by a business.

56.8 The Tribunal did not have to determine whether or not Mr DE had received a business card from the Respondent at that time. The Respondent had confirmed that he had had cards printed by August 2013. Whilst having business cards prepared might suggest the operation of a business, it could also be a step which was preparatory to the establishment of a business.

56.9 Given that acting for Mr DE had been a "one-off", in that he was the only individual who had been charged by the Respondent acting on his own account, the Tribunal could not be satisfied to the required standard that he had operated a business, whether prohibited or not. As a matter of sensible construction, "business" must mean something which was done either regularly or, at least, more than once for payment or some commercial gain. It appeared to be the case that the Respondent wanted to operate a business providing legal services, outside the scope of regulation by the Applicant, but that intention did not mean that he was actually operating a business at the relevant time.

56.10 Accordingly, the Tribunal did not need to determine the other matters raised by the Respondent. The allegation had not been proved to the required standard.

57. **Allegation 1.3 - In acting for DE in a private capacity from June 2013, the Respondent failed to act in the best interest of his client and/or failed to set out the terms and scope of his instructions and/or provide a proper standard of service to his client in breach of Principles 4 and/or 5 and/or 6 of the SRA Principles 2011**

57.1 This allegation was denied by the Respondent.

Applicant's Submissions

57.2 Principle 4 of the SRA Code of Conduct 2011 stated:

> "You must act in the best interest of each client."

Principle 5 of the SRA Code of Conduct 2011 stated:

> "You must provide a proper standard of service to clients."

Principle 6 of the SRA Code of Conduct 2011 stated:

> "You must behave in a way that maintains the trust that the public places in you and the provision of legal services."

57.3 It was submitted for the Applicant that in circumstances when Mr DE (correctly) believed the Respondent was a solicitor, Mr DE paid the Respondent £750 and this fee, according to the Respondent's fee note, was "an agreed fixed fee for all legal services arising from criminal proceedings in Brighton Magistrates' Court." However, Mr DE received no written terms as to the scope of the Respondent's retainer or as to any limitations on the manner in which he was acting.

57.4 The Respondent took the £750 and yet refused to represent Mr DE further having represented him only in respect of an adjournment of the proceedings until another date. Mr DE was being accused of a serious crime. Anyone in such a situation may need adequate representation at Court.

57.5 The text message sent by the Respondent to Mr DE on the afternoon of the Court hearing, set out at paragraph 17 above, was in breach of Principles 4, 5 and 6 in that it had an intimidating and unprofessional tone.

57.6 In line with the Ombudsman's view, the service provided was not acceptable. Mr DE later had to pay an additional £1,200 to another firm of solicitors for representation. The £750 had not been repaid to Mr DE in acknowledgment that a proper service within the limited scope of the fee note post hearing, was not in fact given.

Respondent's Submissions

57.7 The Respondent submitted that this allegation could only be proved if the first allegation were proved. The Respondent submitted that Mr DE's credibility was in issue. The Respondent further submitted Mr DE had not raised any issues concerning the quality of the advice given to him, or concerning the Respondent's reliability and responsiveness. The Respondent submitted that the circumstances leading to the termination of the retainer would not be sufficient to prove the allegation.

The Evidence

57.8 Mr DE's evidence, as noted above, included evidence that he had not been provided with any written terms and conditions of business, that he was unclear about the services the Respondent was proposing to provide and the status in which he was to do so. Mr DE had also given evidence about the text he received from the Respondent after the Court hearing and the subsequent telephone discussion. Mr DE's evidence was to the effect that he found the text to be "passive aggressive" and that the Respondent had been angry at him, rather than the other way round, in the telephone conversation. Mr DE told the Tribunal that the overpayment had occurred because he had forgotten about the direct debit which had been set up and not because

he had panicked and wanted to retain the Respondent's services. Mr DE told the Tribunal that it was not for him to say whether or not the Respondent's advice to him had been good. Mr DE accepted that when the arrangement with the Respondent ended, he had about 3 months to arrange alternative representation. That representation had cost a further £1,200. Mr DE also stated that he felt uncomfortable that the Respondent had been present during the Magistrates' Court hearing in November 2013.

57.9 The Respondent gave evidence that he had explained the nature and scope of the services he would provide. The Respondent told the Tribunal that the text to Mr DE had been "polite but firm" as, in his view, Mr DE had breached the payment terms. The Respondent told the Tribunal that he "wanted out" as Mr DE had breached the original agreement. The Respondent told the Tribunal in his oral evidence that Mr DE had telephoned him in a rage, not that he had been angry with Mr DE and that it was as a result of the abuse he received in that call that he terminated the arrangement. The Respondent described Mr DE's explanation for the overpayment as "preposterous". The Respondent also explained that he had attended the Magistrates' Court hearing in November 2013 in case anything derogatory was said about him.

The Tribunal's Findings

57.10 There was no doubt that at all relevant times the Respondent had been providing Mr DE with legal services, whether or not those services fell within the definition of reserved legal activities, and he had provided those services in a private capacity. There was also no doubt that the Respondent was at all relevant times a solicitor, who held a PC. Mr DE was at all relevant times the Respondent's client, in that the Respondent agreed to advise and act for him in connection with legal services in return for an agreed payment. There was no doubt that the Principles applied to all solicitors, in whatever way they practised or through whatever entity. The Tribunal found that the Respondent was obliged to comply with the Principles, whether the work he carried out was a reserved legal activity or not; after all, many solicitors carried out work which was not "reserved" e.g. in giving advice on business matters.

57.11 The Tribunal found that the Respondent had at all relevant times, in particular from June 2013 onwards, appeared to Mr DE to be a solicitor. The Tribunal found that any explanation which may have been given to Mr DE about applying to become a McKenzie Friend, possibly with a right to address the Court, was insufficiently clear or detailed, such that Mr DE did not properly understand the risk that the arrangement posed to him. There was no dispute about the fact that Mr DE had never before faced criminal proceedings; the legal processes and procedures were not things with which he was familiar. A solicitor such as the Respondent who was aware that he may well not be permitted to represent a client at a criminal trial should have advised the client clearly, and in writing, to seek alternative representation. Mr DE ran the risk that he would attend for trial and be unrepresented and according to his evidence, which the Tribunal accepted, he did not fully understand that risk. Such lack of clarity could not be in the best interests of the client. The Respondent had given evidence that Mr DE had wanted him to act, including as his advocate. However, even on the Respondent's case, the arrangement meant that Mr DE may or may not have had an advocate at trial.

57.12 There could be no doubt that in the period up to and including 5 August 2013 the Respondent had failed to properly set out the terms and scope of his instructions and the risks the client ran of not being represented at trial. There was no criticism of the advice given or work done prior to 5 August 2013. However, the lack of clarity about the terms and (limited) scope of what the Respondent could do in return for £750 was in itself sufficient to show a failure to act in the best interests of the client and there was a failure to provide a proper standard of service. Further, such conduct fell below the standards the public would rightly expect of a solicitor and would undermine rather than maintain the trust the public would place in the Respondent and in the provision of legal services.

57.13 The second main area of concern considered by the Tribunal was the way in which the retainer was terminated. Whilst the Respondent maintained that payment had been due in advance, Mr DE had told the Tribunal that this was not his understanding; again, there was a lack of clarity. In any event, Mr DE had paid £500 of the £750 due under the agreement before Monday 5 August 2013. It had not been advanced by the Respondent that he had, for example, reminded Mr DE that the money was due in advance; indeed, the Tribunal noted a text message from the Respondent to Mr DE on Friday 2 August 2013 in which he asked for the money not to be sent that day due to problems with his account. The Tribunal could not be sure whether or not there had been an agreement to pay in full before the Court hearing 5 August and so could not be sure if Mr DE was in breach or not.

57.14 The text from the Respondent at 13.49 on 5 August 2013 was not found by the Tribunal to be intimidating. The Tribunal accepted the Respondent's evidence that by that stage he felt he had had enough and "wanted out". The wording of the text amounted to a termination of the arrangement, as it clearly suggested that the original agreement had ended and any new deal would not be on such favourable terms. The Tribunal did not have to make any findings about whether Mr DE had been in a rage with the Respondent or the other way round. The evidence was clear that the retainer was terminated by the Respondent because he had not received the remaining £250 into his account before the hearing or within an hour or so of the end of the Court hearing. There was no evidence to support the Respondent's contention that this was the final straw after a number of incidents or breaches. The Tribunal was satisfied that the relationship broke down simply because the payment was, on the Respondent's evidence, later than expected. The Tribunal accepted Mr DE's evidence that he had set up a direct debit to pay the Respondent and had forgotten about it, given the understandable stress of facing a criminal trial. The Tribunal was satisfied this payment was not made in an attempt to re-engage the Respondent; there was no reason for Mr DE to choose to pay the Respondent £500 more than the sum agreed, particularly where (according to Mr DE's text on 8 August 2013) the overpayment meant he was in difficulty paying his mortgage that month.

57.15 The Tribunal found that the manner in which the Respondent terminated the retainer was intemperate and unprofessional. It left Mr DE with the difficulty of having to arrange representation through a firm of solicitors, to whom he would have to provide the relevant papers and instructions; this meant, to a considerable degree, going back over matters previously discussed with the Respondent. In effect, as the trial on 5 August 2013 was ineffective, the actual services provided by the Respondent turned out to be of very little value; Mr DE had to pay for representation and give

instructions afresh. Whilst these difficulties were mitigated by the fact that Mr DE had three months to deal with these matters, rather than having to instruct someone at short notice, terminating a retainer without good reason amounted to a failure to provide a proper standard of service and was a failure to act in the best interests of Mr DE. Further, acting in such a way was conduct which would tend to diminish rather than maintain the trust the public would place in the Respondent and the provision of legal services.

57.16 The Tribunal noted that this allegation included the Respondent's conduct in attending at the Magistrates' Court hearing in November 2013. The Tribunal noted that this had been considered by the Ombudsman in deciding to make an award of compensation to Mr DE. The Tribunal was not satisfied to the higher standard that the Respondent's presence in open court during Mr DE's hearing was in itself a breach of the Respondent's professional obligations.

57.17 The Tribunal found this allegation to be proved to the higher standard with regard to the lack of clarity around the terms of the retainer, the risk to which Mr DE had been exposed that he would be without representation at trial and the circumstances in which the retainer had been terminated.

58. **Allegation 1.4 - The Respondent has breached Principle 7 of the SRA Principles 2011 and/or has failed to achieve the following Outcome: O (10.6) in that he has failed to comply with directions from the Legal Ombudsman to pay monies to DE as directed by them and/ or failed to comply with subsequent orders made by the Court.**

58.1 This allegation was denied by the Respondent on the basis that he contended that the Ombudsman did not have jurisdiction to make the order to pay monies to Mr DE. The factual background to this allegation is set out at paragraphs 20 to 25 above.

58.2 There was no dispute on the facts that after the professional relationship between Mr DE and the Respondent ended, Mr DE made a complaint to the Ombudsman who made an award in favour of Mr DE which had not been paid either when the Tribunal proceedings began or by the date of the hearing.

Submissions

58.3 The Applicant submitted that the Respondent's refusal to comply with directions from the Ombudsman was on any analysis unacceptable and in breach of the Respondent's obligations as a solicitor.

58.4 The Respondent submitted that this allegation could only be proved if allegation 1.1 was proved; if it were not proved that the Respondent had acted as a solicitor then, it was submitted, the Ombudsman did not have jurisdiction to make the order which was therefore unlawful. The Respondent submitted that if the first allegation were proved he would change his plea to this allegation, but would continue to withhold payment pending the outcome of any appeal.

58.5 The Respondent submitted that it was a condition precedent to the Ombudsman having jurisdiction that the person who brought the complaint had retained a regulated entity for the purpose of engaging a solicitor, acting in that capacity, to perform reserved legal activities. This, it was submitted, was in contrast to an individual solicitor being engaged in a private capacity to perform non-reserved legal activities. It was submitted that the Ombudsman's jurisdiction was over or through regulated entities and that the Respondent had not been a regulated entity since September 2011 when his firm ceased to exist. It was submitted that any complaint could only be made through the Firm, as the Respondent's employer, under section 132(2) Legal Services Act 2007. Section 132 of the Legal Services Act 2007, which was headed "continuity of complaints" read:

> "(1) The ability of a person to make a complaint about an act or omission of a partnership or other unincorporated body is not affected by any change in the membership of the partnership or body.
>
> (2) Scheme rules must make provision determining the circumstances in which, for the purposes of the ombudsman scheme, an act or omission of a person ("A") is, where A ceases to exist and another person ("B") succeeds to the whole or substantially the whole of the business of A, to be treated as an act or omission of B.
>
> (3) Rules under subsection (2) must, in relation to cases where an act or omission of A is treated as an act or omission of B, make provision about the treatment of complaints under the ombudsman scheme which are outstanding against A at the time A ceases to exist.
>
> (4) Scheme rules must make provision permitting such persons as may be specified in the rules to continue a complaint made by a person who has died or is otherwise unable to act; and for that purpose may modify references to the complainant in this Part and in scheme rules."

58.6 The Respondent further submitted that this was not a technical point, deployed to escape the spirit of the law. The Respondent submitted that the Ombudsman's processes represented a massive handicap on anyone seeking to defend their reputations from spurious allegations, and massive advantage to anyone who wanted to make such allegations. The Respondent submitted that he insisted on the law in this area being interpreted strictly.

<u>The Evidence</u>

58.7 Mr DE told the Tribunal that he had not received payment of the sums ordered by the Ombudsman. Mr DE told the Tribunal that he had received an email on 16 May 2016 from which he understood that a High Court Writ had been issued, with which the Respondent had not complied, and that it had not been served on the Respondent.

58.8 The Respondent told the Tribunal that the allegation concerning the Ombudsman was wholly spurious. It was not possible to answer back to the Ombudsman, which did not turn down cases and had a "licence to print money".

58.9 In cross examination, the Respondent told the Tribunal that he had not paid the amount ordered by the Ombudsman, for reasons he had already explained (namely, that the Ombudsman had not had jurisdiction to make the order). The Respondent told the Tribunal that he would pay if payment was adjudged to be due and that as an officer of the Court, he would obey the decisions of a Court. It was noted that there was in fact a Court Order. The Respondent told the Tribunal that he had attended Court, as ordered, (in May 2015) and had answered all the questions put to him about his means. The Respondent told the Tribunal that he would not pay until a Court told him to do so, after consideration of his submissions about the legal position. In response to a question about when or how such a hearing would come about, the Respondent confirmed that he had not appealed the Court Order or applied for Judicial Review of the Ombudsman's order. The Respondent told the Tribunal that he would exhaust his domestic procedures first. If his arguments fell on stony ground at a substantive hearing, he would, begrudgingly, pay. The Respondent was asked how such a substantive hearing would be achieved. The Respondent told the Tribunal that he would consider the Tribunal's decision on these points, but his position was that he would not pay until the Administrative Court had refused an application for Judicial Review. The Respondent told the Tribunal that he just wanted the opportunity to be heard.

58.10 It was put to the Respondent that there had been an order of the Court, dated 14 May 2014, to which he was referred. The Respondent told the Tribunal that his was an administrative order, made by a proper officer, directing enforcement but it was not an order made by a Judge who had heard the Respondent's arguments. The Respondent told the Tribunal that he maintained that he was able to attack the award made by the Ombudsman through the enforcement process. The Respondent told the Tribunal that he had made a decision not to pay until justice was done, which included allowing him the opportunity to explain why the decision of the Ombudsman was wrong. It was put to the Respondent that as a solicitor he had a duty to uphold the law, and it appeared from what he was saying that he was picking and choosing which parts of the law he would uphold. The Respondent told the Tribunal that if, in the end, he was ordered to pay he would do so but he was not prepared to do so now. His basic submission was that if he was not practising as a solicitor in dealing with Mr DE, the Ombudsman did not have jurisdiction over him.

The Tribunal's Findings

58.11 The Tribunal noted and found that the office of the Ombudsman was established under the Legal Services Act 2007. Its jurisdiction was set out at section 125 of the Act, as set out at paragraph 47 above, with section 128 (set out at paragraph 48 above) which dealt with the parties in a complaint. It was not necessary for the Tribunal to make any ruling on the jurisdiction of the office of the Ombudsman beyond noting that this was an Ombudsman scheme established by statute, which had the power to make orders in certain circumstances. Although it did not form part of the Tribunal's reasoning, as it was not necessary for the purposes of determining this allegation, the Tribunal considered that it may be helpful to the Respondent to set out its understanding of the Ombudsman's jurisdiction. The Tribunal noted that sections 125 et seq of the Act indicated that the Respondent could be the subject of a complaint as he was an authorised person in relation to an activity which was a reserved legal activity; in this case, he was a solicitor. Further, the Respondent appeared to come

within the jurisdiction of the Ombudsman Scheme as it was not necessary for the complaint to relate to a reserved legal activity. As noted in relation to allegation 1.1, the Tribunal could not be sure that the Respondent had carried out a reserved legal activity with regard to Mr DE's matter prior to 5 August 2013 but he had carried out a reserved legal activity on 5 August 2013. Even without the latter finding, of course, the Respondent would come within the Scheme as he was an authorised person who had provided legal services to Mr DE. The Tribunal did not accept that section 132(2) was relevant; the complaint did not arise from the Respondent's activities prior to September 2011.

58.12 The Tribunal did not have to determine whether or not the Ombudsman's order was correct or reasonable; it had no jurisdiction to do so. There were other avenues which someone dissatisfied with an order made by the Ombudsman could pursue, most notably Judicial Review which may well have been the best route if the dispute was based on construction of the Legal Services Act 2007 and the jurisdiction of the Ombudsman. The Tribunal simply found that the Ombudsman's order existed from 2014 and was not subject to an appeal or review in any Court. The Order had been supported by a reasoned decision; if the Respondent considered that the reasoning was flawed, he could have sought a review of the decision. The Tribunal found – indeed, it was not disputed – that the Respondent had refused to pay the sums ordered by the Ombudsman. Further, the Tribunal found that a competent Court, namely the County Court at Eastbourne had made an order for the recovery of the Ombudsman's award on 14 May 2014. Again, that Order was not being appealed or reviewed and no payment had been made to comply with the Order.

58.13 Here, an Order had been made firstly by a body which prima facie had jurisdiction to deal with complaints involving solicitors, where that Order had not been appealed or made subject to Judicial Review, and secondly a Court had made an Order for enforcement some two years ago which again had not been appealed or made subject to any review. In these circumstances, failure to either comply or take prompt steps to appeal or seek a review of the Orders, was clearly wrong and inappropriate behaviour on the part of a solicitor. The Respondent was obliged to comply with Orders made by the Ombudsman and/or a Court unless those Orders were under appeal or were successfully appealed and overturned. There was a clear failure on the Respondent's part to comply with an important legal a regulatory obligation. This allegation was found proved to the higher standard.

Previous Disciplinary Matters

59. There were no previous matters recorded against the Respondent.

Mitigation

60. Before commencing his formal mitigation, the Respondent raised with the Tribunal an issue concerning the business cards which had been discussed during the hearing on 17 May. As a result of those points, the Tribunal agreed to retain the cards on its files until further order.

61. The Respondent told the Tribunal that he had little mitigation save what had been covered within his defence.

62. The Respondent told the Tribunal that on 5 August 2013 he had not intended to mislead anyone and had told the usher and prosecutor that he wanted to use McKenzie Friend/exempt person status, as he had on a number of other occasions. The Respondent accepted that he could and should have done more to make clear his proposed role on that occasion; he had learned a lesson from that. The Respondent told the Tribunal that he could have produced further documents showing that Courts had on other occasions granted him McKenzie Friend/exempt person status and that he had on those occasions made his status clear. Any breach of the condition on his PC was not wanton or flagrant. The Respondent told the Tribunal that he was grateful for the fact that it had not found he had breached his PC conditions before 5 August 2013.

63. The Respondent told the Tribunal that he had done his best for Mr DE, out of a sense of obligation to Mr KB. Mr DE had had plenty of time to make other arrangements to deal with the criminal proceedings.

64. With regard to the Ombudsman's Order, the Respondent told the Tribunal that this had been a matter of principle. Whilst he had no contempt for the County Court, the Ombudsman's office had displayed a number of shortcomings. The Respondent told the Tribunal that if he decided not to appeal the Tribunal's judgment, after consideration of the written findings, he would arrange to pay the sums awarded as soon as possible. The Respondent told the Tribunal that he wished to correct some evidence given by Mr DE on which he should have cross examined Mr DE. The Respondent told the Tribunal that contrary to what Mr DE had said, the debt had been assigned or sold to bailiffs; he would have respected the Order if he was told it was being enforced by High Court enforcement officers. The Respondent told the Tribunal that he had not made any offer to pay the bailiffs as he was awaiting a final adjudication on the jurisdiction of the Ombudsman. The Respondent told the Tribunal that he would return the case to the County Court at Eastbourne to obtain a proper judgment on the issues. The Respondent told the Tribunal that there had been perjured evidence given by others in relation to the enforcement proceedings and the order for conditional committal to prison which had been made in 2015.

65. At the invitation of the Tribunal, the Respondent gave the Tribunal some information concerning his income, outgoings, his living arrangements and the work he undertakes for H Solicitors. These had not been set out in a statement of means in advance of the hearing, as ordered. The Respondent told the Tribunal that whilst he was not wealthy he was not impecunious. The Respondent told the Tribunal that he had been discharged from bankruptcy in 2012, a year after the order was made.

Sanction

66. The Tribunal had regard to its Guidance Note on Sanction (December 2015), to all of the facts of the case and the submissions of the parties. The Tribunal noted the purposes of sanction in the Tribunal included, per Bolton v The Law Society [1994] 1 WLR 512, punishment, deterrence, ensuring there was no opportunity for repetition and, most fundamentally, to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. In determining the appropriate sanction, the Tribunal first assessed the seriousness of the Respondent's misconduct.

67. The Respondent was solely responsible and therefore culpable for the events before and during August 2013 and in the ongoing matters concerning the Ombudsman. The Tribunal accepted that the Respondent had not planned the misconduct with regard to acting for Mr DE. However, the Respondent's position with regard to refusing to pay the Ombudsman's order was one he had reached after reflection and he had maintained his refusal to pay up to and including the hearing. The Respondent must have realised that refusal to pay an order by a body established to deal with complaints was a serious matter, but he had taken no steps to challenge the order or to comply with it. The Respondent was an experienced solicitor and his failure to comply with his professional obligations would cause harm to his reputation and that of the profession.

68. The Tribunal did not find any aggravating factors, save that the misconduct with regard to not paying the Ombudsman order had been continued over a period of more than two years, including after the making of a Court Order by the County Court at Eastbourne in May 2014. The Tribunal could find few mitigating factors, particularly with regard to the failure to comply with the order by the Ombudsman and the Court order. The continued refusal to pay, when the Respondent was taking no steps to seek the adjudication on legal issues which he said he was awaiting, displayed a lack of insight into the misconduct and its gravity.

69. The Tribunal noted that there were no previous disciplinary findings against the Respondent and it accepted that he had had a desire to provide legal services to clients more cheaply than the services provided by solicitors. However, he had failed to take advice on what was or was not permissible. It was not for the Tribunal to advise him in that regard and, in particular, the Tribunal made no comment on the propriety or otherwise of the proposed business of Firebird. In determining sanction, the Tribunal confined itself to the particular matters found proved with regard to Mr DE and to the Ombudsman Order.

70. In all of the circumstances of the case, the matter was clearly too serious for either "no order" or a reprimand. There had been no adverse comments regarding the Respondent's competence as a solicitor. Whilst there had been harm caused to Mr DE in the handling of the case, that could have been mitigated if the Respondent had complied with the Ombudsman's order, which he had refused to do. This was not a case which was so serious that it was necessary to interfere with the Respondent's ability to practise as a solicitor. The Tribunal determined that imposing a fine was the reasonable and proportionate sanction.

71. In the absence of a statement of means from the Respondent, and given that he stated he was not impecunious (although his means were limited) there was no reason for the Tribunal to adjust the level of fine to take into account the Respondent's financial circumstances.

72. The Tribunal determined that the appropriate level of fine, to reflect the seriousness of this matter, was £2,500. In fixing this figure, the Tribunal noted that it was ten times the amount of compensation that the Ombudsman had ordered and this, in the Tribunal's view, reinforced the Tribunal's view that the fine was proportionate to the misconduct.

Costs

73. On behalf of the Applicant, Mr Miller made an application for the Respondent to pay the Applicant's costs of the proceedings and submitted a schedule of costs in the total sum of £28,499. Mr Miller told the Tribunal that as the actual time spent in preparation and at the hearing was less than had been estimated, the costs sought were £26,387 inclusive of VAT and disbursements.

74. It was submitted that the Respondent had not filed and served a statement of means, despite being informed of the need to do so if he wanted to rely on his means with regard to sanction or costs on several occasions; the Tribunal had made a direction about this, and Mr Miller's office had written to the Respondent to remind him of the direction on 29 April 2016. At that stage, the Respondent had indicated he would collate information about his means before the hearing. It was submitted that where the Respondent had not submitted information about his financial position before the hearing, it would not be appropriate for the Tribunal to make a "football pools" order, i.e. a costs order which could not be enforced without the further permission of the Tribunal.

75. Mr Miller submitted that the preparation and drafting of this case had required a lot of thought and care, particularly as the Applicant had had to consider the legal points raised by the Respondent. It was for the Tribunal to assess the reasonable costs of the case.

76. The Respondent submitted that it was unclear how the Applicant's costs had almost doubled, from about £15,000 when the proceedings were issued to this hearing. The Respondent submitted that the work and preparation involved since the case was issued was minimal. The Respondent submitted that at the outset of the hearing Mr Miller had indicated that this was a relatively simple case and that the costs were therefore excessive and disproportionate.

77. The Respondent submitted that before the Case Management Hearing was due to take place in October 2015 he had proposed to the Applicant that there should be a hearing on a preliminary issue, namely the correct legal analysis of the matters alleged. That proposal had been rejected by the Applicant and so had not been raised with the Tribunal, to avoid the costs of attending a CMH. The Respondent submitted that at no time had anyone on behalf of the Applicant challenged him on his analysis of the jurisdiction of the Ombudsman. The Respondent submitted that when he submitted his skeleton argument by email on 12 May 2016 he had implored Mr Miller to tell him if his analysis was flawed but he had received no response. The Respondent submitted that a hearing on a preliminary issue would not have required the oral evidence of Mr DE and that the question of whether or not the Respondent had been practising as a solicitor when acting for Mr DE could have been dealt with without hearing from Mr DE.

78. Mr Miller told the Tribunal that whilst he had considered the option of a preliminary hearing, and this had had some attractions, he had concluded that one could not make any decision on legal points without determining the facts, in particular whether or not the Respondent was acting as a solicitor. Mr Miller submitted that in his opening he had explained the way in which the case was being put, but there had been no

indication from the Respondent that he changed his position even then; it was unclear, therefore, if the Respondent would have changed his pleas even if Mr Miller had set out a response to the points in the skeleton argument.

The Tribunal's Decision

79. The Tribunal considered carefully the schedule of costs which had been submitted. The Tribunal noted that the Applicant had not succeeded in proving one of the four allegations. The factual background underlying that allegation was the same as that underlying allegation 1.1, so the additional costs in relation to allegation 1.2 were unlikely to be large. Nevertheless, the Tribunal considered it reasonable to make some deduction from the costs claimed of £26,387 as one allegation was not proved at all and allegation 1.1 had only been proved with regard to 5 August 2013.

80. The Tribunal noted that the documents concerning the complaint to the Ombudsman would have been obtained from the Ombudsman, and that these were not complex. There had been no forensic investigation in this case. The Tribunal was satisfied that from about April 2015 the Respondent had asked the Applicant about why his analysis of the legal position was said to be wrong, but there had been little response from the Applicant. It may have been that costs would have been reduced if the Applicant had engaged with the Respondent on these issues. That said, the Respondent had failed to produce a written, narrative account of the factual matters in the case; had he done so, it may have been possible for some factual matters to be agreed in advance of the hearing. Further, the Tribunal was satisfied that a preliminary hearing on legal issues only would not have been appropriate; the factual issue of whether or to what extent the Respondent had acted for Mr DE as a solicitor was essential to determine the legal position as it applied to this case.

81. The Tribunal determined that the time spent on documents in the case was higher than was reasonable. In particular, the schedule noted that 20.4 hours had been spent in drafting the Rule 5 Statement in addition to 21.1 hours in reviewing the documents and preparing the case. The Tribunal was satisfied that the charging rates applied to the work done (£220 per hour for Mr Miller and £145 or £100 per hour for the more junior fee earners who carried out the bulk of the work) were reasonable.

82. Overall, the Tribunal assessed the reasonable and proportionate costs of the case at £18,000.

83. The Tribunal then considered whether there was any reason to reduce those costs on account of the Respondent's means and/or to make a "football pools" order. The Respondent had not complied with the Tribunal's order to submit a statement of means if he wished his means to be taken into account with regard to sanction or costs. The information he had given to the Tribunal orally indicated that his means were limited, but he was not impecunious. Whilst the Tribunal would expect the Applicant to proceed in a proportionate and measured way with regard to enforcement, the Tribunal could see no reason to prevent the Applicant from seeking to enforce the order for costs in the usual way.

84. The Respondent was ordered to pay the Applicant's costs, assessed in the sum of £18,000.

Statement of Full Order

85. The Tribunal Ordered that the Respondent, TERRENCE BALLARD, solicitor, do pay a fine of £2,500.00, such penalty to be forfeit to Her Majesty the Queen, and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £18,000.00.

Dated this 21st day of June 2016
On behalf of the Tribunal

A. G. Gibson
Chairman