The Applicant, the Solicitors Regulation Authority, appealed to the Court of Appeal against the decision of Mr Justice Mostyn dated 12 April 2017 in Malins v Solicitors Regulation Authority [2017] EWHC 835 (Admin). The Court of Appeal, in a Judgment delivered on 7 March 2018, overturned the decision of Mostyn J and allowed the Applicant's appeal. The Order of the Tribunal at paragraph 57 therefore remains in place. The Respondent was ordered to pay the Applicant's costs of the appeal before Mr Justice Mostyn and the costs of the appeal to the Court of Appeal. Solicitors Regulation Authority v Malins [2018] EWCA Civ 366

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11408-2015

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

JOHN MICHAEL MALINS Respondent

Before:

Mr K. W. Duncan (in the chair)
Mr L. N. Gilford
Mr P. Wyatt

Date of Hearing: 20 & 21 April 2016

Appearances

Mr Geoffrey Williams QC of Farrar's Building, Temple, London EC4Y 7BD instructed by the Solicitors Regulation Authority for the Applicant.

Mr Gregory Treverton-Jones QC of 39 Essex Street, London WC2R 3AT instructed by Murdochs Solicitors, 45 High Street, Wanstead, London E11 2AA for the Respondent who was present.

JUDGMENT

Allegations

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

1.1 Created a Form N251 (Notice of Funding) on 2 May 2014 which he backdated to 19 March 2013, in breach of Principles 2 and/or 6 of the SRA Principles 2011.

1.2 Created a covering letter for a Notice of Funding on 2 May 2014 with a date of 19 March 2013, in breach of Principles 2 and/or 6 of the SRA Principles 2011.

1.3 Relied on and/or acquiesced in others at his firm relying on the backdated documents mentioned above from 2 May 2014 until on or around October 2014, as evidence in supporting his position when seeking to favourably negotiate a costs settlement with his opponent in litigation, in breach of Principles 1 and/or 2 and/or 6 of the SRA Principles 2011.

1.4 Dishonesty was alleged in relation to allegation 1.3 set out above. Whilst dishonesty was alleged with respect to this application, proof of dishonesty was not an essential ingredient for proof of any of the allegations.

Documents

2. The Tribunal reviewed all the documents including:

Applicant

- Rule 5 Statement dated 7 July 2015 with exhibit JRL1
- *Indication of Terms –First Class Legal (IS) Ltd dated 13 March 2013
- *Form of Acceptance dated 20 March 2013
- *Certificate of Insurance & Schedule of Cover with Supplemental Schedule of Special Conditions dated 27 March 2013
- Memorandum of Directions – variation by consent dated 19 November 2015
- Certificate of readiness - SRA dated 16 March 2016
- Witness Statement of Mr JPB Marshall dated 16 October 2015 with exhibit JPBM 1
- Witness statement of Mr EJ Williams dated 15 October 2015 with exhibit EJW 1
- Witness statement of Mr Stephen Shirley dated 16 January 2016
- Applicant's schedule of costs as at 18 April 2016
  * Inserted in hearing bundle at Tab 3 pages 132-136

Respondent

- Certificate of readiness dated 10 April 2016
- Admissions and denials to the Rule 5 Statement of the Respondent prepared by Mr Andrew Blatt of Murdochs Solicitors
- First witness statement of the Respondent dated 22 January 2016 with attachments
- *E-mail exchange comprising the Respondent to Mr Marshall dated 2 November 2014, Mr Marshall to the Respondent dated 3 November 2014 with the Respondent's reply of the same day

- Skeleton argument on behalf of the Respondent prepared by Mr Treverton-Jones QC
- Chartered Clinical Psychologist's report
- Letter from Murdochs Solicitors dated 2 March 2015 to the Applicant
- Report from Professor of Translational Neuroscience dated 23 March 2016
- Report from Respondent's GP dated 9 March 2015
- Respondent's Personal Financial Statement dated 15 April 2016 with attachments
  * Inserted in hearing bundle at Tab 3 pages 96A and 96B

Factual Background

3. The Respondent was born in 1972 and was admitted to the Roll in 2001. The Respondent remained upon the Roll and had a current Practising Certificate.

4. At all material times up until 1 May 2013, the Respondent was a partner in the firm of Bond Pearce LLP ("BP LLP"). On 1 May 2013 BP LLP merged with Dickinson Dees ("DD") and became the merged practice of Bond Dickinson LLP ("the firm"). Following the merger the Respondent was a partner in the firm also.

5. The Respondent resigned from the firm on 27 November 2013 and was subsequently a consultant elsewhere.

6. The Respondent was acting for Mr Shirley ("Mr S"), a private individual, in relation to a construction dispute in respect of Mr S's house in which Mr S was the claimant.

7. Prior to issuing proceedings, Mr S's litigation came to be funded with the assistance of external funding. After the Event ("ATE") insurance was taken out by Mr S in relation to this funding, with the policy being accepted by Mr S on 20 March 2013 and commencing on 27 March 2013. The total premium stated to have been paid in relation to ATE insurance was £181,682.04.

8. From 1 April 2013, the Civil Procedure Rules ("CPR") in relation to the recovery of ATE insurance premiums were changed. In summary: if ATE insurance was taken out after 1 April 2013 then the premium would not be recoverable from the losing defendant (save for limited scenarios not relevant to the facts of this matter). If ATE insurance was taken out before 1 April 2013 then the insurance premium would remain potentially payable by a losing defendant. However the CPR set out that for such pre-1 April 2013 premiums to be recoverable the party seeking recovery was required to provide information about the funding arrangement to the court and to other parties.

9. In relation to Mr S's claim, the ATE premium was therefore potentially recoverable as the policy was taken out before 1 April 2013.

10. The claim in relation to Mr S's matter was served on 30 May 2013.

11. On 4 March 2014, the claim was settled in favour of Mr S, following acceptance of a Part 36 offer made by the Defendant. The basis of settlement was that Mr S's costs were to be assessed if not agreed.

12. The Defendant's solicitors (HD) took the position that they had not received formal notification (a Notice of Funding Form N251) in relation to ATE insurance being in place. For the reasons set out above, this could have meant that the insurance premium was not recoverable from the Defendant at all.

13. On 2 May 2014, the Respondent sent an e-mail to the Defendant's solicitors stating:

> "Further to our conversation earlier this week, I attach a copy of our correspondence last year with notice of funding…"

Attached to this e-mail were a copy letter purportedly dated 19 March 2013 and addressed to the Defendant's solicitors, stating that a notice of funding concerning the ATE insurance details was enclosed; and a signed Notice of Funding (Form N251) purportedly dated 19 March 2013.

15. On 7 July 2014, the Respondent wrote on a without prejudice basis to the Defendant's solicitors. In relation to the ATE insurance, the Respondent offered to settle for the full premium of £181,682.94 on the basis that interest and further costs incurred were to be waived. The offer was open for acceptance until 11 July 2014.

16. On 14 July 2014, the Defendant's solicitors wrote to the Respondent on a without prejudice basis:

> "We confirm that our client is willing to offer the sum of £285,842 inclusive of interest, VAT, disbursements, ATE premium and detailed assessment costs (if any) in full and final settlement of your client's claim for costs.
>
> For your information this offer is made-up as follows:
>
> 1. £195,000 in respect of your client's claim for costs; and
>
> 2. £90,841.40 in respect of the ATE premium.
>
> To have any prospect of recovering the ATE premium we consider that your firm must make an application to Court for relief from sanction in respect of the failure to serve or file Notice of Funding.
>
> At the hearing of that application it will be necessary for your firm to convince the Costs Judge that the Notice of Funding was despatched to both our firm and the Court, despite there being no record of it having arrived at either destination. Ultimately we anticipate that this will require cross examination of the appropriate fee earner at your firm.
>
> Your firm faces considerable litigation risk in respect of recovery of the ATE premium. However in the interests of drawing this matter to a conclusion before further costs are incurred our client is willing to offer to pay 50% of the ATE premium..."

17. On 21 July 2014, a further letter was sent by the firm to the Defendant's solicitors stating:

> "...In respect of the ATE premium our client maintains that they are entitled to the full payment of the ATE premium in the sum of £181,682.94. The Form N251 was sent to your firm as we have evidenced. Further the funding arrangements for the case were discussed with your firm throughout the progress of the litigation. Therefore we maintain that you and your client should have been well aware of the ATE insurance in place for this case. The above offer is open for acceptance until 4.00 p.m. on 24 July 2014..."

18. The other legal costs were subsequently settled by agreement; however, no agreement was reached in relation to the claim for the ATE premium.

19. On 14 August 2014, the firm sent a further (open) letter to the Defendant's solicitors. Statements from the letter included:

> "We understand that your argument to justify not to pay the full ATE premium is that you consider that you were not properly notified of our client's funding arrangements. We maintain that this is fundamentally incorrect…
>
> - Primarily, you were notified by way of Form N251 of the existence of ATE insurance in compliance with court rules. The form was sent you on 19 March 2013. A copy of the letter and notice is (sic) funding is attached. We cannot see that this is anything other than proper notification to you and your client of the existence of the ATE policy, notwithstanding any argument that you may raise about receipt of that notification."
>
> "From the above it is clear that you were provided with notice of funding and furthermore were aware of both the intention to obtain ATE insurance and the subsequent existence of such cover. We cannot see any justifiable argument to resist payment of the full ATE premium on the grounds that your client was not properly notified."
>
> "We are instructed by our client that if payment of the full ATE premium is not made by 29 August 2014, we will proceed with detailed assessment solely in relation to the ATE premium. Please note that given the contents of this letter we will seek recovery of our costs of detailed assessment on the indemnity basis, together with an order that your firm be personally liable for such costs."

20. On 10 September 2014, the Defendant's solicitors wrote to the Respondent. In this e-mail they stated:

> "[A] [their insurer client] believe the offer of 50% of the ATE premium previously claimed is reasonable in all the circumstances"

> "We were not served with notice of the ATE premium. You will recall that a significant amount of time was taken up at the mediation and you did not seriously attempted (sic) to argue that we had been served"
>
> "If the offer [of 50% of the premium] is not accepted we invite you to make an application for relief from sanctions."

21. From the correspondence seen by the Investigation Officer ("IO"), no application for relief from sanctions was made by the Respondent or his firm but a bill of costs was served in relation to the disputed ATE insurance with the Defendant's solicitors sending Points of Dispute to the Respondent and another representative of the firm on 21 October 2014.

22. On 24 October 2014, the firm reported the matter to the Applicant.

23. On 4 November 2014, the Respondent made a self-report of the matter to the Applicant. It included:

> "On 2 May 2014 I created and backdated a Form N251 in relation to the litigation proceedings…and also a letter and sent the letter and the form to [HD] stating that the form had been sent to them in March 2013."

These were the documents attached to the Respondent's e-mail of 2 May 2014 referred to above.

24. Upon request from the Applicant, the firm provided the Applicant with the electronic metadata in relation to the relevant documents and information as to their internal investigations.

25. The covering letter sent by the Respondent on 2 May 2014 but dated 19 March 2013, was originally created on 19 March 2013 as a completely separate document on another file (with a description of "Clerk to [DS] QC (Paying counsel's fees)". It was subsequently modified and printed by the Respondent on 2 May 2014. The significance of modifying an already existing document as opposed to creating a new one was that the logos and headers were in the correct format for a letter written on 19 March 2013 i.e. on BP LLP letterhead as opposed to that of the firm.

26. On 8 December 2014, the Applicant wrote to the Respondent asking for his explanation. Following an exchange of intermediate correspondence, the Respondent provided a substantive response to the Applicant by way of letters dated 2 March 2015 and 24 March 2015. The representations in those letters took issue with the contents of the self-report and made representations about the circumstances in which it was prepared.

27. On 13 March 2015, an Authorised Officer made a decision to refer the conduct of the Respondent to the Tribunal.

Witnesses

28. **Mr John Marshall** gave evidence. He was a partner in the firm and its Compliance Officer for Legal Practice ("COLP"). He confirmed the truth of his statement dated 16 October 2015. As he set out in his statement he had become involved in this matter on 20 October 2014 when it was brought to his attention by Mr Edward Williams ("Mr EW"), a Senior Associate in the firm who assisted in the handling of complaints and potential claims notifications under the firm's Professional Indemnity Insurance ("PII") policy. The eventual outcome was that the HD's clients paid £50,000 of the ATE premium. The balance came from a combination of payment by the firm and its PII insurer and in the fullness of time this would impact on the premium paid by the firm. Some of the amount had been funded from an offset arrangement between the firm and its insurer in respect of the firm's aggregate deductible. The firm had to ensure – and did ensure - that the client received back the amount that he had originally paid towards the premium, most of which had come from his funders.

29. The witness had taken advice from his costs colleagues to the effect that it was important to comply with requirements for filing documents but the real purpose of the Form N251 was to give notice to the other side that the case was being funded by ATE insurance. Otherwise that party could complain of prejudice by being unaware of the costs risks to them associated with the existence of ATE funding. Filing at court was important but procedural.

30. In his statement, the witness referred to an investigation within the firm; the individuals who undertook it reported to him. To begin with Ms EJ undertook the work. They were seeking to find evidence that the documents had been created on the stated date and were on the firm's files in order to rebut HD's argument. They were looking to help the Respondent and it was only in doing so that they discovered something was not right. In his statement the witness said that upon being advised of the facts and seeing the evidence of the metadata for himself on 20 October 2014: "I immediately was concerned that this was a serious matter." He took this view because the documents could not have been in existence at the stated time. He went on to say in the statement: "... the date of alleged service, 19 March 2013 predated the inception of the policy on 27 March 2013."

31. It was put to the witness (based on Mr Williams' understanding of Mr Treverton-Jones' Skeleton) that it had been suggested that he had "leaned on" the Respondent to write to the Applicant in the terms he did in his self-report. The witness stated that he did not accept that at all. It had happened as he described in the witness statement when the matter was brought to his attention. He asked for the facts shown by the investigation in respect of the creation of the documents to be checked again because the matter was so serious. In London he had spoken to the firm's managing partner Mr B. In his statement, the witness described a meeting on 22 October 2014 (between 2.30 and 3.30 p.m.) with the Respondent, his Business Group Head Mr K and a fellow Board member of the witness at the firm. The witness explained to the Respondent what had come to light and the issues as they saw them and asked if there was anything the Respondent felt he needed to tell them. The Respondent said there was not. They carried on with the meeting for a period of time, showing the Respondent the documents, and the metadata that sat behind the documents and how that worked. The witness asked again if there was anything that the Respondent had to tell him

because this was regarded as a serious matter. They had to bring the meeting to an end because the Respondent had a piece of work that he needed to attend to. The Respondent was invited to reconsider. The witness and Mr K met with the Respondent again at 6:25 p.m. that day and the Respondent told them that he had something that he needed to make clear regarding the Form N251. In cross examination the witness stated that the second meeting was relatively short; from the beginning of that meeting the Respondent made it clear that he had something to tell them and there was not much more than they could do. In cross examination, the witness referred to a copy of a hand written note which was attached to his statement. It was his recollection that he made it at the end of the third meeting of about 30 minutes after he and Mr B met the Respondent on 23 October 2014. In his statement the witness said in respect of the third meeting:

> "I advised him he may need to seek legal advice himself in relation to his regulatory position."

The witness referred to his handwritten note of that meeting dated 23 October 2014:

> "JM confirmed SRA means may need legal advice".

32. The witness realised that his fears were confirmed. This was a serious development and so he spoke to the firm's dedicated Relationship Manager at the Applicant, Ms MB. He had asked the Relationship Manager if he could show the firm's report to the Respondent because he wanted to ensure there was nothing in it that he would take major exception to or consider to be a major discrepancy. It was made clear that the Respondent was not being invited to help with the report because that was the witness's responsibility but the witness was told that he could show it to the Respondent. The Relationship Manager had made it clear that the witness could not require the Respondent to show him his self-report. The witness gave Ms MB's contact details to the Respondent and understood that the Respondent might have contacted her. In cross examination, the witness confirmed that this was the first matter of this kind that he had considered reporting to the Applicant. He agreed that at this time outcome focused regulation and the role of Relationship Manager were new and he had received helpful advice from the Relationship Manager. In the context of an admitted issue, Ms MB advised that it was important for the solicitor to submit a self-report, that it should be as full as possible to put the conduct into context and a proper degree of remorse should be shown. Mr Treverton-Jones pointed to the words in his Skeleton in respect of the self-report:

> "This was followed by a self report by the Respondent, written on the advice of [the firm's] COLP. Again, this letter is unfortunately worded (in *mea culpa* terms), and does not reflect the true position. He wrote it in this fashion on the advice of the firm's COLP, who considered that the Respondent should show as much remorse as possible..."

The witness was asked if he took issue with that and stated that any discussion he had with the Respondent was against the background of the witness's understanding that the Respondent had done what the firm feared he had done and that it was wrong. Mr Treverton-Jones took it that there was nothing between them. The witness was

referred to his e-mail of 3 November 2014 in which he said he thought that in terms the Respondent was saying:

> "I foolishly believed I could improve my clients' position, and disguise our oversight by sending these letters subsequently in the hope that the Defendants would then stop arguing about a debt I believed they knew about from my discussions with them and simply pay up. I cannot believe now that I could have made such a foolhardy decision. Unfortunately one thing led to another and soon these letters became a focus of the case, and were also copied to my clients when they raised a service complaint asking what was happening. I did something initially very stupid and found it impossible to turn back and it was a matter of relief to me when my firm detected the issue and raised it with me.
>
> ...
>
> I also think you should make clear your willingness to apologise in person to the client and the other side and anyone else impacted as you fully recognise this is not the behaviour expected of a solicitor."

The witness stated that the wording was there to be seen.

33. The witness agreed that the Respondent sent the witness his draft self-report for comment as shown by e-mails presented to the Tribunal during the hearing. In an e-mail dated 2 November 2014 at 08.52 to the witness the Respondent stated: "I have amended the draft from what I sent you earlier in the week." The witness felt that making the comments on the draft which the Respondent invited him to do was in the spirit of what was happening; the Respondent was a partner in the firm and the witness was concerned about his position. The witness wanted to be helpful to the Respondent. He was keen that the Respondent should understand that their positions were not aligned and that the Respondent might need to take advice. The witness stated that he passed on the details of the charity LawCare that Ms MB had given him and he also believed that Ms MB told the Respondent about it directly.

34. The witness agreed that by his e-mail of 3 November 2014 he suggested amendments to the self-report. Following his first discussion with Ms MB when she explained the process the witness was concerned that the Respondent should present his position in the best possible way. The Respondent's email reply to the witness said that the Respondent would add something along the lines of the witness's comments but the witness had no idea at the time if the Respondent adopted his words. The witness's e-mail of 3 November 2014 reflected what the Respondent had told him in the meeting. The witness stated that inevitably when confronted with a situation like this for example in PII cases people were concerned and agitated and if the witness had thought that there was a chance of the Respondent being unwell he would have felt obliged to do more.

35. The witness stated that he had looked at the papers in Mr S's matter but had not found a draft Notice of Funding; he had asked other people to check and double check and it was against that background that he gave his evidence. The witness stated that until the proceedings he had never heard of a computer program called PDF Filler which the Respondent suggested he might have used to create the Form N251 in

March 2013. The witness stated regarding the omission of the figure 2 after Manchester in the DX address of HD which appeared on the purported letter of 19 March 2013 that since the point was raised he had checked and that it was only on the letter in question that he could find that error.

36. The witness rejected the suggestion made by the Respondent in respect of alleged gaps in the matter file that chaos had been caused by the merger of the two former firms; the witness had checked about the period prior to the merger because he was a partner in DD (as opposed to BP LLP where the Respondent worked). The team in which the Respondent operated at that time operated a paperless electronic filing system. The witness and Mr EW had found that the paper file had gaps but the electronic file was relatively complete. On merger of the two firms the two different word processing and document management systems which operated pre-merger continued. The firm then had "BP LLP" users in certain offices and "DD" users in other offices.

37. The witness stated that from his relatively limited experience of the Respondent after the merger there was no reason to say that the Respondent worked particularly hard. The witness had looked at recorded chargeable hours before the merger and billings. He gave the details he recalled of the Respondent's chargeable hours and billing. His chargeable hours in the preceding full year had been just under the notional target for DD partners. The witness accepted that hours and billing were not the only measures and he regarded the Respondent as conscientious and having a workload that should have been manageable.

38. In cross-examination, the witness stated that he was based in Newcastle but worked two days a week in London. Mr EW was based in Southampton. The witness had become more involved in the firm's insurance practice and he met the Respondent on a number of occasions in the London office and knew what the Respondent did. The witness was a commercial litigator. As senior Partner in DD since 2010 he had been heavily involved in the merger negotiations and so had had no client practice and also had other roles in the business.

39. The witness stated that the firm carried out an annual trawl designed to identify any matters that the firm should be aware of in respect of its PII. Mr EW managed this for the southern offices of the merged practice and an issue came to light about service of the N251 on the court and some issues about service to the client had come to light on the file as well. This process was not something that formed part of the witness's practice. Clearly there was a requirement to serve the other party but if that did not happen one could apply for relief from sanction. He understood that it was open to a solicitor to say that he had not served the Form but had let the other side know in correspondence.

40. The witness clarified that the firm asked for an opinion of Counsel on the basis of its prospects of being able to recover the ATE premium for Mr S in the event that no Form N251 had been served on the other side but they were on notice of the fact that there was an ATE premium in existence and also regarding the situation where the copies provided to them by the Respondent were not correct and the firm could not prove that they were correct. Counsel advised that because the jurisdiction to provide

relief was almost equitable and given what appeared to have occurred it was less likely that the court would grant the firm relief from sanction.

41. The witness was also asked by Mr Treverton-Jones about the significance of the chronology around the ATE insurance policy. The witness stated that this was not an area in which he practised; his understanding was that it was necessary to have acceptance by the client and to have commenced the policy when the Form N251 was served. The Tribunal enquired about evidence that the terms of the insurance were accepted on 20 March 2013. Subsequently the Applicant produced a copy of an Indication of Terms document dated 13 March 2013 in the case of Mr S which expired on 20 March 2013 and a Form of Acceptance dated 20 March 2013 along with a Certificate of Insurance & Schedule of Cover shown as commencing on 27 March 2013 and a Supplemental Schedule of Special Conditions also dated 27 March 2013. Mr Williams explained that these documents had been held on the firm's electronic system.

42. The witness statements of **Mr Edward Williams** ("Mr EW") dated 15 October 2015 senior associate with the firm and **Mr Stephen Shirley** (Mr S") the client dated 16 January 2016 were read into evidence. Mr Williams pointed out that the evidence of the former was agreed while that of the latter was not wholly accepted by the Applicant but Mr Williams had no cross examination for Mr S.

Findings of Fact and Law

43. 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.

(Paragraph numbers in quotations have been omitted unless they aid comprehension. Submissions include those in the documents and those made orally at the hearing.)

General Submissions for the Applicant

44. For the Applicant, Mr Williams submitted that the Respondent had fully engaged with the proceedings and filed an Answer in which all the allegations were denied. There were no issues about the authenticity of the documents. The report by the firm to the Applicant on 27 October 2014 triggered an investigation by correspondence. The Respondent did not wholly stand by his subsequent self-report but the Applicant felt that it was important and the process by which it emerged was of some relevance.

45. Mr Williams drew a distinction between allegations 1.1 and 1.2 which related to the creation of documents; they were very serious, encompassing lack of integrity (Principle 2) and allegation 1.3 about relying on them under cover of dishonest correspondence over a five month period – ample time for the Respondent to reflect and put right what was wrong. The Respondent might be said to be fortunate regarding the absence of an allegation of dishonesty in respect of the first two allegations. There was no legal bar to pursuing dishonesty in respect of allegation 1.3 only.

46. Mr Williams submitted that the judgment of the High Court in a Tribunal case was awaited in respect of the definition of lack of integrity but there was no requirement for proof of a subjective element and lack of integrity did not equate to dishonesty. In the case of SRA v Chan, Ali and Abode Solicitors Ltd [2015] EWHC 2659 (Admin), the meaning of lack of integrity had been raised but not been the subject of much argument and it was said:

> "As to want of "integrity", there have been a number of decisions commenting on the import of this word as used in various regulations. In my view, it serves no purpose to expatiate on its meaning. Want of integrity is capable of being identified as present or not, as the case may be, by an informed tribunal or court by reference to the facts of a particular case."

Mr Williams also rejected Mr Treverton-Jones' suggestion that different standards should be applied to different levels of seniority and expertise among solicitors. He referred to the case of Bolton v The Law Society [1994] 1 WLR 512 where it had been said that no distinction should be made between one solicitor and another, referring to "every member, of whatever standing..."

General Submissions for the Respondent

47. Breach of Principle 2 of the SRA Code 2011 was alleged in respect of all three allegations. Mr Treverton-Jones submitted that this was an increasingly fashionable allegation for the Applicant; it was the poor man's dishonesty. If Mr Williams was correct and the test was purely objective, the mindset of the solicitor was irrelevant. That would impose the same standard of integrity on a trainee on their first day in the profession as it did on a solicitor with 30 years experience. Mr Treverton-Jones submitted that a higher standard was expected of a veteran than a trainee; the latter could be naive and inexperienced and so there had to be a mental element to integrity. Setting aside dishonesty and lack of integrity, Mr Treverton-Jones accepted that the Respondent's conduct could be criticised. The question was to what extent it crossed the threshold into professional misconduct and the consequences which followed for the Respondent's livelihood and reputation. The Respondent conceded that his conduct had been wrong in not making it clear to HD what he had done in creating the two documents but he was not wrong in the creation of those documents. (Later in the hearing the Tribunal asked for clarification about the Respondent's stance in respect of what he told the firm's costs team and the Respondent confirmed that he accepted that he had been wrong in not making clear to them what he had done when they were relying on the documents he had created. He said in evidence that he had not given them proper instructions but he went further through Mr Treverton-Jones and accepted that he should have made his actions clear to them.

48. Mr Treverton-Jones submitted that there were personal matters upon which the Respondent relied and which were relevant to the Tribunal's assessment of whether his conduct had crossed that line. Mr Treverton-Jones referred to a Psychological Report of a Chartered Clinical Psychologist. Mr Treverton-Jones relied on the chronology in the report which was divided into separate time periods during 2014 and the psychological effects of health issued affecting the Respondent and family members which it described. The report was undated but Mr Treverton-Jones confirmed that it had been obtained in the middle of 2015 for purposes unrelated to

the Tribunal proceedings. In respect of the medical evidence, Mr Williams submitted that the Applicant had never been asked to agree the report and had not done so.

49. **Allegation 1.1 - [The Respondent] created a Form N251 (Notice of Funding) on 2 May 2014 which he backdated to 19 March 2013, in breach of Principles 2 and/or 6 of the SRA Principles 2011.**

Allegation 1.2 - [The Respondent] created a covering letter for a Notice of Funding on 2 May 2014 with a date of 19 March 2013, in breach of Principles 2 and/or 6 of the SRA Principles 2011.

49.1 For the Applicant, Mr Williams submitted that an entity ST was Defendant to very substantial claims brought by Mr S arising out of defects to property. Part of the agreement between Mr S and his funder was that the funder could recover all the funding from any damages prior to the balance being paid over to Mr S. The funder took out an ATE insurance policy to protect the funding of costs. The premium was round £180,000 and formed a very significant element of Mr S's costs. The funder had paid half of the premium around £90,000 and from any recovery of costs the full amount of the premium would be paid to Mr S. There was nothing unusual in this setup. Mr S had a real and significant interest in recovery of the full amount of the premium. Mr S could recover the premium if he won or the case was settled. Mr Williams referred the Tribunal to an extract from the White Book:

> "Section 19 Providing Information About Funding Arrangements: Rule 44.15
>
> 19.1 (1) A party who wishes to claim an additional liability in respect of a funding arrangement must give any other party information about that claim if he is to recover the additional liability…"

The premium was an additional liability. Paragraph 19.2 related to what was required in the method of giving information:

> "(1) In this paragraph, "claim form" includes petition and application notice and the notice of funding to be filed or served is a notice containing the information set out in Form N 251.
>
> (2) (a) A claimant who has entered into a funding arrangement before starting the proceedings to which it relates must provide information to the court by filing the notice when he issues the claim form.
>
> (b) He must provide information to every other party by serving the notice…"

Paragraph 19.4 (1) dealt with the information which must be provided:

> "Unless the court otherwise orders...

(3) Where the funding arrangement is an insurance policy, the party must –

(a) state the name and address of the insurer, the policy number and the date of the policy and identify the claim or claims to which it relates…

(b) state the level of cover provided by the insurance; and

(c) state whether the insurance premiums are staged and, if so, the points at which an increased premium is payable."

Paragraph 44.3B covered limits on recovery under funding arrangements:

"44.3B – (1) Unless the court orders otherwise, a party may not recover as an additional liability-

...

(e) any insurance premium where that party has failed to provide information about the insurance policy in question by the time required by a rule, practice direction or court order.

(Paragraph 9.3 of the Practice Direction (Pre-Action Conduct) provides that a party must inform any other party as soon as possible about the funding arrangements entered into before the start of the proceedings.)"

There was also a reference to Rule 3.9 which set out the circumstances the court would consider on an application for relief from sanction for failure to comply with any rule, practice direction or court order. Mr Williams submitted that this meant if there was an insurance policy such as that which S had, it was necessary to inform the other side as soon as possible so that they could take it into account regarding any defence to the litigation. It was possible to obtain relief or apply to do so if one failed to send a copy of the funding notice to the court or the other side but the outcome of such an application in this case was unknown and no application came to be made.

49.2 Mr Williams pointed out that the claim was served on the Defendant on 30 May 2013. On 28 February 2014, the Respondent accepted an offer of settlement dated 20 February 2014 on behalf of his client and stated that details of costs would be provided in due course. Costs crystallised in February 2014. HD for the Defendant declined to pay the full amount of the insurance premium on the basis that it had not been properly notified about the funding provided to S. A letter of 14 August 2014 from the Respondent's firm quoted in the background to this judgment recorded what HD had said. Mr Williams explained that there were no other documents that could be found about it and it was thought that HD's position had been put at a mediation meeting. On 2 May 2014, the Respondent sent his e-mail quoted in the introduction to this judgment to Ms SG of HD on a without prejudice basis. Mr Williams submitted that the words in the email "I attach a copy of our correspondence last year" were important. They related to the purported letter dated 19 March 2013 from the firm to HD which stated:

> "Please find enclosed a notice of funding confirming the details of the ATE insurance that has been taken out in respect of our client's claim."

This letter was dated some 13 months prior to the e-mail of 2 May 2014. Mr Williams submitted that it was not a copy of what was described as "our correspondence last year" but a document created by the Respondent on 2 May 2014 and that the letter dated 19 March 2013 never existed. Mr Williams then turned to a "Notice of funding of case or claim" dated 19 March 2013 which referred to an insurance policy issued on 13 March 2013 in respect of the proceedings between Mr S and ST. He submitted that this was not a true copy of an earlier document; it was also created by the Respondent in May 2014. The Notice referred to the date of the insurance policy as 13 March 2013 but it was in fact issued on 27 March 2013. Mr S did not even accept it until 20 March 2013. The Respondent sent a Notice to HD about a policy of 13 March 2013 when there was no such policy at that date.

49.3 Mr Williams referred to the firm's report to the Applicant dated 24 October 2014. The firm stated:

> "In September 2014, in connection with the forthcoming renewal of the firm's professional indemnity insurance, the Risk and Best Practice team in [the firm] made enquiries of all fee earners in the firm to ascertain details of any claims against the firm or any circumstances that could give rise to a claim. On 10 September 2014 [the Respondent] responded to this enquiry by stating that there was a dispute over payment of the ATE premium relating to whether or not the Form N251 had been filed at court. He stated that the form had been served on the Defendant.
>
> Upon further investigation, it transpired that, in fact, there was also a dispute over whether or not the Form N251 had been served upon the Defendant.
>
> This prompted a more detailed internal investigation into the evidence that would be available to support [the Respondent's] stated position that the Form N251 had been served on 19 March 2013. From an examination of metadata on our document management system, we discovered that the documents that were sent to [HD] on 2 May 2014 were, in fact, created by [the Respondent] on 2 May 2014…
>
> ...
>
> In the event that a fall ATE premium is not recovered from the Defendant, this firm will pay the unrecovered part of the premium to ensure that [Mr S] is not prejudiced by [the Respondent's] actions."

Mr Williams submitted that the firm made good the unrecovered part of the premium for Mr S and because of the good offices and responsible conduct of the firm the client had not lost out. He submitted that the documents, the letter of 19 March 2013 to HD and the N251 were fakes which the Respondent had written 13 months after their purported date in a calculated and sophisticated exercise. In a letter of 23 October 2014 from Mr Marshall of the firm to HD it was stated:

> The above facts may be relevant to your client's position on the issue of recoverability of the ATE premium."

Mr Williams submitted that a solicitor of integrity did not create documents backdated over 13 months previously without making it abundantly clear to all with an interest that that was what had been done. If he had endorsed the documents to the effect that he could not find the relevant letter and Notice but believed that he had sent them and believed they were something like these particular documents he might not be before the Tribunal but he went on to deploy these two documents in correspondence when he sought to obtain a costs settlement for Mr S (allegation 1.3).

49.4 Mr Williams submitted that in making his self-report, the Respondent said he had been leaned on by Mr Marshall. The Applicant said that was not so and there was no untruth in the self-report. The self-report included:

> "It became clear in 2013 that we were going to have to issue proceedings in order to progress the claim. I made arrangements via a broker, [MS] of LES, to obtain third party funding for the claim as Mr [S] was going to struggle to fund the litigation himself. As part of the funding ATE costs insurance had to be taken out in relation to the claim. The ATE policy was taken in March 2013. We served proceedings on 30 May 2013. The claim ultimately settled on 4 March 2014...
>
> The costs claim was settled on 28 July 2014, but excluded settlement of the ATE premium. The Defendant's solicitors, [HD], argued that they had not been given proper notice of the ATE insurance for the claim and so were not liable to pay the ATE premium. This included an argument that the Form N251 had not been served on them.
>
> The matter that I wish to report is that on 2 May 2014 I created and backdated a Form N251 in relation to the litigation proceedings against [ST] and also a letter and sent the letter and the form to [HD] stating that the form had been sent to them in March 2013. I created a covering letter dated 19 March 2013 which I said had issued the Form N251.
>
> I considered that [HD] were well aware of the funding arrangements in the case, including the ATE premium. I had discussed the funding arrangements with [HD] at various points throughout the case and they did not argue that the Form N251 had not been served until the mediation in January 2014. This is obviously no excuse for my conduct.
>
> I accept that I made subsequent false representations in relation to the letter and Form N251 to [HD]... This was totally unacceptable and the creation of those documents was a total aberration on my part of which I am ashamed.
>
> I created the documents myself and no one else at the firm was involved in creating the documents.
>
> It is clear to me now that I was not thinking clearly in any way for a variety of reasons, but I think that I foolishly believed that I could improve my client's

position and disguise our oversight by sending these letters in the hope that the Defendant would not argue any further about payment of the ATE premium which I believed they were well aware of from my discussions with them. I cannot believe now that I made such a foolhardy decision.

I did something initially very stupid, driven to an extent by other pressures on me at that time, and found it difficult to turn back. I knew I would need to address this issue at some stage and it was a relief to me when the firm identified the issue and raised it with me, so that the issue can be resolved with the client and with the Defendant's solicitors.

I have cooperated fully with the investigation by the firm and am assisting with the resolution of the matter.

I am willing to apologise in person to the client, to the Defendant's solicitor and anyone else who has been affected by this incident, as I fully appreciate that this is not the conduct or behaviour to be expected of a solicitor.

I have never come close to even considering doing anything like this before and have always been clear and honest with my clients. I believe that my honesty is one of the things that my clients really appreciate about me…

There were a range of personal circumstances and circumstances at work which placed me under very significant stress in the first 6-9 months of this year. I am not seeking to use these issues as an excuse for my conduct…"

Mr Williams submitted that he relied on what the Respondent had said to the Applicant; it was pretty much what happened, adopting the Respondent's own words.

49.5 Mr Williams submitted that one needed to look at the circumstances in which the false documents were created. By May 2014 the firm was Bond Dickinson LLP. At the material date in March 2013 it was BP LLP and so what the Respondent did was as set out in an e-mail dated 7 April 2015 from Mr Marshall of the firm to its Relationship Manager at the Applicant Ms MB:

"As requested, I have made sure we checked again in relation to the letter to [HD] and set out below the details you require.

[The Respondent] e mailed [HD] on 2 May 2014. Attached to that e mail was the covering letter that was said to have accompanied the Notice of Funding purportedly sent on 19 March 2013. That covering letter was a Filesite document, bearing the document number 26519928. Our investigation into the document number 26519928 revealed the following:

- It was created on 19 March 2013 by [the Respondent's] secretary
- The Filesite profile/description of the document reads 'Clerk to [DS] QC (paying Counsel's fees)'
- It was filed in Filesite in a different (and unrelated) matter number (i.e. not 377757.1)

- Our IT department has confirmed that [the Respondent] modified the letter on 2 May 2014, but cannot determine what modifications were made
- Our IT department also cannot provide a version of the document in its original form"

49.6 Mr Williams worked on the assumption that that was the file number 377757.1 related to Mr S's matter. He submitted that the Respondent went to the computerised records of another case entirely so that the purported letter showed BP LLP and not Bond Dickinson and he altered that letter to create the document he sent to HD. Using the template of the BP LLP letter he bolstered his dishonest documents as having been sent in March 2013. If he had done the honest thing of typing up what he thought was sent in March 2013 it would have been on Bond Dickinson notepaper but it had the BP LLP header and the DX address of HD lacked the 2 following Manchester which Mr Williams submitted was a deliberate omission to support the theory that the letter had been sent but not received. Based on Mr Marshall's evidence Mr Williams submitted that this was a unique and deliberate error by the Respondent. Mr Williams submitted that the Form N251 sent on 2 May 2014 to HD was from a document from another file. The Respondent said that he had a draft of the Notice in his daybook but that was not before the Tribunal. Mr Williams submitted that while dishonesty was not pleaded in respect of the creation of the two documents, the circumstances of how the documents came to be created were essential to the allegations of lack of integrity.

Submissions for and evidence of the Respondent

49.7 Mr Treverton-Jones submitted that the case against the Respondent was very poorly pleaded. Mr Williams said that the Form N251 and the re-created covering letter of 19 March 2013 were false in his opening and cross-examination and asserted that the Respondent had created a bogus DX addressed to cover his tracks. These were the clearest possible allegations of dishonesty in the creation of the documents. The Tribunal could only deal with the allegations pleaded in respect of the two documents and no dishonesty was alleged in the Rule 5 Statement in respect of their creation.

49.8 The Respondent gave evidence that he was a qualified civil engineer and by the time he worked on the case of Mr S had been a solicitor for 11 or 12 years specialising in construction law. The Respondent was referred to a handwritten note dated 12 March 2013 between him and Mr KA from the funder. It recorded

> "ATE to be confirmed shortly → busy in the run up to change at end of month → [MC] chasing."

and

> "[The Respondent] not clear it would be an issue but no downside in serving N251 now → might help settlement
>
> → Agreed to send N251 once ATE + premium is sorted"

The Respondent stated that he was not in a position to issue proceedings until after the end of March 2013 and he and Mr KA discussed (on 12 March 2013) how to arrange things and discussed it with the broker. There was some urgency particularly from the

funder who wanted protection. Mr KA then chased up the broker Mr MC and they received the ATE terms the next day 13 March 2013. The Respondent discussed with S and MC and the funder and it was confirmed that the Respondent could send the N251 based on the offer because it had the crucial elements, including the premium, which were required for the notification. There was no relevant guidance and no case law and he served the N251 Notice and the next day the premium and cover were confirmed. Ultimately written acceptance came from Mr S on 20 March 2013 but he had already confirmed before then that he accepted the policy (although in fact the policy was for the protection of the funder). The policy documents were not sent to the Respondent until 4 April 2013 although they were dated 27 March 2013 and this demonstrated why the Respondent needed information to get the Form N251 off before the end of the month.

49.9 The Respondent confirmed that he was convinced that he had sent the N251 to HD; it was a critical issue at that time. He also had two other cases and they were all dealt with before the end of March 2013. The Respondent named them and said they were still ongoing. He had not needed to ascertain whether there was a Form N251 on those files because there were mediations in respect of both matters and the ATE premium was discussed by reference to the Forms N251. In respect of the S case the Respondent stated that there was an electronic file with the insurance team and hard copy with the construction team. There was a gap of nearly six months in the hard copy file. The Respondent did not know why that was; it could be that the documents were in a filing tray. He had checked on the electronic file and the documents were not there but he knew he had done them. He noted there was very little correspondence on the electronic file with the funder, the client and HD and so clearly correspondence was missing. He had a hand written Form N251 in a day book. The nub of all this was that he genuinely believed that he sent the form but he could not demonstrate it from the file. The Respondent explained that he used his daybook for telephone attendance notes, meeting notes, actions and keeping key documents, witness statements, pleadings and key correspondence. He had done that since he qualified and kept the daybook in addition to the matter file so that he had his own reference book with all the relevant issues on a case. The insurance documents which the Applicant had produced at the hearing were at the back of the daybook along with the hand written Form N251.

49.10 As to HD being on notice about the ATE position, apart from service of the Form N251 the Respondent did not have references to correspondence but there was a series of correspondence throughout 2013 with HD in the run-up to proceedings being issued particularising the ATE insurance position and so making HD aware that their client was exposed to the premium and funding. The firm again raised the issue later in the year in connection with expert evidence that there was an exposure to paying ATE insurance. Attached to the Respondent's statement was a telephone attendance note in respect of a conversation with Mr LC of HD on 7 August 2012. It included:

> "LC asked whether there was any insurance involved in the claim given the fact that [B], the firm from which the Respondent had brought the case when he moved] and [BP LLP] were primarily insurance firms. I said that there was no insurance involved and that we were acting direct for [Mr S] who was funding the claim himself. I said that there was the possibility that [Mr S] would apply for third party litigation funding if it was not possible to resolve

> the claim within the pre-action protocol period, however at this stage the claim is being funded entirely by him…"

On 22 November 2012, the Respondent wrote a Calderbank letter to HD which included:

> "In light of the above, we look forward to receiving your client's proposals for settlement of this dispute. If no reasonable proposal is received within 21 days of the date of this letter, we will have no alternative but to issue proceedings without further notice. The premium in respect of ATE cover will be incurred at that point..."

There were also telephone discussions. The Respondent referred to there being part funding and ATE insurance in place and LC did not raise an issue regarding the Form N251. This ran all way through to the end of 2013 when there was a site inspection. LC, the Respondent and two experts attended. It was a 20 minute meeting which showed the pitiful state of the property. They got into a settlement discussion. The Respondent mentioned and LC acknowledged the ATE insurance position and did not raise the N251 point.

49.11 As to how the covering e-mail of 2 May 2014 and attachments came to be created, the Respondent stated that the mediation in January 2014 was the first time that HD raised the issue of not receiving the Form N251. The Respondent had a separate discussion with Ms SG who had taken the matter over from LC after he left HD. She said she had files in Liverpool and in Manchester and needed to review them and determine what had and had not been received. As at 2 May 2014, HD had not carried out a proper review of its files. He used exactly the same wording from the Form in his daybook reflecting the Indication of Terms document. He created a Form N251 to go to HD not to cover up an earlier error or to mislead them. The intent was for HD to go and find the documents in their files. He accepted in his meeting with Mr Marshall that he created the copy documents and that it was not the right thing to do and had accepted that throughout. It was crude and stupid; he could have said that they were duplicates of documents sent in 2013. As to why the Respondent had not put that in his covering e-mail on 2 May 2014; it was lack of thought; he created the documents to demonstrate what he recalled being sent in the copy email.

<u>Determination of the Tribunal in respect of allegations 1.1 and 1.2</u>

49.12 The Tribunal had regard to the evidence including the oral evidence and the submissions for the Applicant and the Respondent. The Tribunal noted that in the particular circumstances of this case it was necessary to file and serve the Form N251 on the other side at least in advance of the change in the CPR which came into effect on 1 April 2013. The Respondent's evidence was that it was not possible to commence the proceedings before the cut-off date and proceedings were actually issued in May 2013. The Tribunal noted the submissions in respect of the test for integrity (Principle 2). It was the Tribunal's understanding that the test was objective. In order to assess whether the Respondent's admittedly wrongful conduct in creating back dated documents crossed the line, as Mr Treverton-Jones put it, over into professional misconduct and constituted acting in breach of the requirement to act with integrity and to maintain public trust, the Tribunal considered that it had to

consider his explanation that he had created and served originals of the covering letter and Form N251 in March 2013 and that his creation of the documents was therefore a crude form of duplication.

49.13 The Tribunal did not overlook the submission that the documents in Mr S's case ran to 12 to 14 boxes. However the information before the Tribunal was clear; there was no evidence that documentation had been sent to HD in March 2013. The Tribunal had the benefit of Mr EW's evidence about searches of the firm's systems and the Respondent's own evidence of his inability to find contemporaneous copies of any such documents. The best evidence that the Respondent could produce that the Form N251 existed in March 2013 was his own oral evidence that he had a handwritten draft of it in his daybook up until he left the firm and that he used that handwritten draft as the basis for the document he created in May 2014. He also stated that the handwritten draft was among a wad of loose documents which he asserted had disappeared from the daybook. The Tribunal considered that his reliance on the retention of a draft was suggestive that a final typewritten version was not prepared. He admitted but could give no reason why he had not retained a copy of the completed and served Form in his daybook when his evidence was that it was his practice to keep key documents in such a book for each matter. The Form N251 was certainly a key document because of the impending deadline for the change in the CPR rules. Even if the Tribunal accepted the Respondent's evidence that a handwritten draft existed and had disappeared, it undermined his credibility that he had also not added it or a copy of the final version of the Form N251 as served to the file either electronically or in hard copy. There was then the obstacle that the electronic and paper filing systems contained no copy of any contemporaneous covering letter which the Respondent asserted he was sure he had sent. In answer to this the Respondent asserted that documents were missing from the electronic file and the paper file for the relevant period. The only other evidence to support the assertion that the documents had been sent was a reference in his oral evidence by the Respondent to a time recording entry for a letter to HD on 19 March 2013. However that did not constitute proof of the contents of any such letter or that it was signed and dispatched on that day. The evidence before the Tribunal led it to conclude that a covering letter and Form N251 were not sent in March 2013 to HD.

49.14 The Tribunal noted the chronology of events. On the Respondent's own evidence he became aware in January 2014 during the course of the mediation process that the opponent's solicitors HD were asserting that they had not been served with the Form N251. At that point the appropriate conduct would have been for the Respondent, having carried out the appropriate checks as to whether the Form had been served on HD and finding there was no evidence on the electronic or paper files that it had, to have applied to the Court for relief from sanction which had to be done promptly. He should also have reported to his colleagues that there was a potential claim against the firm. These failures were not the subject of any allegation but were part of the context of the case. The Tribunal did not find credible his reliance on the possibility that HD would find the documents in its files and that it had been toying with searching for them for some nine months. It was clear by May 2014 that these documents were not suddenly going to materialise. The Respondent was an experienced lawyer in this particular field and on his own evidence had dealt with two other cases where the CPR deadline was material and where his evidence was that the Forms N251 were in existence and in play during negotiations between the parties. The Tribunal noted that

he did not produce the draft to HD in May 2014 and he could not on his own evidence produce it to the Tribunal at the hearing. The Tribunal was not satisfied that the handwritten draft existed but considered that the Respondent could not simply admit to having created the backdated documents but instead used the device of the draft to justify having done so. The Tribunal considered the Respondent's explanation that there was no trace of the Form N251 on the firm's systems because he had used a program PDF Filler. Even if this were the case and it left no trace on the firm's systems of the document itself, following normal office procedure he would have created the covering letter on the firm's system but no trace could be found of that either.

49.15 The Tribunal considered that the Respondent was an experienced litigation solicitor and clearly well versed in court procedure. In a situation where it was obvious what he had to do – apply promptly to the Court for relief from sanction – because he could not prove that he had served notice of ATE funding on the other side and knew (and indeed had always acknowledged) that he had not filed notice at Court, the Respondent chose instead when costs discussions were heading to court proceedings to create two backdated documents. This was a quite deliberate act involving use of the firm's computer system to extract a heading for one of its predecessor firms which would have been in use in March 2013 and a document template. The Respondent had minimised the issues in obtaining relief from sanction in his evidence but the Tribunal considered that the outcome was far from certain thus putting him under additional pressure. The Respondent faced a further complication in that by maintaining his assertion that he genuinely believed that he had served Form N251 at the appropriate time he made it impossible to apply for relief from sanction. In respect of the facts and circumstances surrounding the creation of the two backdated documents there were simply too many factors which militated against the explanation which the Respondent had given for his actions. The Tribunal found that the Respondent's actions in creating Form N251 Notice of Funding (allegation 1.1) and a covering letter for a Notice of Funding (allegation 1.2) both on 2 May 2014 displayed a clear failure to act with integrity (Principle 2) and that he had not behaved in a way that maintained the trust the public placed in him and in the provision of legal services (Principle 6). The Tribunal accordingly found allegations 1.1 and 1.2 proved on the evidence to the required standard.

50. **Allegation 1.3 - [The Respondent] relied on and/or acquiesced in others at his firm relying on the backdated documents mentioned above from 2 May 2014 until on or around October 2014, as evidence in supporting his position when seeking to favourably negotiate a costs settlement with his opponent in litigation, in breach of Principles 1 and/or 2 and/or 6 of the SRA Principles 2011.**

Allegation 1.4 - Dishonesty was alleged in relation to allegation 1.3 set out above. Whilst dishonesty was alleged with respect to this application, proof of dishonesty was not an essential ingredient for proof of any of the allegations.

50.1 Principle 1 of the SRA Principles 2011 stipulated that "You must… uphold the rule of law and the proper administration of justice. Mr Williams submitted that a solicitor with integrity sought to ensure that all documents which emanated from his office, and in particular documents that related to disputed litigation evidence, were accurate and, under no circumstances, created and sent their opponents documents which were

apt to mislead them into believing that particular steps had been taken that were relevant and/or important to the issues in dispute. The Respondent relied on the backdated documents (and/or acquiesced in reliance on them by others in his firm) as evidence that the relevant steps had been taken, in correspondence to his opponent from 2 May 2014 until on or around October 2014. By such reliance he sought to obtain a settlement of the dispute with the assistance of backdated evidence, without any further explanation being provided. Such conduct tended to undermine the proper administration of justice because it could lead to the settlement of a legal dispute on the basis of incorrect and/or misleading facts. Such conduct also demonstrated a lack of moral soundness, rectitude and steady adherence to a moral code on the part of the Respondent such as to inevitably diminish the trust and confidence the public placed in him and the provision of legal services.

50.2 In respect of dishonesty, for the Applicant, Mr Williams relied on the two limbed test for dishonesty in the case of Twinsectra Ltd v Yardley [2002] UKHL 12 where Lord Hutton had said:

> "... before there can be a finding of dishonesty it must be established that the conduct was dishonest by the standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest... although he should not escape a finding of dishonesty because he set his own standards of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct."

50.3 Mr Williams submitted that it was the Respondent's case that he believed that he sent the letter and Form N251 in March 2013 and in May 2014 sent to HD what he believed he had already sent but this was not what he said to HD. In his e-mail of 2 May 2014, the Respondent said: "I attach a copy of our correspondence last year" which Mr Williams submitted could only mean that the documents were copies of genuine documents sent on that date and not documents created subsequently on a computer by the Respondent. The e-mail told a lie. Having sent it, the Respondent found himself in a trap.

50.4 Mr Williams submitted that in further correspondence with HD the Respondent mis-conducted himself in similar ways. On 7 July 2014, the firm [the Respondent] wrote to HD including:

> "In a final attempt to resolve the costs in this matter our client is prepared to accept £210,000 in respect of direct legal costs plus the ATE premium of £181,682.94 in full and final settlement of all of its costs in this matter…"

This letter set the scene. On 14 July 2014, HD made a counter offer. The position was made clear; HD had the e-mail from the Respondent dated 2 May 2014 but did not accept that it was ever in receipt of the Notice of Funding or the 19 March 2013 letter and so agreement was reached on costs excluding the ATE premium. The court would have to decide about the premium if the parties could not come to terms. On 14 August 2014, the letter quoted in the background to this judgment went from the firm to HD including:

> "Primarily, you were notified by way of Form N251 of the existence of ATE insurance in compliance with court rules. The form was sent to you on 19 March 2013."

Mr Williams submitted that there was no insurance on 19 March 2013. The letter also asserted "From the above it is clear that you were provided with notice of funding…" The Respondent was reasserting the e-mail of 2 May 2014 and resending the documents and insisting that they had been sent on 19 March 2013 when he could not find any letter on the file and he knew that he had sent what he created 13 months later. Mr Williams submitted that this was a dishonest letter. The recipient of a solicitor's letter must be able to assume that the solicitor told the complete truth and did not dissemble or mislead in any way or the reputation of the profession would suffer enormous damage. If as the Respondent said, he thought that he had created documents which reflected what he remembered, he should just have said so. Mr Williams referred the Tribunal to a document which he said appeared to be a draft of the August letter which was dated 11 August 2014. There were three days between the draft letter and the final version going out; time for the Respondent to reflect on what he had done and get things right but he did not use the time for proper purposes. He had a duty to come clean and if he had done so he could have helped himself but he was trapped and pursued the matter in a dishonest fashion.

50.5 Mr Williams also referred to the letter dated 21 July 2014 from the firm to HD which he said he had overlooked in his opening. He referred to the statement:

> "In respect of the ATE premium our client maintains they are entitled to the full payment of the ATE premium in the sum of £181,682.94. The form N251 was sent to your firm as we had evidenced…"

Mr Williams submitted that the above sentence breached the Principles alleged (1 and/or 2 and/or 6) and was dishonest.

50.6 Mr Williams adopted what was said in the Rule 5 Statement about dishonesty over and above his oral submissions. The Rule 5 Statement asserted that not only was the Respondent's conduct in making his statements to HD regarding the documents he had created dishonest by the ordinary standards of reasonable and honest people but he must also have been aware that it was dishonest by those standards for the following reasons:

- he knew that the opponent's solicitors were disputing having received the relevant Notice of Funding;

- he had consciously created the actual documents sent to his opponent's solicitors on 2 May 2014 (but dated 19 March 2013) shortly before sending them;

- as could be seen from the e-mail from the firm dated 7 April 2015, the Respondent ensured that the covering letter looked as if it was from 19 March 2013 by using as a template a different document sent from that older date from a completely separate matter, rather than creating a new document and simply back-dating it;

- the documents were repeatedly relied on by the Respondent over a period of approximately five months in formal correspondence seeking to obtain a favourable costs settlement for this client;

- the Respondent's position was challenged by the opponent's solicitor and no clarification or correction was provided;

- although the statements below had since been clarified and/or sought to be corrected by further submissions, in a contemporaneous self-report the Respondent stated as quoted above and restated here for convenience:

  "...on 2 May 2014 I created and backdated a Form N251... and also a letter and sent the letter and the form to [HD] stating that the form had been sent to them in March 2013."

  "I accept that I made subsequent false representations in relation to the letter and Form N251 to [HD]... This was totally unacceptable and the creation of those documents was a total aberration on my part of which I am ashamed."

  "... I think that I foolishly believed that I could improve my client's position and disguise our oversight by sending these letters in the hope that the Defendant would not argue any further about payment of the ATE premium which I believed they were well aware of from my discussions with them. I cannot believe now that I made such a foolhardy decision.

  I did something initially very stupid, driven to an extent by other pressures on me at that time, and found it difficult to turn back..."

  "I have never come close to even considering doing anything like this before and have always been clear and honest with my clients."

Submissions for and evidence of the Respondent

50.7 Mr Treverton-Jones submitted that it was intellectual nonsense for the Respondent's e-mail dated 2 May 2014 to form part of allegation 1.3 and be alleged to be dishonest when the two documents sent under its cover were not pleaded as dishonest. Mr Treverton-Jones also submitted that Mr Williams had only belatedly taken the Tribunal to the letter from the firm to HD dated 21 July 2014 and this might mean that he did not attach much importance to it and only one sentence in the document had been highlighted "The form N251 was sent to your firm as we have evidenced". (Mr Williams rejected the suggestion.) The Respondent said that this document was drafted by the costs team after they took the file over in summer 2014 but he accepted that he had signed the letter. It was the Respondent's evidence that he had not drafted the firm's letter of 14 August 2014 but he accepted that he probably saw it. Mr Treverton-Jones submitted that no course of conduct had been proved during the period May to October 2014. Mr Williams would probably have liked to run allegations that the two documents were dishonestly created but he came in late to the case and was fixed with the way it was pleaded by the Applicant. The Tribunal was faced with a half-hearted allegation of dishonesty in deployment of the documents rather than their creation and so it was submitted that dishonesty was not proved.

50.8 Mr Treverton-Jones asked the Tribunal to note the evidence of the client Mr S particularly where he stated;

> "[The Respondent] has provided me with a copy of his handwritten attendance note dated 15 September 2014. From memory, this does reflect a fair summary of what we discussed. In particular under the section "Discussed merits of recovery":
>
> "Service disputed by HD"
>
> My recollection is that we reviewed the same points that I have set out above in relation to the fact that [HD] disputed service of the form.
>
> "[The Respondent] doesn't dispute filing at Court"
>
> [The Respondent] explained that while he believed that the form was sent to [HD], he did not dispute the fact that the form was not filed at Court at a later date in the proceedings.
>
> "Advice from costs team that HD's knowledge of funding and ATE is key"
>
> [The Respondent] summarised the position that notwithstanding the dispute regarding the service of the N251 and the fact that the form was not filed Court, the fact that [HD] were clearly aware of the funding and ATE insurance would assist in being able to recover the ATE premium from [ST]. I think he mentioned the advice that the [firm's] costs team had given in this regard that there was a reasonable argument that the ATE premium was recoverable because of [HD's] clear knowledge of the funding and associated ATE insurance.
>
> I note that in my e-mail of the 17 September 2014 I confirmed that call, and the fact that he had confirmed the potential issue with regard to the ATE recovery was still an issue in that [HD] were still disputing the service of the N251 form. I note that I again put [the Respondent] on notice that should there be any shortfall in recovery as a result of any issue with the service of the N251 form or otherwise, I would be looking to recover that from [the firm]."

50.9 Mr Treverton-Jones submitted that some of the major planks of the Applicant's case on dishonesty had disappeared as the case developed as follows.

- In respect of the Form N251, Mr Williams attached importance to the date of 13 March 2013 given as the date the insurance policy was issued on the basis that the Respondent had not then seen the insurance contract documents. The fact that the final insurance contract date was 27 March 2013 had been fully explained by the Respondent in evidence. Terms were offered orally and accepted by the client before the Form was sent. The Respondent was entitled to send the Form before the final written contract came into existence. Mr Marshall had not been able to dispute that in evidence and accepted that he had no experience of this type of litigation. Mr Treverton-Jones submitted that Mr Williams had taken a legalistic approach to whether a contract of insurance existed at 13 March 2013 but that was

not the point. The Respondent gave evidence that before 13 March 2013 Mr S accepted the premium quotation and on 13 March was aware it was confirmed. So there was a contract in law and even if it was not a contract it did not matter. If the Respondent had waited he would have missed 31 March 2013 deadline and would have lost the opportunity for Mr S to recover the ATE premium in the case.

- Any significant reliance on the Respondent's self-report was undermined. In it the Respondent talked of disguising an oversight but it emerged that the wording was suggested to him by Mr Marshall in his e-mail of 3 November 2014 and that passage in his self-report was word for word the same as Mr Marshall suggested. The Respondent must take responsibility for the document and he altered some of Mr Marshall's wording but the Tribunal should be slow to act on admissions drafted by a third party. The force of the self-report was much diminished by the fact that it copied in large part the report of the firm and in crucial passages adopted the wording of Mr Marshall. In his witness statement, the Respondent set out why little weight should be given to the self-report:

  "It is clear that the self-report is not correct and does not address any of the relevant facts set out in this statement. Further, it is clear when reviewing the self-report now that it is totally inconsistent with the following:

  a) The report does not refer to any of the relevant correspondence, notes or documents in relation to the matter and so it (sic) not correct. I did not look at the file or any of my notes prior to preparing the report.

  b) The report is entirely inconsistent with the contemporaneous correspondence and attendance notes.

  c) The report is entirely inconsistent with the discussions that I had during the case with the client, the ATE insurer and the broker.

  d) The wording of the report is not in a style that I would ever use. In fact the wording of the report shows that I was totally submissive and following the direction of the COLP rather than thinking clearly and dealing properly with the matter.

  e) I recall that the COLP suggested that I added a sentence to say that I was relieved that the issue had been identified. This is clearly incorrect because I had already explained the position to 3 people outside of the firm, including the client. Also, I had not seen the Points of Dispute [from HD] at the time I sent the self-report.

  f) The report was prepared when I was not in a stable state of mind, as evidenced by all of the above."

  Mr Treverton-Jones submitted that the crucial point was that when the Respondent made admissions to Mr Marshall they were in precisely the same terms as he made in evidence to the Tribunal. In his statement Mr Marshall said:

> "[The Respondent] explained that he had been reflecting and did need to tell us Form N251 had been created by him on 2 May 2014. He said he was sure one had been prepared and served on [HD] at or around March 2013 and had not thought through the consequences."

The Respondent had also said the same thing through Mr Blatt in his response to the Explanation with Warning letter from the Applicant. His belief led him to recreate documents he believed had been sent in March 2013.

- Any suggestion that Mr Marshall had leaned on the Respondent to make the self-report was rejected. It was fully accepted that Mr Marshall acted from the best of motives throughout. Mr Treverton-Jones' Skeleton argument did not make any such suggestion and Mr Marshall effectively agreed in cross-examination with the relevant sentence in the Skeleton when it was put to him. Mr Marshall and the firm were in new territory when they dealt with the matter. Mr Marshall had never dealt with a report of this kind before. Self-reporting came in with the SRA Code of Conduct 2011 on 6 October 2011. Until then a solicitor was under an obligation to report misconduct by other solicitors but not their own. There was no doubt that Mr Marshall and the firm's Relationship Manager whom he consulted were acting in good faith in making suggestions about what should be in the self report to be made by the Respondent.

50. 10 Mr Treverton-Jones suggested that the outcome of the allegation of dishonesty would depend on the view the Tribunal formed of the Respondent. He had been subject to penetrating cross examination by Mr Williams and the Tribunal. He was an excellent witness and disarming in some respects. He did not try to say that he acted correctly in creating the documents and in not telling HD what he had done. His evidence had the ring of truth. There were certain facts which assisted his case:

- Once the file was handed to the costs team the case went on to the back burner as would seem right to practising solicitors. A good settlement was obtained for the client and the solicitor with conduct of it could get onto other work.

- The Respondent had little contact with HD; just the two letters complained of and some conversations with Ms SG. These were not fertile ground to establish a course of conduct between May and October 2014. She had told the Respondent that her firm had the files in two different places and about the difficulties in obtaining instructions from her insurer client.

- The material events occurred soon after the merger of DD and BP LLP. The latter firm did not have its own costs team and the team dealing came from DD.

50.11 Mr Treverton-Jones referred to the Respondent's personal difficulties. It would have been the easiest thing to bring forward the date when his concerns materialised but he did not seek to blame events in May 2014 on his concerns about his own future health. However three major medical issues arose for the Respondent over the summer of 2014. Mr Treverton-Jones submitted that the Tribunal could take these into account in respect of whether the Respondent developed a dishonest intent. It was very likely that his mind was only half engaged with work issues The Respondent gave evidence that the case was not really on his mind. The Tribunal might also

consider that it was of some significance in assessing the Respondent's mental state that for the first time in his career complaints were made by clients into other matters about lack of attention to the file and the Tribunal had the evidence of Mr S in that respect relating to the summer of 2014. The Tribunal had been presented with an overall picture of someone who had taken his eye off the matter.

50.12 Mr Treverton-Jones suggested that the Tribunal to ask itself three questions:

1. Did the Respondent have an honest belief that he sent the Form N251 to HD in March 2013?

2. If so did he still have an honest belief in May 2014 when he did what he did?

If the answer to both questions was "Yes" it went a long way to dispel the allegation of dishonesty. The Tribunal had asked the Respondent whether it occurred to him that he had overlooked serving the Form; His response was careful and compelling; he said that if this was "knockabout" correspondence it would have occurred to him but he remembered this Form.

3. Did the Tribunal accept the Respondent's evidence that LC at HD was well aware that ATE insurance had been taken out.

Mr Treverton-Jones submitted that the answer to the third question should be clear. Attached to the Respondent's statement was a key letter dated 22 November 2012 from the Respondent to LC. It included:

> "In light of the above, we look forward to receiving your client's proposals for settlement of this dispute. If no reasonable proposal is received within 21 days of the date of this letter, we will have no alternative but to issue proceedings without further notice. The premium in respect of ATE cover will be incurred at that point..."

Mr Treverton-Jones submitted that this made clear that ATE insurance was being taken out and in telephone conversations it was made clear that it was or had been taken out. This made it much less likely that the Respondent had created the documents in order to mislead HD.

50.13 Mr Treverton-Jones submitted that the Respondent would have had good evidence that HD was firmly on notice of ATE funding and would have a strong argument that non-service should be given relief from sanction. Paragraph 44.3B.2 of Civil Procedure stated:

> "Where solicitors had acted for a claimant under a CFA and gave notice of funding, a dispute arose because, following the incorporation of the practice, no new notice of funding was received by the defendant. The claimant's solicitors had apparently signed a copy of the notice at a later date. The defendant argued that no success fee should be payable. The Master granted relief from sanction. On appeal the court found that it was not incumbent on the Master to embark on an enquiry into the claimant's solicitors' conduct. The Master was correct to identify as the overwhelming the crucial matter that

the defendant had known all along that the claimant was represented under a CFA: Scott v Duncan [2012] EWHC 1792 (QB) Spencer."

50.14 This followed on from the part of Civil Procedure Rules that Mr Williams had taken the Tribunal to. The important thing was knowledge that the individual was represented under a CFA and Mr Treverton-Jones submitted that the same principle should apply to an ATE premium. The Defendant was not prejudiced and so could not complain about not being served with notice. Mr Treverton-Jones submitted that if the Tribunal answered favourably the questions which he had posed it should be very difficult for the Applicant to establish dishonesty in this case. He also submitted that the Respondent had made an open report to the ATE insurers, to the client and to the brokers and that was inconsistent with dishonesty.

50.15 In respect of the Applicant's reliance on the fact that a search of the relevant electronic files did not throw up the N251 or covering letter as being sent in March 2013, Mr Treverton-Jones asked the Tribunal to treat the evidence of Mr Marshall about what was in the electronic and paper files with some care. He said that the relevant files were electronic and not paper. The Respondent's representatives had asked for the Applicant to produce the file; albeit only a day or so before the case started. They were told the file covered 12 or 14 boxes which the Applicant could courier to London if they insisted. The Respondent's representatives decided that it would be disproportionate to see these documents but there was obviously a paper file regarding the case of Mr S. The Respondent's evidence was that there was a six-month gap in the documents in the file between November 2012 and May 2013. This assertion had not effectively been contradicted by Mr Marshall and Mr Treverton-Jones invited the Tribunal to accept the Respondent's evidence on that issue. The Respondent gave evidence that certain documents were not on either the electronic or hard copy files. An expert's report was cited and he gave evidence about other correspondence being missing. Mr Treverton-Jones submitted from the Respondent's evidence that that the Form N251 could be downloaded from the Internet from PDF Filler and would not need to go through the firm's systems.

50.16 Mr Treverton-Jones submitted that the allegation of dishonesty failed by some distance. It was made on a secondary basis. It relied on only three documents in support and the Respondent did not draft two of them. The Respondent was a decent honest solicitor who made one error of judgement in that he did not make clear that he was sending to another firm of solicitors what he believed were duplicates of documents he had sent previously. This was not a matter of dishonesty or lack of integrity and Mr Treverton-Jones left the Tribunal to decide in respect of the other allegations of breach of Principles whether a finding of professional misconduct was justified against him.

Respondent's Evidence

50.17 The Respondent stated that he had not made any attempt to mislead anyone; he accepted that creating the copy documents was the wrong thing to do. It was a crude attempt to get HD to search their files and it did not mislead them. Ultimately it led them to review files. It was not designed to cover up earlier failings and he could not see how the admission he made to Mr Marshall had become an allegation of misleading. The e-mail asking him to see Mr Marshall came out of the blue. His

recollection of the notification he made to the Risks Team in June 2014 related to not filing the N251 at court. He thought there was a misunderstanding at the outset of the meeting with Mr Marshall. The Respondent said he would go back and check the file and he did so. At the end of the first meeting Mr Marshall showed him the documents he had created. He had said that he had sent them because he genuinely believed that they had already been sent in 2013.

50.18 The Respondent stated that the idea that he should self-report arose out of advice from Mr Marshall. As to whether he adopted Mr Marshall's suggestions, the Respondent stated that there were a lot of things in it that he really struggled with. His self-report was produced in the context of his personal issues including health matters. If he had been in his right state of mind the Respondent would have checked what the self report was intended to do and check the wording both of the firm's report and his own. The self-report sounded as if he was seeking to cover up an earlier omission and seeking to mislead which was not so. He had discussions with Ms SG in 2013 and she was getting her files sorted; her team members were leaving and so she was getting the work done in a stop start way.

50.19 The Respondent stated that it was not until he was put in touch by LawCare with Mr Blatt (who now represented him) that the issue of the contents of the self report came up. When he looked at it he did not recall saying any of these things and that was his position from his first response to the Explanation with Warning letter from the Applicant. As to whether it had occurred to him to self-report, he had understood the purpose of the Applicant but not had an awareness and understanding of what a self- report was or what it was intended to achieve. The self-report was made at a time when the Respondent had no expectations for his own future and he did not give the report much thought. He had no recollection at all of Mr Marshall mentioning that he might want to take independent legal advice about the self report. The Respondent stated that when he prepared the self-report that he "was not thinking at all full stop". It was put to him by the Tribunal that it did not borrow exactly the wording of Mr Marshall's e-mail and so he had given some thought into what he put into it. The Respondent confirmed that he had prepared the self-report himself on his home computer. In respect of the detail of the self-report and the sentence "This is obviously no excuse for my conduct." This was not what he would put in. In respect of the words: "This was totally unacceptable and the creation of those documents was a total aberration on my part of which I am ashamed." This was not his wording. He had already discussed with the client, the funder and the ATE insurer the issue and there was no sense to be ashamed when he discussed it with them. Regarding the reference to apologising, the Respondent stated that this was inconsistent with the circumstances. He had already had discussions with Mr S and he was very supportive and a willingness to apologise was inconsistent with what had happened by that time. The Tribunal referred the Respondent to Mr Marshall's e-mail of 3 November 2014 which included:

> "I foolishly believed I could improve my clients' position, and disguise our oversight, by sending these letters subsequently in the hope that the Defendants would then stop arguing about a debt I believed they knew about from my discussions with them and simply pay up..."

It was pointed out to the Respondent that his wording was different; he used his own words and had not just cut and pasted. He said in the self-report:

> "It is clear to me now that I was not thinking clearly in any way for a variety of reasons, but I think that I foolishly believed that I could improve my client's position and disguise our oversight by sending these letters in the hope that the Defendant would not argue any further about payment of the ATE premium which I believed they were well aware of from my discussions with them. I cannot believe now that I made such a foolhardy decision."

The Respondent agreed that he could see the Tribunal's point.

50.20 The Respondent stated that dishonesty was inconsistent with his recollection of two facts; his discussions with the client in 2014; he confirmed and acknowledged to the client that he could not find and provide the originals of the copy documents. He had to tell the client that there was an issue with filing and it was a very difficult conversation. Also inconsistent with dishonesty were communications which he had with Mr CM the ATE broker and Mr JM (a manager at the ATE insurer) which were recorded in letters and an attendance note about how if the Form had not been received by HD the premium would be recovered. Also he knew that his report within the firm would lead to an investigation of the file which was inconsistent with trying to cover up earlier failings. In cross examination the Respondent rejected the suggestion that what he had done was calculated. It was unusual but if his aim had been to cover up an error and mislead HD he would never have acted as he did. He knew as a litigator that the origin of the document could be traced and if his intention was to mislead and to create documents to be used for the court it would have been done in a fundamentally different way. It did not make sense to seek to mislead HD because the substantial issue of failing to file at court still remained. He knew about the latter and he was not responsible; his assistant confirmed that it was not filed at court. The costs people at the firm said that not filing at court was a "sideshow" and that they would be able to apply for relief in that respect. Sitting where the Respondent now sat he accepted that it would have made sense to tell the truth but discussions with the key people in the case who needed to understand the prospects of recovering the premium, the client, the insurer and the funder confirmed exactly what he said in his evidence. They knew there was an issue regarding service of the Form and there was significant evidence that the other side HD knew about the funding position. The Respondent denied making dishonest statements.

50.21 In cross-examination the Respondent disagreed that failure to give written notice to HD of the funding arrangements would have severely diminished his ability to recover the premium. He and the ATE insurers looked at the case law because this was still a relatively new area and they concluded the issue was more about HD's knowledge of the funding and ATE arrangements than failure to file at court. There were a number of factors relevant to success in obtaining relief apart from the question of service for example the size of the premium and the stage at which the policy was taken out.

50.22 The Respondent stated that the issue for him in creating the documents was demonstrating what happened in 2013. The potential problem regarding standard of work for the client was an issue but not the "be all and end all". The Respondent

accepted that he could have said in his communication to HD that he was sending duplicates of what had been sent in March 2013. He had not had to address the problem before of not being able to demonstrate from a file what he believed was sent With the benefit of hindsight not explaining to HD was his main omission in the case. The Respondent relied on his recollection and the evidence on his daybook that the letter and N251 went to HD in March 2013. There had been a meeting with the funder on 12 March 2013 and policy information was received on 13 March 2013. It was because he had the information to demonstrate what he recalled being sent that he did what he did and it was in the context of two conversations with Ms SG after the mediation and after the settlement that they had not checked their files. He was demonstrating by sending the documents that HD was aware of the funding and premium levels from March 2013. As to why he had not kept the draft version of the Form, he had left his daybook at the firm when he left. There had been a bundle of documents including the draft form, details of the insurance and pleadings but all of those had been taken out of the file. As to whether it had occurred to him to send the hand written Form to HD, he did not think it through.

50.23 In cross examination the Respondent accepted that the 2 May 2014 documents were presented in a misleading way and that HD could be misled but they were not misled because they were reviewing their files and ultimately HD said it never received the Form N251. As to why the Respondent accepted that what he had done was wrong, he stated that with hindsight he could not obtain from his firm's files the documents that he genuinely believed had been sent and so he said "Here are copies of what we sent." He rejected the suggestion that he was stuck with that line and had to carry on with it. HD held the matter up for a year by not sorting it out. If the issue had not come up with Mr Marshall, service of the N251 could have been dealt with by witness evidence.

50.24 The Respondent accepted that he could not possibly remember the wording of a letter sent on 19 March 2013. He stated that there was an entry on his time recording system regarding a letter of that date. Although it was agreed evidence he did not have a clear recollection of finding a different case with the BP LLP letterhead to use as a template which he opened and then modified and printed out twice. It was not a methodical and calculated exercise. It was done in some haste. The Respondent stated that there would have been other letters with the BP LLP heading on Mr S's file. It was put to him that he had made two attempts at the document but he did not remember. He absolutely rejected the assertion that he omitted the figure 2 after Manchester in HD's DX address in the 19 March 2013 letter deliberately; it was a cut-and-paste job from another letter to HD.

50.25 The Respondent was referred to the response submitted by his solicitors on 2 March 2015 and his witness statement. His solicitors said:

> "[The Respondent] accepts with the benefit of hindsight (that being a wonderful thing) that he did not think through what he did and accepts that he should have made it clear in the correspondence to HD that this was a Duplicate of a letter and form which had been sent to them previously. This is his major regret in this case ..."

50.26 In his witness statement dated 22 January 2016 he said:

> "I did no more than replace the missing letter and document that I have previously completed and sent…
>
> I accept, with the benefit of hindsight, that I did not think through the wording of the letter to HD and I should have made it clear in the correspondence to HD that this was a duplicate of a letter and form which had been sent to them previously or which we believed had been sent to them previously. However, it does say in the covering letter that was sent to HD that they were being sent a copy of the earlier correspondence, but I accept that this could have been made clearer.
>
> When I sent the letter to [HD] in May 2014, I did not try to mislead them; I was simply seeking to demonstrate what I believe to be the true position. The issue was that over the next few months after sending the copy documents, I did not pay full attention to this case for all the reasons set out below, particularly in relation to instructions to the cost team at [the firm] and my communications with the costs team.
>
> My intention behind sending a copy of the form to HD in May 2014 was to provide a copy of what had been sent to them in 2013. I thought it would lead to them reviewing their files and locating the form which had previously been sent to them, given that I knew other correspondence to HD had previously been mislaid. If necessary, I intended to explain the position in a witness statement if the matter had to go to costs assessment proceedings…"

50.27 The Respondent maintained that the first sentence quoted above was true. He was asked why he had not given his explanation at an earlier time. He stated that he had said to Mr Marshall that this was a copy of a document that he maintained been sent in 2013. Mr Williams referred the Respondent to the statement of Mr EW where he described the process by which the Form N251 had been created on 2 May 2014. The Respondent stated that he did not what know why the document had been open for over four hours. He described the Form as a copy of his handwritten draft produced from the Indication of Terms. The Respondent stated that the Indication document dated 13 March 2013 was very close to an insurance policy; it confirmed cover and conditions and when one received the final policy document it was not fundamentally different from the Indication document which was used with input from the insurers as confirmation for the N251. The Respondent agreed that the N251 was dated 19 March 2013. By that date Mr S had accepted the terms which were then confirmed in writing but he had accepted by telephone acting on the Respondent's recommendation and to a large extent from the ATE insurer and funder that indications of the policy wording would be as on the N251. There was a note of a conversation with KA of the funder that everything was being done in order to get the Form served by the end of March 2013.

50.28 The Respondent rejected the assertion that he was setting his own standards of what honest conduct meant. He believed it was a true statement when he said in his e-mail of 2 May 2014 "I attach a copy of our correspondence last year". He rejected the suggestion he went to some trouble to create and send it in order to improve the

client's position regarding his costs. The critical issue was whether the other side were aware They were aware and knew about it in 2012. It was clumsy to say the least to use the words he did in respect of correspondence he had created that day but the intent behind it was to send a copy of what he believed was sent in 2013. The Respondent defended the statement in the letter of 21 July 2014 to HD: "The form N251 was sent to your firm as we have evidenced." because in the context of the few discussions he had had with Ms SG, HD was still in the process of reviewing its files. He was not washing his hands of this letter which he had signed and he agreed that the letter constituted digging one's heels in and reinforcing the e-mail of 2 May 2014 but Ms SG was apologising and HD had not got to the point of saying that they had not received the Form and the Respondent pointed to the next sentence of the letter which said: "Further, the funding arrangements for the case were discussed with your firm throughout the progress of the litigation."

50.29 The Respondent accepted overall responsibility for the firm's letter to Ms SG on 14 August 2014, but stated that this letter was drafted by the costs team. It was put to him that he had opportunities to correct these statements and to be frank. The Respondent stated that during the period from May 2014 until the Points of Dispute were served was five months and he only had two conversations with Ms SG and prepared one letter. The costs team was managing it. The matter did not receive his full attention if any attention from August 2014 on when the client made his complaint. It was not an issue that he was working on weekly or monthly and considering how the firm should deal with it. The issue was with HD reviewing their files. The other side's insurer A had changed their claims management and the files had gone to his former firm. The team at HD had changed; Ms SG said she was struggling regarding the work with which she had to deal.

50.30 The Respondent was asked whether he made any challenge to Mr Marshall's evidence that the firm could not find evidence on the files that the documents had been sent in March 2013. The Respondent stated that he knew there was correspondence with the funder, HD and the client including e-mail correspondence with the client asking him if he had certain documents which were not on the electronic file and should be. Also the client had wanted an expert's report from the firm which was not there and the firm had to go back to the expert to obtain it.

<u>Determination of the Tribunal in respect of allegation 1.3</u>

50.31 The Tribunal had regard to the evidence including the oral evidence and the submissions for the Applicant and the Respondent. There were three key documents to which this allegation applied; the Respondent's covering e-mail of 2 May 2014, the firm's letter of 21 July 2014 and the firm's letter of 14 August 2014. The Tribunal found all three documents sent by the Respondent on 2 May 2014 to be quite unequivocal in their terms. The e-mail of 2 May 2014 stated: "I attach a copy of our correspondence last year with notice of funding." The statement left the Respondent no room for manoeuvre. It was irrelevant whether he believed that he had sent equivalent documents in 2013 because that was not what he said in the e-mail. The documents attached were not true copies of anything sent by the Respondent or his firm to HD the previous year and he knew that. He created these documents without being able to say that they were exact replicas of what he asserted he had sent before and he accepted that in cross-examination in respect of the letter dated 19 March

2013. It was clear that the purpose of the production of the three documents was to send them to HD. However his asserted motive was to provoke HD to search their files. The Tribunal found this not to be credible; if that was his purpose he would have written in different terms.

50.32 The Tribunal noted that the 21 July 2014 letter which the Respondent testified was prepared by the costs team following his handing the file over to them, had his signature and he accepted that he signed it. It used the key and misleading words "as we have evidenced". The Respondent may not have read the letter in detail but he knew that the backdated documents were being relied on by the costs team in negotiating costs with the other side, a negotiation which might have to be resolved in court. The Tribunal considered that the letter was not accurate as the Respondent knew he could not evidence the Form. The 14 August 2014 letter was, the Respondent believed, written by the costs team. Mr Treverton-Jones said that the Respondent accepted that he probably saw it. It perpetuated what had been said in the earlier letter but went into greater detail. The keywords were "The form was sent to you on 19 March 2013… From the above it is clear that you were provided with notice of funding…" The Tribunal considered that in sending the e-mail of 2 May 2014 the Respondent relied on the backdated documents as evidence in supporting his position as alleged and that in respect of the letters of 21 July 2014 and 14 August 2014 he acquiesced in others at his firm relying on them also. The correspondence formed part of a piece of litigation and in acting as he did the Tribunal found that the Respondent failed to uphold the rule of law and the proper administration of justice (Principle 1). The Tribunal also found that the Respondent acted with lack of integrity (Principle 2). Such action would also diminish the public's trust in the Respondent and the profession (Principle 6). Tribunal therefore found allegation 1.3 proved on the evidence to the required standard.

Determination of the Tribunal in respect of allegation 1.4 dishonesty

50.33 In respect of the allegation of dishonesty attached to allegation 1.3, the Tribunal had regard to the evidence including the oral evidence and the submissions for the Applicant and the Respondent. It applied the two limbed test for dishonesty set out in the case of Twinsectra and quoted by Mr Williams.

50.34 The Tribunal considered carefully the Respondent's evidence that he honestly believed he had sent a letter to HD on 19 March 2013 enclosing Form N251. This was the subject of the first of the questions which Mr Treverton-Jones had posed. The Tribunal first considered whether a covering letter and Form N251 had been sent to HD in March 2013 in advance of the deadline for the change to the CPR rules about recovery of an ATE premium. The Tribunal did not overlook the submission that the documents in Mr S's case ran to 12 to 14 boxes, however the information before the Tribunal was clear; there was no evidence that documentation had been sent to HD in March 2013. The Tribunal considered the Respondent's explanation that there was no trace of the Form N251 on the firm's systems because he had used a computer program PDF Filler. Even if this were the case and it left no trace on the firm's systems of the document itself, following normal office procedure the Respondent would have created the covering letter on the firm's system but no trace could be found of that either. The Tribunal had the benefit of Mr EW's evidence about searches of the firm's systems and the Respondent's own evidence of his inability to

find contemporaneous copies of any such documents as opposed to the reconstructed duplicates which he admitted to creating. Even if the Tribunal accepted the Respondent's evidence that a handwritten draft existed and had disappeared, it undermined his credibility that he had not added it to the file either electronically or in hard copy. There was then the obstacle that the electronic and paper filing systems contained no copy of any contemporaneous covering letter which the Respondent asserted that he was sure he had sent. The Respondent asserted that documents were missing from the electronic file and the paper file for the relevant period. The best evidence that the Respondent could produce that the Form N251 existed in March 2013 was his own oral evidence that he had a handwritten draft of it in his daybook up until he left the firm and that he used that handwritten draft as the basis for the document he created in May 2014. He also stated that the handwritten draft was among a wad of loose documents which he asserted had disappeared from the daybook. The Tribunal considered that his reliance on the retention of a draft was suggestive that a final typewritten version was not prepared. He admitted that he had not retained a copy of the completed finalised Form in his daybook and could give no reason for that omission. The Form N251 was certainly a key document because of the impending deadline for the change in the CPR rules. Given his reliance on his daybook it was not credible that the Respondent had failed to add a copy of such a vital document to the key documents he kept there. The only other evidence to support the assertion that the documents had been sent in March 2013 was a reference by the Respondent in his oral evidence to a time recording entry for a letter to HD on 19 March 2013. However that did not constitute proof of the contents of any such letter or that it was signed and dispatched on that day. The evidence before the Tribunal led it to conclude that a covering letter and Form N251 were not sent in March 2013 to HD.

50.35 The Tribunal then had to consider whether the Respondent honestly believed that a letter dated 19 March 2013 and Form N251 were sent. On the Respondent's own evidence he became aware in January 2014 during the course of the mediation process that the opponent's solicitors HD were asserting that they had not been served with the Form N251. At that point as already noted, the appropriate conduct would have been for the Respondent, having carried out the appropriate checks as to whether the Form had been served on HD and finding there was no evidence on the electronic or paper files that it had, to have applied to the Court for relief from sanction which had to be done promptly. He should also have reported to his colleagues that there was a potential claim against the firm. These failures were not the subject of any allegation but were part of the context of the case.

50.36 In respect of Mr Treverton-Jones' second question as to whether the Respondent continued to have a genuine honest belief at the time he created the two documents; the evidence upon which he relied for that belief was very flimsy. The Tribunal had considered in connection with allegations 1.1 and 1.2 and not found credible his reliance on the possibility that HD would find the documents in its files and that it had been toying with searching for them for some nine months (see paragraph 49.14 above). Even if he only had a handwritten draft to produce to HD it would have been very easy if somewhat uncomfortable for him to communicate with HD, provide a copy of the draft and explain that he could not find copies but was convinced that the originals had existed and had been sent and to ask HD to carry out a search of their files. The Tribunal noted that he did not produce the draft to HD in May 2014 when

he was still at the firm and in possession of his daybook and he could not on his own evidence produce it to the Tribunal at the hearing. The Tribunal was not satisfied that the handwritten draft existed. It considered that the Respondent could not simply admit to having created the backdated documents but used the device of the draft to justify having done so. Whether or not the draft existed, the Respondent had the option of a frank explanation to HD in order to prompt a search of their files. Instead he chose to adopt a course of action which at the very least he admitted was wrong; he created two documents the purported copy covering letter dated 19 March 2013 and the purported copy Form N251. The Tribunal considered that the Respondent's actions in creating the 19 March 2013 covering letter and the Form N251 were evidence that led to the inescapable conclusion that at least from January 2014 when he was alerted to HD's concerns and could find no supporting evidence for any belief that he had dispatched the documents at the appropriate time, that he did not have a genuine belief that he had done so and that at the time of creating the backdated documents the Respondent did not have a genuine belief that he had prepared and served the originals on the other side in March 2013. As to the third of Mr Treverton-Jones' questions, regarding whether the Tribunal accepted the Respondent's evidence that LC of HD was aware of the ATE insurance, the Respondent had emphasised that he had told HD on one or more occasions that Mr S had ATE funding but the Tribunal considered that this was only relevant in the context of an application for relief from sanction and LC's knowledge was not the sole determinant of whether relief from sanction would be obtained.

50.38 The Respondent had relied heavily in his defence on repudiating parts of the self-report and the Applicant relied on it so the Tribunal considered the context and contents of the self-report in some detail. Of the meeting on 22 October 2014 between Mr Marshall and the Respondent in the presence of Mr K his Business Group Head, Mr Marshall said in his statement:

> "[The Respondent] told me that he had printed the documents of our electronic file for Mr [S's] case on our IT system when [HD] had raised the question of service…"

Mr Marshall's evidence was not challenged. The Respondent had begun his interactions with his colleagues in respect of the backdated documents with a lie although this was not the subject of any of the allegations. When they met again at 6:25 p.m. the same day the Respondent told Mr Marshall;

> "that he had been reflecting and did need to tell us Form N251 had been created by him on 2 May 2014… I asked him if he also accepted the covering letter was created in the same way but he said he could not remember..."

At the meeting the following day at which the Managing Partner was present Mr Marshall recorded in his statement: "I asked him again about the covering letter and he said that the same must apply as with the Form N251..." The Tribunal considered that after that series of events Mr Marshall had no choice but to file a report to the Applicant. The Tribunal noted this was the first time that the Respondent accepted that he created the backdated document. Mr Marshall's manuscript notes compiled no later than shortly after the last of the three meetings supported what he

said in his witness statement. The Respondent completely accepted Mr Marshall's evidence on these points.

50.39 In the firm's report to the Applicant which Mr Marshall prepared it was stated:

> "[The Respondent] therefore made a false representation (on 2 May 2014 and subsequently) to [HD] that the documents attached to his e-mail of 2 May 2014 were sent to [HD] on 19 March 2013."

Having had the benefit of seeing the firm's report to the Applicant which was sent on 24 October 2014, the Respondent prepared his self-report dated 4 November 2013. The Tribunal noted the e-mail exchanges between the Respondent and Mr Marshall about the drafting of the self-report which showed that the Respondent in his own words had sent a draft of it to Mr Marshall earlier in the week. He then sent an amended draft on 2 November 2014 inviting Mr Marshall's comments in response to which Mr Marshall suggested text. The Tribunal considered that the final version of the self-report was a rational document which was well prepared and comprehensive and had been put together over a period of days. The Respondent sought comments from Mr Marshall and partially adopted his wording. The Tribunal did not consider this to be the document of an irrational or troubled man who was not concentrating on the issues. Mr Treverton-Jones had submitted that at the time he prepared the report the Respondent had been contemplating taking his own life and did not care what he wrote but merely cut and pasted from Mr Marshall's suggestions. The Tribunal did not consider that this described the document the Respondent had sent the Applicant. The Tribunal also accepted Mr Marshall's evidence which was supported by his handwritten note that at the 23 October 2014 meeting he "advised [the Respondent] that he may need to seek legal advice himself in relation to his regulatory position…" The Respondent testified that he had no recollection of being told that but the Tribunal found that it had occurred. The self-report followed upon the Respondent admitting to his colleagues what he had done regarding the backdated documents. It was possible that with the benefit of hindsight the Respondent might have wished to change a few points in the document but the Tribunal found that the self-report was a true statement of what had happened, of the Respondent's feelings and his motivation for what he had done. It was entirely credible that as he said in the self-report that having created and sent the backdated documents he found it difficult to turn back and that it was a relief to him when the firm identified the issue and raised it with him. The Tribunal also noted that the Respondent had addressed the issue of honesty in his self-report;

> "I have never come close to even considering doing anything like this before and have always been clear and honest with my clients. I believe that my honesty is one of the things that my clients really appreciate about me…"

These were not words which had been adopted from Mr Marshall's e-mail of 3 November 2014; they were the Respondent's own words. The Tribunal also noted that the firm's report to the Applicant made no reference to honesty. The Tribunal accepted that the Respondent adopted Mr Marshall's words in respect of his motivation being to improve his client's position but there was no need for him to have added the reference to honesty.

50.40 The Tribunal addressed additional issues raised by Mr Williams. He had placed some emphasis on an error in the DX address (the omission of the figure 2 after Manchester) which the Respondent used for HD in the purported letter of 19 March 2013. The Tribunal did not attach any weight to this discrepancy in the address and was not satisfied that it represented any calculated attempt by the Respondent to create a doubt in the minds of HD that the document had been sent and not received. Mr Williams had also pursued a line of questioning challenging the validity of sending a Form N251 when the contract of insurance had not been issued. The Tribunal did not consider that the Respondent's use of the date of 13 March 2013 as the date in which the ATE policy had been issued had any significance in terms of allegation 1.3. The content of the purported copy Form was irrelevant; what was material to all the allegations was the fact of its creation and in respect of allegation 1.3 its deployment.

50.41 The Tribunal found that by creating the backdated documents and seeking to persuade HD that they had been served, the Respondent invited HD to accept that was the position and thereby avoiding the need to seek relief which would be of benefit to him and the client and the Tribunal found this to be the case. The Tribunal noted that it was Mr Marshall who suggested to him that he referred to this in the self-report. The consequences of non-service on the other side were much more serious than failure to file the Form N251 with the Court whether Mr Treverton-Jones' analogy to the Civil Procedure provisions was valid or not as other factors than knowledge were involved in a decision regarding relief from sanction. The Tribunal rejected the Respondent's defence based on the premise that he created and used the documents in order to provoke HD into searching files and finding the Form. He might have believed that the notice had been served originally but once that was questioned in January 2014 and had become a certainty by May 2014 he could not have held that genuine belief. The Tribunal wished to make clear that it arrived at its conclusions about the allegation of dishonesty based on the Respondent's evidence and on the documents in the case. It regarded the self-report as supportive of its conclusions. Based on the evidence the Tribunal considered that by the ordinary standards of reasonable and honest people the Respondent's actions in relying on the backdated documents he had created and by acquiescing in others at the firm doing the same would be considered dishonest and that the objective test in the case of Twinsectra was satisfied.

50.42 As to the subjective test, the Tribunal considered that the Respondent found himself in the position of having made a mistake regarding non service of the Form N251 which left his firm with the potential exposure of over £181,000 in terms of the premium which had to be paid back to the client Mr S. At the very latest by May 2014 he knew that he could not prove service of the Form on HD and must have had very serious doubts about whether service had been effected. He then consciously covered up his failure and then acquiesced in the costs team innocently doing the same and continued with his denial at least in respect of the covering letter dated 19 March 2013 in the first interview with Mr Marshall on 22 October 2014. While he might not have had the S matter in the forefront of his mind over the summer he did nothing to correct the false impression which the 2 May 2014 email and attached documents on the file would have given the costs team. The Tribunal had seen and heard evidence about various medical problems of a serious nature which had affected the Respondent and also close members of his family but it had no evidence that he was incapable of realising what he was doing at the material time. Mr Marshall had testified that the

Respondent had an average workload. The medical report which was before the Tribunal was undated. The Tribunal had been informed that it had been prepared in the summer of 2015 but for other purposes than these proceedings. The Respondent in evidence had expressly stated that he did not seek to rely on his personal circumstances in respect of what he did in May 2014 but rather that they affected him in the summer of that year. He had shown himself to be capable of drafting a comprehensive and well prepared self-report at the end of October and early November 2014. Furthermore he had accepted unreservedly in evidence and Mr Treverton-Jones had emphasised that there was no suggestion that he had been "leaned on" by Mr Marshall. The Tribunal found that the Respondent had a choice in May 2014 of applying to the court for relief from sanction and if that failed resorting to the firm's PI insurance in respect of his oversight but instead he chose to create and deploy backdated documents as if they were genuine copies of originals and in doing so the Respondent knew that he was being dishonest and the subjective test was therefore satisfied. Accordingly the Tribunal found dishonesty proved in respect of allegation 1.3 on the evidence to the required standard.

Previous Disciplinary Matters

51. None.

Mitigation

52. For the Respondent, Mr Treverton-Jones submitted that the Tribunal was well aware of the authorities which related to exceptional circumstances giving grounds to avoid the ultimate sanction of strike off. The Respondent had had no previous difficulty with his regulator nor any arising after resigning from the firm. He had made a successful transition to the role of consultant elsewhere. At his new organisation all the solicitors were consultants who received 70% of the fees that they brought in. He had taken all his clients with him when he moved. Mr Treverton-Jones submitted that the most serious misconduct related to creating the two backdated documents although dishonesty had not been alleged in respect of it. He invited the Tribunal to take the view that there had been a combination of circumstances which he submitted amounted to exceptional circumstances. The Respondent had a lot to face in the summer of 2014. He had never previously set a foot wrong and suddenly behaved as he did. The explanation was what was going on in his personal life and in those circumstances Mr Treverton Jones asked that he be allowed to remain on the Roll.

Sanction

53. The Tribunal had regard to its Guidance Note on Sanctions, to the mitigation offered for Respondent and to the testimonials which had been submitted. An allegation of dishonesty had been proved against the Respondent and he had also been found in breach of Principles 1, 2 and 6 of the SRA Code of Conduct 2011. Even without the dishonesty proved in respect of allegation 1.3, the finding of lack of integrity in respect of allegations 1.1 and 1.2 in creating backdated documents placed the Respondent's misconduct at the more serious end of the scale. A finding of lack of integrity could itself lead to strike off and as had been said in the case of Bolton v The Law Society [1994] 1 WLR 512 one of the purposes of sanction was:

> "the most fundamental of all: to maintain the reputation of the solicitor's profession as one in which every member, of whatever standard, may be trusted to the ends of the earth."

The Tribunal had regard to the full range of sanctions available to it but it was stated in the Guidance Note that the most serious misconduct involved dishonesty whether or not leading to criminal proceedings and criminal penalties. A finding that an allegation of dishonesty had been proved would almost invariably lead to striking off, save in exceptional circumstances as Mr Treverton-Jones acknowledged. The dishonesty had lasted from 2 May 2014 when the Respondent relied on backdated documents until October 2014 when the firm discovered what he had done. Exceptional circumstances could only be considered in relation to that period and the Respondent in evidence specifically accepted that he did not seek to rely on his personal circumstances in respect of what he had done in May 2014 when the conduct the subject of allegations 1.1 and 1.2 had taken place. The Respondent said in his statement that health and personal issues fundamentally affected his judgement and performance at work particularly in the latter part of the summer and autumn 2014 and when he submitted the self-report and that they also affected his recollection of certain events. In the Guidance Notes it was stated that particular matters of personal mitigation that might be relevant and might serve to reduce nature of the sanctions, and/or its severity included that the misconduct arose at a time when the respondent was affected by physical or mental illness that affected his ability to conduct himself to the standards of the reasonable solicitor. Such mitigation should be supported by medical evidence from a suitably qualified practitioner. The Tribunal had not been provided with such medical evidence. The Respondent did not come within the other categories set out in the Guidance Note. The Tribunal found that the Respondent might well have been affected by personal issues but the Tribunal had no evidence that any of them affected his working to the standard expected of a solicitor. The personal matters he relied on could amount to personal mitigation but not to exceptional circumstances regarding the allegation of dishonesty which been found proved. The Tribunal therefore considered that strike off was the appropriate sanction.

Costs

54. For the Applicant, Mr Williams applied for costs in the amount of £19,981.50. Mr Treverton-Jones submitted that there had been no discussions between the parties about costs but in the light of the Tribunal's finding the Respondent accepted that he would have to pay costs and he did not challenge the contents of the Applicant's costs schedule. The Tribunal noted in respect of the Respondent's ability to pay costs that he had assets and had previously been in receipt of income which met his expenses. There was some equity in his house and he might be able to obtain employment. It summarily assessed costs in the amount of £19,000.

Application to defer the implementation of Sanction

55. For the Respondent, Mr Treverton-Jones applied for the implementation date for strike off to be deferred for 28 days. He submitted that the Respondent was a consultant working in an organisation which was not a traditional partnership. The Respondent could not just pass cases to someone else as all the other lawyers in the organisation were also self-employed consultants. The Respondent would therefore

have to attend to the distribution of his caseload. It did not seem right that he could not operate for the next couple of weeks or so to ensure the efficient distribution of the 15 to 20 cases upon which he was working. Mr Treverton-Jones understood that the Respondent had two or three reasonably urgent matters including the decision of an adjudicator which was due on the day of the hearing and proceedings which needed to be issued the following week. Mr Williams opposed the application on the grounds that the Respondent had been struck off for dishonesty and it would not be consistent with that finding to allow him to remain in practice. Hopefully the mechanics of the distribution of his case work could be dealt with effectively in the same way as they would if he were a sole practitioner.

56. The Tribunal had regard to the submissions for the Respondent and for the Applicant. It had to consider the public interest and the reputation of the profession as well is the interest of Respondent's clients. The Tribunal did not consider that the matters which were being relied on were of such urgency that arrangements could not be made for them to be dealt with appropriately and taken together with its finding of dishonesty, the Tribunal did not consider that it would be appropriate to grant the application.

Statement of Full Order

57. The Tribunal Ordered that the Respondent, John Michael Malins, Solicitor, be Struck Off the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £19,000.00.

Dated this 1st day of June 2016
On behalf of the Tribunal

K.W. Duncan
Chairman