SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11427-2015

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

NORMAN LUPER Respondent

Before:

Mr J. P. Davies (in the chair)
Mrs A. Kellett
Mr R. Slack

Date of Hearing: 8 June 2016

Appearances

Mr Andrew Bullock, Counsel employed by the Solicitors Regulation Authority of The Cube, 199 Wharfside Street, Birmingham B1 1RN for the Applicant

Mr Augustus Ullstein QC of 39 Essex Chambers, 81 Chancery Lane, London WC2A 1DD, instructed by Carr & Kaye Solicitors, 131 Great Titchfield Street, London WC1W 5BB

JUDGMENT

Allegation

1. The allegation against the Respondent made on behalf of the Solicitors Regulation Authority was that:

1.1 on or about 10 September 2014, he amended a Report on Lease of Shop & Premises on the Ground Floor, 4 CB, Ealing, London dated 10 July 2012 so as to make it appear that his client M Limited had received advice within that document which it had not received and thereafter sent that Report to his client. In so doing he:

1.1.1 breached Principle 2 of the SRA Principles 2011; and/or

1.1.2 breached Principle 4 of the SRA Principles 2011; and/or

1.1.3 breached Principle 6 of the SRA Principles 2011; and/or

1.1.4 failed to achieve Outcome O (1.2) of the SRA Code of Conduct 2011.

Whilst dishonesty was alleged with respect to this allegation proof of dishonesty was not an essential ingredient for proof of the allegation.

Documents

2. The Tribunal reviewed all the documents including:

Applicant

- Rule 5 Statement dated 8 September 2015 with exhibit AJB1
- Statement of Agreed Facts dated 3 June 2016
- Judgment in the case of Solicitors Regulation Authority v Sharma [2010] EWHC 2022 (Admin)
- Judgment in the case of Solicitors Regulation Authority v Imran [2015] EWHC 2572 (Admin)
- Applicant's statement of costs as at date of final hearing dated 31 May 2016

Respondent

- Letter to the Tribunal from Carr & Kaye Solicitors dated 8 March 2016 by way of answer to the Rule 5 Statement
- Outline Submissions of the Respondent - Updated drafted by Mr Augustus Ullstein QC dated 27 May 2016
- Report of Dr M. McPhillips dated 2 November 2015
- Report from the Respondent's GP dated 9 May 2016
- Report of Regulatory Settlement Agreement dated 13 May 2016 in the case of 009360 Rickard from the Applicant's website
- Testimonials

Preliminary Issue

3. The Tribunal noted that a Statement of Agreed Facts had been submitted in advance of the hearing which was signed and dated by both parties on 3 June 2016. In it, the Respondent admitted the allegation made against him in the Rule 5 Statement: "including, for the avoidance of doubt, the allegation of dishonesty". The Tribunal had also received Outline Submissions made for the Respondent by Mr Ullstein QC. The Tribunal enquired whether the medical report of Dr M. McPhillips dated 2 November 2015 was agreed by the parties. For the Applicant, Mr Bullock submitted that the report had been obtained for the Respondent and formed part of his case. It could be treated as unchallenged but should not be treated as agreed.

4. The Tribunal wished to be certain that there was clarity about the admission of dishonesty made by the Respondent as he had submitted medical evidence. The Tribunal referred to the case of Bolton v The Law Society [1994] 1 WLR 512 where it was stated:

> "...Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors."

The Tribunal employed the combined test for dishonesty set out in the case of Twinsectra Ltd v Yardley [2002] UKHL 12, where Lord Hutton had said:

> "...there is a standard which combines an objective test and a subjective test, and which requires that before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest. I will term this "the combined test"."

5. The Tribunal had in mind that medical evidence could be adduced in respect of an allegation of dishonesty in different ways. For the Applicant, Mr Bullock submitted that the medical report in question did not state that the Respondent's judgement might have been affected by any medical condition but that the Tribunal could take the medical evidence into account when determining whether there was any exceptional circumstance in respect of the dishonesty. Guidance on exceptional circumstances was set out in the case of Solicitors Regulation Authority v Sharma [2010] EWHC 2022 (Admin). The Tribunal pointed out that the report of Dr McPhillips said "it is possible that depression also affected his judgement..." Mr Bullock submitted that the report did not go further and address the second and subjective element of the test in Twinsectra. He pointed out that the Respondent had been in receipt of legal advice throughout the proceedings and that his Leading Counsel at the hearing was experienced in regulatory matters.

6. For the Respondent, Mr Ullstein declined the offer of being provided with an earlier judgment of the Tribunal involving medical evidence and dishonesty; the Respondent in this case had recognised within a very short time of altering the report in question that it was wrong and dishonest to have done so. Mr Ullstein could not put the Respondent's case as high as saying that the second limb of the test in Twinsectra was not satisfied.

Factual Background (based on Statement of Agreed Facts subject to minor editorial changes)

7. The Respondent was born in 1948 and was admitted to the Roll of Solicitors in 1978. His name remained upon that Roll. He did not presently hold a practising certificate.

8. From 31 March 2009 until 16 September 2014, the Respondent was employed as an Associate at Gillhams Solicitors LLP ("the firm") in London.

9. The Respondent acted for M Ltd ("the client"). In or about July 2012, the Respondent was retained by M Ltd to act on its behalf in relation to the taking of a lease of the ground floor premises situate at and known as 4 CB, Ealing, London ("the commercial transaction") from the reversionary owner T Ltd for a term of 10 years. The Respondent was instructed to Report on Title in respect of the lease.

10. The lease in question contained covenants upon the part of M Ltd which prevented that company from assigning the whole of the demised premises to an assignee other than, amongst other things, a "Qualifying Person" within the meaning of the lease (Clause 3 (26) (d) (ii) (C)).

11. The lease defined a Qualifying Person as meaning an assignee who, in the case of a limited company was amongst other things:

> "... a limited company incorporated in England and Wales with annual profits before tax in three complete trading years immediately preceding the date of the application for a licence to assign which in each year… exceed an amount representing the yearly rent service charge and insurance rent payable…at the date of the application multiplied by three…" (Clause 3 (26) (d) (iv) (A)).

12. In the course of that retainer the Respondent prepared a Report on the Lease dated 10 July 2012 "(the original report"). Although that Report discussed the covenants containing restrictions upon assignment contained within the lease, it did not explain the specific restrictions which existed upon an assignment to a limited company with respect to the need for such a company to have trading profits exceeding the yearly rent as provided for within Clause 3 (26) (d) (iv) (A).

13. By an e-mail timed at 14.04 on 10 September 2014, Mr ND the managing director of M Ltd asked the Respondent to send him a copy of that Report. The Respondent replied to that e-mail at 15.32 that same day attaching what purported to be a copy of that Report.

14. The purported copy of the Report sent to Mr ND at that stage was identical to the original except that the words:

> "...The proposed assignee will need to show previous years trading profits exceeding the rent..."

had been added into the guidance upon the terms of the lease concerning alienation. These words were absent from the original report.

15. On 10 September 2014, the client contacted a partner at the firm and advised him that the original report appeared to have been altered. This was investigated by the firm and on 17 September 2014 the firm's Compliance Officer for Legal Practice and the Respondent, separately reported the matter to the Applicant.

16. On 19 September 2014, the Respondent wrote a further letter to the Applicant in order further to clarify the situation regarding his conduct. In this letter he stated:

> "... The situation is that on the 10 day (sic) of September 2014 I was requested by a client to e-mail him a copy of my Report on Title on a commercial lease that he had purchased in July 2010. I was aware that the client had intended to assign this commercial lease but there had been difficulty in doing so due to the fact that the landlords had inserted a fairly restrictive condition on their granting a licence to assign. I obtained a copy of the Report and I noted that it had not specifically referred to the restrictive condition. I panicked and in a terrible moment weakness I altered the report on title…"

17. On 7 April 2015, the Respondent was asked to respond to two statements being:

> "On 10 September 2014 you were asked by a client of the Firm to provide it with a copy of a Report on Title relating to a commercial lease that he had purchased in July 2010 ("the Report").
>
> At the time of the request you were aware that the client had been experiencing difficulty in assigning the lease. The difficulty was due to a condition within the lease restricting the client's ability to obtain a licence to assign from the landlord ("the Restrictive Condition")
>
> Upon reviewing the Report you identified that it did not refer to the Restrictive Condition. You subsequently altered the Report to make the reference to the Restrictive Condition and provided the amended Report on Title ("the Amended Report") to the client. You did not advise the client that the references to the Restrictive Condition had not appeared in the Report.
>
> The differences between the Report and the Amended Report were subsequently identified by the client…"

18. On 19 April 2015 by way of a letter, the Respondent stated: "I accept your recital of the background" and he admitted the allegations against him.

19. The Respondent admitted that he amended the Report on Title so as to make it appear that it had referred to the restrictive conditions with respect to assignment within the lease.

Witnesses

20. There were no witnesses save that the Respondent gave evidence as to the facts in the case and in relation to his state of mind, medical condition and in mitigation (see below).

Findings of Fact and Law

21. 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.

22. **Allegation 1. The allegation against the Respondent made on behalf of the Solicitors Regulation Authority was that:**

1.1 on or about 10 September 2014, he amended a Report on Lease of Shop & Premises on the Ground Floor, 4 CB, Ealing, London dated 10 July 2012 so as to make it appear that his client M Limited had received advice within that document which it had not received and thereafter sent that Report to his client. In so doing he:

1.1.1 breached Principle 2 of the SRA Principles 2011; and/or

1.1.2 breached Principle 4 of the SRA Principles 2011; and/or

1.1.3 breached Principle 6 of the SRA Principles 2011; and/or

1.1.4 failed to achieve Outcome O (1.2) of the SRA Code of Conduct 2011.

Whilst dishonesty was alleged with respect to this allegation proof of dishonesty was not an essential ingredient for proof of the allegation.

22.1 For the Applicant, Mr Bullock reminded the Tribunal that all the allegations including dishonesty were admitted and invited the Tribunal to dispose of the matter on the basis of the facts recorded in the Statement of Agreed Facts dated 3 June 2016 signed by both parties. In his submissions he would draw out the key features and documents. In the course of advising the client the Respondent made the Report on Lease dated 10 July 2012 in which he referred to the covenants against alienation but did not identify the onerous covenant regarding assignment to a limited company. The material part of the Report was as follows:

> "(l) with regard to alienation:
>
> > (i) Not to assign the whole of the premises without the Landlord's consent such consent not be unreasonably withheld or delayed. Upon any assignment the Landlord shall request you to enter into an Authorised Guarantee Agreement which basically means that you in turn will be guaranteeing your successors in title should they default

under any of the terms of the Lease. This is quite a normal arrangement in commercial leases."

Mr Bullock referred to the exchange of e-mails on 10 September 2014 when in response to a request from Mr ND the Respondent provided him with what purported to be a copy of the Report, "purported" because the copy had been amended to make reference to the restriction contained in the lease about assignment to a limited company. The Tribunal enquired why Mr ND asked for the copy as he already had one. (Mr ND provided a copy of the relevant part of the original Report and of the amended copy when he contacted the firm on 10 September 2014). Mr Bullock did not have that information. The Respondent was challenged about the matter the day following the client making contact expressing concern that the report had been altered. An attendance note dated 11 September 2014 recorded that the Respondent "initially denied that he had amended the Report on Title and blamed "computers"." It continued that the Respondent very quickly made admissions when he was informed that an investigation had been carried out and the computer records had been checked which showed that he had modified the Report at 15.31 on 10 September 2014 before sending the amended copy to the client at 15.32. After making admissions he left the office. Mr Bullock submitted that it was to the Respondent's credit that he made a self report to the Applicant and that in his subsequent letter of 19 September 2014 he made admissions which he maintained up to and including the hearing before the Tribunal.

Determination of the Tribunal in respect of allegation 1.1

22.2 The Tribunal considered the submissions for the Applicant and for the Respondent based on the Statement of Agreed Facts which was presented by the parties. The Tribunal found proved that Principle 2 (integrity), Principle 4 (relating to best interests of clients), Principle 6 (relating to public trust) and outcome O (1.2) (providing services to clients in a manner which protected their interests in their matter, subject to the proper administration of justice) had been breached and that allegation 1.1 was proved on the evidence to the required standard. The Tribunal also found in respect of the allegation of dishonesty that by the ordinary standards of reasonable and honest people the Respondent's conduct in making an amendment to the Report on Title so as to make it appear that his client had received advice which it had not received and thereafter sending the report to the client would be considered dishonest so that the objective test in the case of Twinsectra was satisfied. The Tribunal also found by virtue of the Respondent's admission that he knew that what he was doing was dishonest and the subjective test was also satisfied to the required standard.

Previous Disciplinary Matters

23. None.

Case law in respect of exceptional circumstances

24. Mr Bullock submitted that the Respondent relied on exceptional circumstances. The Statement of Agreed Facts included:

> "The Respondent seeks to make submissions as to exceptional circumstances in this case which he contends justifies the Tribunal finding that it falls into the "... small residual category where striking off will be a disproportionate penalty…" identified by Mr Justice Coulson in the case of Sharma."

25. The guidance in Sharma stated:

> "(a) save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the roll, see Bolton and Salisbury. That is the normal and necessary penalty in cases of dishonesty, see Bultitude. (b) There will be a small residual category where striking off will be a disproportionate sentence in all the circumstances, see Salisbury. (c) In deciding whether or not a particular case falls into that category, relevant factors will include the nature, scope and extent of the dishonesty itself; whether it was momentary, such as in Burrowes, or over a lengthy period of time, such as Bultitude; whether it was a benefit to the solicitor (Burrowes) and whether it had an adverse effect on others."

Submissions for and Evidence of the Respondent in respect of exceptional circumstances

26. The Respondent gave sworn evidence in support of his assertion that this was a case where there were exceptional circumstances. He was in the process of difficult divorce proceedings at the material time. The conduct occurred when he was six weeks away from the renewal of his practising certificate and it had not been his intention to apply to renew it because he felt that he was not working to the standards which he had set himself in his previous 37 years of practice. He felt that he was making mistakes and generally not up to the requirements of the role of solicitor. He had been to see his GP immediately after the incident. He had previously had an extremely good memory but was forgetting things. He underwent tests and was informed that he was not suffering from Alzheimer's disease but that his condition was stress-related and age-related. The stress was relieved by ceasing to work. He had not been dismissed by the firm but had handed in his resignation on 11 September 2014. The firm had asked him whether he was able to finish off his cases working under supervision by helping a locum which he did. If the Tribunal agreed not to strike him off he would undertake to apply to the Applicant to remove his name from the Roll and not to seek restoration and not to seek or take employment or remuneration in connection with the provision of legal services.

27. The Tribunal enquired whether the Respondent recollected anything about being contacted by the client before he amended the Report. The Respondent stated that basically he panicked; it was a moment of madness. It was sheer nonsense because he would never normally have done such a thing. If in his nearly 40 years of practice he made mistakes he did not cover them up but acknowledged them. The Respondent understood that the client was thinking of selling the property in question by way of assigning the lease and that caused the Respondent to read the Report. The Respondent had not received legal advice before making his first report to the Applicant but the Respondent stated that did not alter the fact of what he had done.

28. The Tribunal enquired whether at the time the Respondent accepted he was in the wrong whether he understood what he was admitting by making the admission. The Respondent replied that he was "in a state" at the time. He was not sure that he could rationalise amending the original Report. He referred to the attendance note made by AK of the firm dated 11 September 2014 which stated:

> "I pointed out that over the last year or so [the Respondent] had changed and we had all noticed that he was not the same Norman as he used to be. He said that his wife had also noticed this. He then said that he had been on anti-depressants for the last 10 years. He said that his change may be an age-related issue and/or related to him taking anti-depressants. He said that he was going to make an appointment to seek professional advice to try and get to the root of the problem."

29. The Tribunal enquired about the Respondent's current medical condition. He was still taking antidepressants and suspected that he would have to do so indefinitely. He had not taken other named medication for over a year because it had made him extremely tired although it was pointed out to him that his GP's report stated that it did not cause any mental or emotional issues.

30. The Tribunal expressed some concern about what it had heard from the Respondent in evidence in the context of Dr McPhillips report that it was possible that depression affected his judgement. Mr Ullstein submitted that the Respondent always accepted when discussing with him and those instructing him that what he had done was a moment of madness but he appreciated that what he was doing was dishonest. He further submitted that in the majority of cases that came before the Tribunal there was premeditation or a course of conduct. The Tribunal accepted Mr Ullstein's submissions; it would not go behind the Respondent's admissions.

31. Mr Ullstein submitted that whereas the Respondent said there was here a one off or unpremeditated act of madness, the conduct was in a very different category from the vast majority of cases of dishonesty by a solicitor. He referred to the case of Solicitors Regulation Authority v Imran [2015] EWHC 2572 (Admin) at paragraphs 29 and 30 of the judgment:

> "... in my view it is not possible when assessing exceptional circumstances simply to pick off the individual features of the case. It is necessary, as the tribunal did, to record and stand back from all of those many factors, putting first and foremost in the assessment of whether or not there are exceptional circumstances the particular conclusions that had been reached about the act of dishonesty itself. The fact that many solicitors may be able to produce testimonials and may immediately confess the dishonest behaviour is certainly relevant to the determination of whether or not it is an exceptional case, but is not a factor that is likely to attract very substantial weight. Far greater weight would be the extent of the dishonesty and the impact of that dishonesty both on the character of the particular solicitor concerned but, most importantly, on the wider reputation of the profession and how it impinges on the public's perception of the profession as a whole.

> I am satisfied that in this case the tribunal, having understood the nature of the dishonesty, certainly placed that at the heart of their decision both as to the culpability of the respondent but also as to the effect of that dishonesty on the reputation of the profession. The assessment of the Tribunal in paragraph 23 of the decision includes an assessment of the impact on the public and their view that the public "would be inclined to empathise with a young man who had clearly worked very hard to be the first in his family to go to university and achieve a professional qualification and then made a spur of the moment and totally misguided and foolish decision to avoid the consequences of a speeding offence".

32. Mr Ullstein submitted that it was plain from the testimonials that the Respondent had been a credit to the profession for 36 years. He then destroyed that with his moment of madness which was totally misguided and foolish as in Imran. Mr Ullstein submitted that the primary purpose of sanction was to protect the public and maintain public confidence in the profession. The Respondent himself took the view in September 2014 that he would no longer practice and so the public were protected; he had retired and he proposed to give an undertaking to have his name removed from the Roll and not to seek restoration thereafter and so the main purpose of sanction was already fulfilled. Mr Ullstein asked the Tribunal to put itself in the shoes of the public; they would say that the Respondent should be allowed to retire; he had recognised the effect of age on his work and had retired. Mr Ullstein referred to the case of Rickard 009360 where the Applicant had dealt with the matter internally and allowed the individual to remove himself from the Roll. Mr Ullstein accepted that in the Rickard case the Applicant came to the conclusion that the test for dishonesty was unlikely to be satisfied before the Tribunal but he distinguished the Rickard case because the course of conduct had taken place over a year and had resulted in a shortfall of £200,000 in client account. The Tribunal pointed out that there was medical evidence in the Rickard case which meant that the Applicant could not satisfy the subjective test for dishonesty. In this case the medical evidence did not go that far. Mr Ullstein submitted that considering what Mr Rickard had done as against what the Respondent had done, it was plain that the Respondent's offence was the lesser. Mr Ullstein submitted that the Tribunal had accepted undertakings in the past. It was difficult to understand the basis on which Mr Bullock suggested that it could not do so (see below); an undertaking and an order were the same thing. The Tribunal could deal with the matter by adjourning for 14 days within which period of time the Respondent could apply to come off the Roll.

33. The Tribunal indicated that it would find it helpful to go through the Court's comments about exceptional circumstances in the Sharma case to test their relevance to this matter.

- In Sharma it was pointed out that the respondent was guilty of repeated acts of forgery and his conduct was not a one off; he signed five different documents. Mr Ullstein submitted that Sharma also wrote a letter on 9 October 2007 which compounded the misconduct. The judgment stated that the letter was a serious aggravating factor because not only was the letter itself untrue but it seemed to the Court that it was a deliberate and dishonest attempt to mislead a third party.

- Sharma had benefitted from his forgeries because a particular transaction proceeded as he wanted it to on the basis of the forged signatures. As to whether there was any benefit to the Respondent in this case if his act of dishonesty were to go undetected, the Tribunal pointed out that it could be said that the firm would have continued to receive instructions from that client as a result but noted that the Respondent had in any event decided to retire. Mr Ullstein submitted that there were the additional points raised by the Tribunal; the client already had the original version of the Report in his possession and the Respondent's dishonesty was never going to succeed on any view. Mr Ullstein submitted that the only benefit to anyone was that the firm might not have been sued for the Respondent's negligence which occurred when he did not give the correct advice in the original Report. The client had brought a claim against the firm but it had been settled by the firm's professional indemnity insurers on advice.

- As to whether the dishonesty had an adverse effect on others, Mr Ullstein submitted that the loss suffered by the firm was caused by the Respondent's original error and not because of the matter before the Tribunal. The Respondent admitted that he had overlooked the point about alienation and his dishonesty did not compound anything. Mr Ullstein referred to the points looked at by Mr Justice Dove in Imran; in this case the Respondent had admitted what he had done to his partners at the outset, had left the firm and ceased to practice. It was a sorry end to a long career and Mr Ullstein asked that the Respondent be allowed to retire with some dignity intact rather than being struck off.

34. Mr Ullstein submitted that the cases of Sharma and Imran gave no guidance as to what exceptional circumstances might be or what was within or without the small residual category of cases. He submitted that if ever a case fell within the category this was it; the Respondent's actions had no impact on others, his conduct was a one off which was done without thought and if it required strike off, it was difficult to conceive of any case that fell into exceptional circumstances.

Submissions for the Applicant on exceptional circumstances

35. Mr Bullock addressed the main purpose of sanction and quoted from the Tribunal's Guidance Note on Sanctions paragraph 5:

> "The case of Bolton v The Law Society [1994] 1 WLR 512 sets out the fundamental principle and purposes of the imposition of sanctions by the Tribunal: "Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal." "... a penalty may be visited on a solicitor ... in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way ..." "… to be sure that the offender does not have the opportunity to repeat the offence; and" "… the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth … a member of the public … is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is

> injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires." (Sir Thomas Bingham, then Master of the Rolls)"

36. Mr Bullock drew two points from Bolton; as well as the factors which Mr Ullstein at identified in his Outline submissions there was a punitive and deterrent element to sanction and secondly the paramount consideration was the maintenance of the collective reputation of the profession. On the authority of Bolton, Mr Bullock suggested that a useful starting point for the Tribunal in its deliberations might be to consider what would be the impact on the collective reputation of the profession of having the Respondent's name remain on the Roll when he had admitted dishonesty in the circumstances of this case. To allow the Respondent to give an undertaking that he would remove himself from the Roll was deeply problematic. Section 47(2) of the Solicitors Act provided that the Tribunal being seised of this matter then had a discretion on penalty and in Mr Bullock's submission needed to consider that discretion in line with the cases of Bolton and Sharma and the fundamental principles which he had referred to.

37. Secondly the suggestion of an undertaking was problematic; to whom was it to be offered? The Tribunal was not able to accept undertakings from a Respondent. Mr Bullock was not aware of any authority but it was a position agreed by a number of different divisions of the Tribunal in the past. The Applicant could accept undertakings but for good public interest reasons it might not wish to do so in cases of dishonesty. It might wish to leave the matter to the Tribunal to exercise its discretion under section 47(2) and decide what the appropriate penalty should be in a given case. It would be wrong in principle for the Respondent to be allowed to tie the hands of the Applicant as regulator or of the Tribunal as an independent Tribunal by saying that he was threatened with being struck off but would "go quietly" and give undertakings to that effect. The Tribunal should not be compelled to accept such an undertaking by the Respondent. Mr Bullock submitted that this led onto a regulatory difficulty with that suggestion; how would the Tribunal approach matters if the Applicant was not willing to accept the undertaking. The Tribunal might think that there was a further conceptual difficulty; the case was advanced as one of exceptional circumstances and if it was found to be so then the Respondent did not merit being struck off. One of the lesser sanctions would be open to the Tribunal and in that case the proposed undertaking would go too far because the undertaking included a commitment never to apply to be readmitted. Conversely, if exceptional circumstances were found not to apply then there would be the deterrent effect of the formal sanction of a strike off and respondents faced with serious allegations of dishonesty where there were no exceptional circumstances should not be allowed to go quietly.

38. Mr Bullock also submitted that from the public protection point of view there could be a difference between an order of striking off a solicitor from the Roll and an undertaking of the type suggested. It might be a remote possibility given the Respondent's stated intention to retire but it would be open to the Respondent to apply to the Court to be released from the undertaking. By contrast if he was struck off the Roll at the hearing then there was a lengthy line of authority culminating in the case of Solicitors Regulation Authority v Kaberry 30th October 2012 (unreported) that he would need to demonstrate exceptional circumstances for restoration to the Roll. In the case of Imran, Mr Justice Dove quoted Sharma and continued:

> "There was some discussion during the course of the argument as to the approach which should be taken to the finding of exceptional circumstances. At one point during the course of his submissions Mr Williams [for the Solicitors Regulation Authority] developed an argument that the question of exceptional circumstances should in truth be approached on the basis that they were circumstances which were unique to the particular case of dishonesty which was being considered. It seems to me however – in particular having regard to paragraph 13 of what was said in Sharma – that the question of exceptional circumstances is in truth the other side of the coin of there being a small residual category of those cases which involve a finding of dishonesty but where striking off is not the appropriate remedy. In other words, that small residual category will be those where there are exceptional circumstances. Beyond that, it is probably not sensible to stray bearing in mind the fact-sensitive nature of the investigation which will be undertaken by the Tribunal in considering the appropriate sanction in cases of dishonesty."

39. Mr Bullock further referred to the Imran judgment where it stated:

> "Clearly, at the heart of any assessment of exceptional circumstances, and the factor which is bound to carry the most significant weight in that assessment, is an understanding of the degree of culpability and the extent of the dishonesty which occurred. That is not only because it is of interest in and of itself in relation to sanction but also because it will have a very important bearing upon the assessment of the impact on the reputation of the profession which Sir Thomas Bingham MR (as he then was) in Bolton identified as being the bedrock of the tribunal's jurisdiction."

40. Mr Bullock submitted that these points in addition to those of Mr Ullstein were the statements of principle. It was a fact sensitive investigation to determine if there were exceptional circumstances and key factors were the degree of culpability or the extent of the dishonesty which went to the impact on the reputation of the profession and it was not a tick box exercise but rather an impressionist one. It was necessary for the Tribunal to look at the matter as a whole and decide if this was an exceptional case.

41. The Tribunal raised a query about the desirability of incentivising members of the profession to self-report and invited submissions as to how its decision on sanction might play a part in that; it wished to encourage solicitors to self-report and to do so whether the issue involved was or was not dishonesty. Mr Bullock submitted that from the gloss on the decision in Sharma provided in the case of Imran, the determination of exceptional circumstances required the Tribunal to look at the totality of the case. The background included that the Respondent made a self-report and did so promptly within three days of his initial misconduct. The Tribunal in deliberating on sanction was entitled to take that fact into account but Mr Bullock suggested regarding the question of protection of the reputation of the profession that the Tribunal was addressing a rather narrower question which was as he had formulated earlier in his submissions. Mr Bullock rejected the suggestion that this approach meant that where there was a finding of dishonesty there could never be a finding of exceptional circumstances; cases might fall into the small residual category such that the reputation of the profession did not demand removal from the Roll.

Tribunal's determination in respect of exceptional circumstances

42. The Tribunal considered carefully the guidance in the case of Sharma and the judgment in the case of Imran. It also had regard to the testimonials advanced for the Respondent. It considered the nature, scope and extent of the dishonesty. The client sent his request for a copy of the Report on Lease at 14.04 on 10 September 2014. At 15.32 the Respondent sent back to him the purported copy. The attendance note of the interview between two members of the firm and the Respondent showed that he had modified the report at 15.31. The misconduct therefore took place within less than one and a half hours. There was no evidence of any premeditation or prolonged misconduct. It took place on the spur of the moment within a very narrow window. The Tribunal while not in any way underestimating the importance of documents presented by solicitors being utterly reliable, noted that the Respondent had inserted one sentence of a little over one line into one document. This was not a case of a number of documents being forged to protect the Respondent's personal position or that of the firm. The Respondent was asked to produce a copy of a document two years after he had originally sent it to the client. There was no prospect that he could cover his tracks because the original Report was in the possession of the client as shown by the fact that the client provided a copy of the original version along with the amended version when he raised his concerns with the firm. When he looked at the Report in preparation for sending it to the client, the Respondent realised the error in the advice that he had given. He gave sworn evidence to the Tribunal that upon the realisation he had panicked. The Tribunal found that he was a credible witness who was not in any way evasive and was totally humbled by the realisation of what he had done. Although his immediate reaction upon being questioned by his colleagues was to blame "computers", in the words of the attendance note from the firm when it was pointed out to him that the computer records had been checked and showed that he had modified the Report at 15.31 the previous day he "very quickly then admitted that he had altered the Report on Title". In his letter to the Applicant of 19 September 2014 written further to his self-report he said: "I panicked and in a terrible moment of weakness I altered the Report on Title." By contrast and in support of his assertion that his behaviour was a one-off he went on to give an example of a mistake he had made in the previous year where he had acknowledged the situation. The Tribunal accepted that very shortly after sending the document the Respondent was remorseful. The Respondent gave evidence that within minutes of pressing the send button he asked himself "What have I done? The Tribunal considered whether the misconduct was of benefit to the Respondent and whether it had an adverse effect on others. Potentially this forgery was of some benefit because it meant that the Respondent might seek to avoid blame for his original negligence by doing something that he should have done two years earlier, that is to draw attention to the onerous aspect of the alienation term. Possibly his action might have cost the firm money and put his employment at risk if his original mistake were exposed. However in the circumstances he could only benefit for a very short time because the client had the original report and flagged up the discrepancy with the firm. Furthermore as Mr Ullstein pointed out, the adverse effect arose out of the original error and the client, once he had detected the error was able to make a claim and achieve a settlement. There was a potential adverse effect on the firm because a disciplinary meeting had to be convened and when the Respondent resigned there was the question of how his work could be covered to protect his clients. The Tribunal noted however the Respondent's evidence which it accepted was that he was going to retire anyway

at the conclusion of that practice year on 31 October 2014; what happened merely brought his departure forward by a few weeks.

43. As to the guidance to be found in the case of Imran, the Tribunal considered the Respondent's degree of culpability having looked at the extent of the dishonesty which occurred. The Respondent was culpable for what he had done but his culpability was ameliorated by the lack of planning and the fact that the harm in the situation was mainly caused by his original error rather than his misconduct. In Imran the Court placed some importance "on the spur of the moment nature of the dishonesty and the fact that it arose spontaneously and not in a planned manner" which clearly applied in this case also. The Tribunal also considered as set out in Imran the impact of the dishonesty on the character of the particular solicitor concerned and here whilst the Respondent accepted that he was dishonest there was evidence from the firm's attendance note that it had been seen that he had changed over the last year. Most importantly the Tribunal assessed the impact on the wider reputation of the profession and how it impinged on the public's perception of the profession as a whole. Cheating by a lawyer was bound to diminish public trust in the profession but the Tribunal queried how significant that would be given the facts of this particular case. It appreciated that testimonials were not a determining factor nor was the Respondent's immediate confession when faced with a proven fact of what he had done but they formed part of the context against which the public would assess the matter as did his deteriorating condition of depression at the relevant time. Offset against his experience which might indicate he should have known better than to do what he did, he was under a great deal of personal and professional pressure at the time avoiding going home and spending increasing hours in his workplace. This did not affect his ability to understand his actions but it put him into a depressed frame of mind where making errors of judgement would be more likely. The Tribunal considered, having stepped back as recommended in Imran and taking the whole picture in the round including the nature, scope and extent of the dishonesty that this case fell within the small residual category of exceptional circumstances.

44. The Tribunal advised the parties that although the finding of exceptional circumstances meant that strike off would not be the appropriate sanction, having regard to the seriousness of a finding of dishonesty based on the agreed facts in this case it was important that the Tribunal should send a message to the profession and that to dispose of the matter by undertakings would not be appropriate. It was in any event impractical because the Tribunal had no way of enforcing an undertaking given to it and in the circumstances the Applicant was not willing to accept one. The Tribunal indicated its provisional view without prejudice to its final decision that to make an order for indefinite suspension of the Respondent could achieve the appropriate outcome of protecting the public and maintaining the reputation of the profession and if at a future point the Respondent recovered his personal life to the extent that he wished to seek to practice again he would have to come back to the Tribunal for permission to do so. In expressing this view, the Tribunal had in mind the very high hurdle which any solicitor who had dishonesty proved against him would have to overcome in order to succeed in having an indefinite suspension lifted.

Mitigation

45. Mr Ullstein clarified for the Tribunal that although the Respondent stated in a response to the Applicant under cover of a letter dated 19 April 2015 that "I have worked for Carr & Kaye Solicitors as a consultant non-practising solicitor under the supervision of the partners, in particular Mr [PK]." this was what was proposed but he was not presently working. Having heard the Tribunal's findings in respect of exceptional circumstances, Mr Ullstein had no further submissions to make by way of mitigation. As to evidence of the Respondent's financial position which might be relevant if the Tribunal chose not to strike him off but to impose some other sanction, the Respondent informed the Tribunal that the financial arrangements within the divorce proceedings had not yet been settled but the matrimonial home was to be placed on the market shortly. He detailed his financial position including the value of the matrimonial home, his funding of the divorce and the effect on his capital. He was in receipt of both a private and state pension and was a joint owner of two investment properties which produced income.

Sanction

46. Having regard to its finding of exceptional circumstances and in the absence of any further mitigation, and noting the genuine and complete insight shown by the Respondent, his remorse and his open and frank admissions from the outset and his cooperation with the Applicant, the Tribunal determined that the appropriate and proportionate sanction in this matter would be to impose an indefinite suspension upon the Respondent.

Costs

47. The parties informed the Tribunal that costs had been agreed in the sum of £5,663.80 in accordance with the Applicant's costs schedule. Mr Bullock submitted that in fairness to the Respondent it would be appropriate to reduce the amount of preparation time which had been claimed because it had been agreed that the matter could proceed on the Statement of Agreed Facts. Preparation time should therefore be reduced from four hours to 30 minutes. Mr Bullock also pointed out that the amount of time claimed for travel and waiting should have been entered at half the hourly rate reducing that element of the schedule from £520 to £260. It had therefore been agreed between the parties subject to the endorsement of the Tribunal that costs should be payable by the Respondent in the sum of £4,948.80 and that this should be payable to the Applicant by 8 September 2016. The Tribunal considered the costs claimed to be reasonable and made an order in the terms agreed.

Statement of Full Order

48. The Tribunal Ordered that the Respondent Norman Luper, solicitor be suspended from practice as a solicitor for an indefinite period to commence on the 8th day of June 2016 and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the agreed sum of £4,948.80, such costs to be payable to the Applicant by 8 September 2016.

Dated this 18th day of July 2016
On behalf of the Tribunal

J. P. Davies
Chairman