SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11575-2016

BETWEEN:

MICHAEL SCHWARTZ Applicant

and

SOLICITORS REGULATION AUTHORITY Respondent

Before:

Mr R. Hegarty (in the chair)
Mr A. N. Spooner
Mr S. Howe

Date of Hearing: 22 December 2016

Appearances

Ms Marianne Butler, counsel, of Fountain Court Chambers, Fountain Court, Temple, London EC4Y 9DH, instructed by Mr Alastair Wilcox, solicitor, of the Solicitors Regulation Authority, The Cube, 199 Wharfside Street, Birmingham B1 1RN for the Applicant.

Mr Robin Halstead, counsel, of 1 Essex Court, Temple, London, EC4Y 9AR for the Respondent, Mr Michael Schwartz, who was present.

JUDGMENT ON THE RESPONDENT'S APPLICATION TO VARY CONDITIONS IMPOSED BY THE TRIBUNAL

Background

1. The hearing dealt with an application made by Mr Michael Schwartz on 11 November 2016. Although Mr Schwartz was the applicant for the purposes of this hearing, he will be referred to as the Respondent and the Solicitors Regulation Authority will be referred to as the Applicant, to assist in reading and understanding linked documents.

2. On 16 August 2016 an Authorised Officer of the Applicant decided to grant the Respondent a practising certificate for the practice year 2015/16 subject to four conditions. These conditions, which were referred to in the hearing as the Previous Conditions, included the condition that the Respondent may act as a solicitor only as an employee whose role had first been approved by the SRA, and that he must immediately inform any actual or prospective employer of the conditions and the reasons for them. The reasons for the imposition of those conditions were set out in a Decision document dated 16 August 2016. That document was not before the Tribunal at the September 2016 hearing.

3. On 8 and 9 September 2016, the Tribunal heard and determined certain allegations against the Respondent. Full details of the allegations, the Tribunal's findings and reasons are set out in the Tribunal's Judgment, which was dated 20 September 2016 and which is available on the Tribunal's website under the same matter number as given above. As at the date of this hearing, the Tribunal had not received any notification of an appeal by either party against its findings, sanction or costs order.

4. At the conclusion of the hearing on 9 September 2016, the Tribunal ordered that the Respondent be suspended from practice as a solicitor for a period of five years from 9 September 2016. That suspension was suspended for five years from 9 September 2016 subject to compliance by the Respondent with a number of conditions ("the Conditions"). The Respondent was ordered to pay the Applicant's costs of the proceedings in the sum of £17,333. The Conditions imposed included the requirement that the Respondent should not work as a solicitor, other than in employment approved by the Solicitors Regulation Authority. It was further required that the Respondent should immediately inform any actual or prospective employer of the Conditions and the reasons for them. The other conditions imposed were not directly relevant to the application heard on 22 December 2016.

5. On 11 November 2016 the Respondent wrote to the Tribunal, by email, making an application to vary the Condition that he could not work as a solicitor other than in employment approved by the SRA. On 14 November 2016 the Tribunal gave directions for the conduct of the application. It was directed that the hearing of the application would take place on 17 January 2017. It was further directed that the Applicant should file and serve an Answer to the application by 14 December, with supporting documents, and that the Respondent should file and serve a Reply to the Answer by 6 January 2017.

6. At the request of both parties, the hearing of the application was brought forward to 22 December 2016.

Documents

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

Respondent: -

- Application dated 11 November 2016
- Submissions on behalf of the Respondent (submitted on 22 December 2016)
- Respondent's witness statement, with exhibits, dated 22 December 2016

Applicant: -

- Applicant's submissions dated 14 December 2016
- Applicant's schedule of costs dated 20 December 2016
- Witness statement of Myanh Ta, SRA Authorisation Officer, with exhibits, dated 19 December 2016

Other documents: -

- Judgment arising from the hearing of 8 and 9 September 2016, dated 20 September 2016.

Preliminary Matter

8. The hearing began in the Tribunal's court room 1 shortly before noon. After approximately 40 minutes, it was noted that the recording equipment was not working. The Tribunal had by that point heard preliminary submissions by Mr Halstead on behalf of the Respondent and the Respondent's evidence, and had begun to hear the Applicant's submissions. The Tribunal rose whilst the issue was addressed.

9. On investigation, it transpired that none of this hearing had been recorded, although the recording equipment had operated normally during a previous hearing in the same court room on 22 December. As the problem could not be rectified promptly, the hearing was transferred to the Tribunal's court room 5. On resumption, the Tribunal heard the Applicant's submissions and the hearing continued in the normal way.

10. The parties were informed that the first part of the hearing had not been recorded. Detailed notes of the Respondent's evidence had been taken by those in court, including the Clerk and Mr Wilcox of the Applicant.

Respondent's Application

11. The Respondent's application dated 11 November 2016, save for the formal parts, was framed as follows:

> "Since the imposition of the condition, various firms have written to the SRA to obtain permission to employ me (having been informed by me of the conditions and the reasons for their imposition) but no consents have been

forthcoming notwithstanding the passage of time. They are sending more requisitions, most of which are considered irrelevant by both the prospective employers and myself. As I understand it, all the prospective employers are content to abide by the conditions imposed and have advised you accordingly. As I am unable to work at all at the moment (which was not the intention of the Tribunal) I have no source of income. Duncan Lewis, the solicitors for whom I do the majoring of my work, pay me 2 months in arrears, which means that as of now I have no income and therefore cannot support my family or pay the mortgage.

I submit that the other conditions imposed by the SDT are sufficient to protect the public and the integrity of the profession.

Furthermore, the delay in giving consents means that those firms who have previously employed me will use other solicitors and the good will I have built up over many years will go and they will cease to employ me.

It is my submission that the SDT did not intend that I was not able to work but the delay by the SRA is effectively preventing me from working.

The nature of my work is solely in the criminal field, in that I only appear at police stations and magistrates' courts. It would appear that the majority of questions raised by the SRA are irrelevant, bearing in mind the type of work I do.

In view of the existing conditions which I am not challenging, I would submit that notwithstanding paragraph 56 (of the Judgment) the likelihood of further misconduct is low with all the other conditions in place. In view of the urgency I would be obliged if the matter could be listed within 7 days."

12. The Respondent's written submissions, prepared by his counsel Mr Halstead, and submitted on the morning of 22 December 2016, read:

"1. This is the hearing of the [Respondent's] request to vary one of the restrictions imposed on his practising certificate by the Tribunal on 9 September 2016.

2. The reason for the request is that the SRA has been so dilatory in approving the Applicant's requests for approval of potential employers that he has effectively been barred from working for the last three months. The restrictions were clearly not intended to have this effect and this hearing has been expedited in recognition of this.

3. The [Applicant] claims that the reasons for the delay in granting approval is (sic) due to investigation into historic breaches of the previous conditions and an allegation that:-

i) he breached the conditions by appearing in court on 14/9/16;
ii) he signed particulars of claim.

4. It would appear from [the Respondent's] witness statement that he has been misinformed by MyAnh Ta that he was able to continue to work as a freelance agent without being in breach of the restrictions imposed on 16 August 2016. He relies on an attendance note of his phone call to MyAnh Ta made on the day he was informed of the restrictions imposed on August 16.

5. [The Respondent] accepts that he breached the current restrictions by appearing in court for Toussaint & Co on 14 September (2016). He has since realised that his understanding of the date of the imposition of the restrictions was erroneous and wished to apologise for this one admitted breach. In mitigation [the Respondent] had been under enormous pressure in the Tribunal and this lapse is possibly understandable in the circumstances.

6. The signing of the Particulars of Claim is denied and the evidence appears to absolve [the Respondent] entirely.

7. There are no allegations of financial misconduct which were the pertinent allegations addressed by the Tribunal.

8. [The Respondent] has been unable to work and his financial circumstances are now dire. It is submitted that he has been punished enough by the restrictions imposed and it would be disproportionate to continue this restriction given its punitive effect."

13. Mr Halstead for the Respondent referred to the written submissions, set out above, which he did not propose to rehearse in the oral hearing. The Tribunal noted that the basis of the application appeared to be that the SRA had not dealt with applications to approve employment. The Tribunal queried whether this was the correct forum, as it was not for the Tribunal to review the operation of the SRA in its regulatory function. If it were contended that the Applicant was not acting properly, judicial review may be the appropriate step. The Tribunal had jurisdiction to vary conditions it had imposed, but normally would do so only if the passage of time or a change of circumstance meant that the conditions were no longer relevant; it did not appear to the Tribunal that the Respondent was contending that the condition in question was no longer appropriate.

14. In response to this observation, Mr Halstead submitted that the application to vary was based on the proposition that the Condition about approval of employment was so punitive that it had the effect of preventing the Respondent from working at all. The Respondent worked as a freelance criminal solicitor, who may be telephoned in an evening and asked to attend court the following morning. In these circumstances, the requirement for prior permission was unduly onerous and could not be met.

15. The Tribunal noted that if it were contended that the Condition was disproportionate, the appropriate route may have been to appeal against sanction. Mr Halstead confirmed that this was a possible route. However, he had been instructed that it had not been the Tribunal's intention to prevent the Respondent from working and that the

Tribunal could vary the Condition if it was just to do so. In considering that issue, the Tribunal would note the onerous and punitive effect of the Condition on the Respondent.

16. The Tribunal noted that the written submissions did not cover the matter raised by Mr Halstead (and referred to at paragraph 14 above) that the Respondent worked on a freelance basis and that it did not appear to be advanced as a reason for the application in the application dated 11 November 2016.

17. In response to this observation, Mr Halstead submitted that the main thrust of the application was that the Respondent was, in effect, prevented from working because of the requirement to obtain approval before he was instructed to act for a firm. Mr Halstead told the Tribunal that the Respondent attended at police stations and magistrates' courts, at short notice; it was not possible to obtain the Applicant's permission overnight to undertake such work. Mr Halstead told the Tribunal that the main source of the Respondent's income was from his work as a freelance criminal solicitor, on an ad hoc basis. In these circumstances, the Condition requiring approval of employment from the Applicant was punitive. It was submitted that it would be just to remove this Condition, as it prevented the Respondent from working. Mr Halstead submitted that the thrust of the Tribunal's Judgment arising from the September 2016 hearing was not that the Respondent should be prevented from working.

18. Mr Halstead then called the Respondent to give evidence. A note of the Respondent's evidence is set out below.

19. After conclusion of the Respondent's evidence, and the Applicant's submissions, Mr Halstead made brief closing submissions.

20. Mr Halstead noted the Applicant's reference to the case of Scott (see below) and submitted that that case was much more serious than the present case, involving as it did an abuse of client money. It was not suggested that the Respondent had breached the Conditions in relation to handing client money, so there was no increased risk if the restriction were withdrawn.

21. Mr Halstead submitted, with regard to the question of whether there had been a change of circumstances, that the Respondent had to take work if and when he could, from potentially a number of firms of solicitors. It would be just to lift the Condition.

22. Mr Halstead submitted that on the Respondent's three appearances at the Tribunal, he had been given the benefit of the doubt. It was submitted that this showed that the Tribunal recognised that the Respondent was doing his best. The Respondent was content for all of the other Conditions to remain in place.

23. Mr Halstead submitted that the Respondent had shown obvious honesty in the witness box at this hearing. He had admitted, under Oath, that he had breached the relevant Condition and that he had known at the relevant time that the Condition was in force. It was submitted that the Tribunal should take this into account in assessing the application and, in particular, it could be satisfied that the Respondent was not a risk to the public.

Applicant's Submissions

24. The Applicant's submissions were made after the Respondent had given his evidence.

25. Ms Butler told the Tribunal that the Applicant opposed the Respondent's application. As the Tribunal had observed at the start of the hearing, a Condition could only be varied if the circumstances had changed such that the Condition was no longer appropriate, or for some other good reason. In this case, there was no evidence of any change in circumstances or any other good reason which had emerged since the September 2016 hearing. Indeed, if anything, the need for the Condition had increased as the risk posed by the Respondent had increased. It had not been submitted for the Respondent that there was no risk. Rather, the submissions on behalf of the Respondent had all been about his particular working arrangements.

26. It appeared to be suggested for the Respondent that it was never appropriate for the Respondent to be subject to a condition requiring prior approval of employment by the Applicant. However, the Tribunal had been aware when making the Order in September 2016 that he intended to work as a consultant; for example, this was referred to at paragraph 19 of the Judgment dated 20 September 2016. It was noted that the Respondent had generally been a consultant with one firm at a time.

27. Ms Butler submitted that it was a matter for the Respondent to determine how he structured his work. It was not appropriate to apply a lower standard to this Respondent because he wanted to be able to work for more than one firm at a time. The protection of the public required that there be conditions in place, particularly given the finding of lack of integrity, and the Respondent should not be able to get around this by choosing to work for several different firms. It had been suggested for the Respondent that he could inform the Applicant of work he had done after the event. Ms Butler submitted that this was both irrational and unworkable. In order to manage risk and protect the public it was not sufficient for the Respondent to provide information after the public had been exposed to risk.

28. Ms Butler referred to the reasons set out in the Judgment for the imposition of the Conditions. There had been serious findings, including that the Respondent had breached Principles 2, 4, 5, 6 and 10 (i.e. had shown a lack of integrity, had failed to act in the best interests of clients, had failed to provide a proper standard of service, had failed to act in a way which would uphold the trust placed in the Respondent and the provision of legal services and had failed to protect client money and assets). Further, the Respondent had admitted a breach of the SRA Practice Framework Rules 2011, in that he had practised as a sole practitioner when not permitted to do so. Ms Butler submitted that this was part of a historic pattern of breaches by the Respondent.

29. Ms Butler referred to the Judgment of Lady Justice Sharp in Scott v SRA [2016] EWHC 1256 (Admin) ("Scott") and in particular a passage which referred to Bolton v Law Society [1994] 1 WLR 512, which read:

> "In the light of its factual findings, the SDT rightly attached considerable significance to two fundamental points. First, to the essential principles identified in [Bolton] at 518-9 by Sir Thomas Bingham MR (with who Rose

> LJ and Waite LJ agreed) where it was said amongst other things that, "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 on him by the [SDT]". See further Emeana and others, where it was said at para 26 that in cases where there has been a lapse of standards of integrity, probity and trustworthiness, a solicitor should expect to be struck off, and that striking off is the most serious sanction, but it is not reserved for offences of dishonesty. And secondly, to the onerous obligation on solicitors to ensure that the solicitors accounts rules are observed because of the importance attached to affording the public maximum protection against the improper and unauthorised use of their money…"

30. Ms Butler submitted that this passage underlined that the Tribunal's sanction was not overly onerous. Further, there had been no appeal against sanction. Ms Butler submitted that the Order was unusual, as it involved suspension of a period of suspension. Ms Butler referred to paragraphs 56 to 61 of the Judgment, which set out the Tribunal's reasons for its sanction. In particular, it was noted that the Tribunal determined that the risk of further misconduct was not low. The Tribunal had noted that the appearance in September 2016 was the Respondent's third appearance at the Tribunal; all three hearings had involved the Respondent's dealings with client money. It was clear from paragraph 58 of the Judgment that the Conditions were required to protect the public. At paragraph 59 it was made clear that the seriousness of the Respondent's misconduct justified suspension from practise; no lesser sanction was appropriate. At paragraph 61 it was specified that if the Respondent breached the Conditions, the 5 year suspension could be activated.

31. Ms Butler submitted that the Tribunal had tried to give the Respondent the benefit of the doubt on his third appearance at the Tribunal. To act as a deterrent to future misconduct and taking into account the seriousness of the misconduct, suspension from practise as a solicitor was justified.

32. Ms Butler submitted that the Order was made on 9 September 2016. It was now common ground that the Respondent had worked for Toussaint Solicitors, deliberately, when he was not permitted to do so. This was confirmed in the emails annexed to Ms Ta's witness statement.

33. Ms Butler submitted that the matter was extremely serious. The Respondent had been dishonest in his witness statement. He knew that he was subject to the Conditions from 9 September 2016 but deliberately breached them. He had lied in his witness statement, at paragraph 9 (see paragraph 46 below). Under cross examination, the Respondent had accepted that he knew he was not allowed to work (without permission) but had done so; he had apologised. In the light of this, any suggestion that the risk posed by the Respondent had been diminished was ludicrous. The Respondent's main argument appeared to be that the Condition about approval of employment was inconvenient.

34. Ms Butler submitted that there was disputed evidence concerning CEL and Duncan Lewis, but those were not issues for the Tribunal to determine on this occasion. Ms Butler would, on the relevant occasion, submit that the Respondent's evidence about his work/whether the Conditions had been breached was untenable. Ms Butler

submitted that the question for the Tribunal to determine on this occasion was whether circumstances had changed and the risk posed by the Respondent had reduced such that the Conditions could be varied. Ms Butler submitted that the risk had increased rather than diminished. The Respondent had been given one last chance by the Tribunal, but had deliberately breached a Condition only a few days after it was imposed. The Respondent's convenience was wholly irrelevant.

35. Ms Butler told the Tribunal that prior to the date of this hearing it was not known that the Respondent admitted to breaching a Condition; he had only admitted in cross examination that the breach was deliberate. If the Applicant had been aware of this, it would have made an application to lift the suspension of the period of suspension.

36. In response to a question from the Tribunal about whether the Applicant could activate the suspension of the Respondent, or whether this was a matter for the Tribunal to determine, Ms Butler submitted that the appropriate course of action was for the Applicant to consider if there was evidence of a breach of the Conditions. If there was sufficient evidence, the matter should be remitted to the Tribunal for a decision on whether the suspension order should be activated. The rationale for this approach was that: a) the Order in September 2016 was made by the Tribunal, which determined matters to the criminal standard, whereas the Applicant applied the civil standard; b) the Applicant could not impose a suspension order; and c) it was important for such an important decision, which could prevent the Respondent from working as a solicitor to be made by an independent body.

37. Ms Butler indicated that in the light of the Respondent's written submissions and witness statement, in which he admitted a breach of a Condition, on 14 September 2016, she would invite the Tribunal to activate immediately the five year suspension as the Respondent had failed to comply with the Conditions made on 9 September 2016. Ms Butler submitted that the Tribunal could, indeed, activate the period of suspension of its own motion in the light of the Respondent's admission in evidence.

Witnesses

The Respondent

38. The Respondent affirmed. He gave evidence in chief, in which he confirmed that the witness statement he had signed on 22 December 2016 was true.

39. The Respondent told the Tribunal that on 22 July 2016 he was told that there were no restrictions on his Practising Certificate. The Respondent told the Tribunal that he had then received an email from Ms Ta on 16 August 2016, which contained a note stating that there were new restrictions and that he needed the Applicant's consent to be employed. The Respondent told the Tribunal that he then telephoned Ms Ta immediately to explain the nature of his employment (i.e. freelance and ad hoc) and that he was not "employed" as such. The Respondent told the Tribunal that Ms Ta told him that, in those circumstances, he did not need consent to work.

40. The Respondent told the Tribunal that on the basis of what Ms Ta told him he had continued to work for various solicitors until the hearing at the Tribunal in September 2016.

41. The Respondent told the Tribunal that after the Tribunal hearing he had told the solicitors he worked for of the Conditions and that he had told them of the Previous Conditions after receipt of the email on 16 August 2016. The Respondent told the Tribunal that after the Tribunal hearing he had face to face meetings with various solicitors and had given them copies of the Tribunal's Judgment. The Respondent told the Tribunal that he accepted that he had breached the Condition, in that he had worked on 14 September 2016 without permission. This was before receipt of the Tribunal's Judgment. The Respondent told the Tribunal that he accepted that he was wrong to have carried out this work, and that he had not worked since. Various firms had contacted him enquiring about work, but he had told them he could not work without the Applicant's permission.

42. The Respondent told the Tribunal that Duncan Lewis, one of the firms which had applied for permission to employ him, paid him two months in arrears. The Respondent told the Tribunal that he was now relying in savings and his wife's income as he had no income of his own. The Respondent told the Tribunal that he was happy for all of the other Conditions to remain in place; he only wanted removal of the requirement for prior approval. The Respondent told the Tribunal that he would be content to have a condition requiring him to inform the Applicant promptly after carrying out work for a firm.

43. The Respondent told the Tribunal that the other work he had had was for Civil Enforcement Limited ("CEL"). This was not a solicitors' firm but was a body which issued County Court claims arising from parking claims. The Respondent told the Tribunal that he had been employed by CEL, but in August 2016 he had informed them that he could not work for them anymore. The Respondent told the Tribunal that he had then been given permission to work for CEL, but that permission had then been removed. The Respondent told the Tribunal that the Applicant had said they understood that CEL was his only employer and indicated that it would be too much for him to work for other bodies which had applied for permission as well. The Respondent told the Tribunal that his work for CEL was for only a few hours per month.

44. The Respondent was then cross examined by Ms Butler on behalf of the Applicant.

45. The Respondent told the Tribunal that he had taken the hearing on 8 and 9 September 2016 very seriously, as it raised serious matters including alleged dishonesty. The Respondent told the Tribunal that the Tribunal's Order had been a matter of extreme concern for him. The Respondent confirmed that the Chair of that hearing had read out the full Order at the end of the hearing, including the term that the Respondent was suspended for five years but that suspension was itself suspended provided the Respondent complied with certain Conditions. The Respondent confirmed that two of the Conditions were that he could not work as a solicitor other than in employment approved by the Applicant, and that he must inform any actual or prospective employer of the Conditions and the reasons for them.

46. The Respondent told the Tribunal that he accepted he was bound by the Conditions from 9 September 2016 and that it was wrong for him to have worked on 14 September 2016 without permission. The Respondent told the Tribunal that it had been silly and stupid of him to do this work. He had no explanation for why he had

worked on that date, save for his own stupidity. The Respondent told the Tribunal that he knew that the Conditions applied from 9 September 2016. However, he accepted that in his witness statement, at paragraph 9, it was stated:

> "I accept that I did one Court attendance on 14/9/16. This was prior to publication of the SRA's (sic) reasons and I incorrectly thought that until publication I could work. On reflection I realised that this was incorrect."

47. It was put to the Respondent that what was said in the statement was untrue. The Respondent told the Tribunal that he accepted he was aware (at 14 September) that the Conditions applied from 9 September 2016.

48. It was put to the Respondent that he had not informed Toussaint and Co of the Order/Conditions and/or the reasons for the Conditions. The Respondent told the Tribunal that he had had a face to face meeting with Mr Toussaint, but he could not recall the date. The Respondent told the Tribunal that it was likely the meeting was after 14 September 2016. The Respondent was referred to an email from Mr Toussaint, dated 10 November 2016, which was annexed to Ms Ta's witness statement which stated, "Thank you for your email (of 3 November 2016). I can confirm that I have now received and read a copy of the Tribunal's findings dated 20th September 2016" and an email from Mr Toussaint dated 1 December 2016 to the Applicant referring to the instruction to attend court on 14 September 2016 in which it was stated, "Once again this was prior to our knowledge of any SDT Hearing." It was put to him that this suggested that the copy Judgment had been provided to Mr Toussaint at a later stage. The Respondent told the Tribunal that he recalled giving Mr Toussaint a photocopy of the Tribunal's Judgment. The Respondent told the Tribunal that he had explained the situation and provided a copy of the Judgment later. The Respondent told the Tribunal that he did not dispute what Mr Toussaint said in his email.

49. With regard to Duncan Lewis Solicitors, the Respondent told the Tribunal that he had spoken to Ms Ta on 16 August 2016, from which conversation he understood that he did not need approval as he was not employed but was a consultant. Ms Butler noted that Ms Ta was present in court and although it would ultimately be a matter for evidence, her instructions were that there was no such conversation. The Respondent told the Tribunal that this was not correct. When he received the letter with the Previous Conditions (on 16 August 2016) he immediately telephoned Ms Ta as the restriction imposed was serious. The Respondent told the Tribunal that he had not carried out any further work for CEL as he had had an employment contract with them, as a consultant. He had continued working for other solicitors. Whereas he had a consultancy agreement signed with CEL he did not have any written agreements with the firms of solicitors for which he carried out work. The Respondent told the Tribunal that Ms Ta told him that for the sort of work he was doing he did not need approval. The Respondent told the Tribunal that he had no contract with Toussaint and Co or Duncan Lewis; he was working on a freelance basis and Ms Ta said, unequivocally, that he could do that work without specific approval.

50. It was put to the Respondent that the Previous Conditions contained a reference to the definitions in the SRA Glossary and that those definitions did not draw any distinctions between the various types of work or employment status. The

Respondent told the Tribunal that he did not have those definitions to hand when he phoned Ms Ta, who told him it was OK for him to work. Ms Butler informed the Respondent that the Applicant keeps logs of telephone calls, and that his evidence about this telephone call was disputed by the Applicant.

51. The Respondent told the Tribunal that it had been recommended that his employment with CEL should be approved, subject to conditions with which both CEL and the Respondent were happy. They had assumed that permission had been given, but that permission was then withdrawn.

52. The Tribunal noted that with regard to CEL and the Particulars of Claim which bore the Respondent's name, it was not stated that he was a solicitor. The Respondent told the Tribunal that Particulars of Claim could be issued without a solicitor, but if a solicitor were acting the fixed costs on issuing proceedings could be claimed. For that reason, it was worthwhile for CEL to have him check the proceedings. The Respondent told the Tribunal that he had advised on defended claims involving CEL.

53. There was no re-examination.

Ms Ta's Witness Statement

54. The Tribunal had available the witness statement of MyAnh Ta of the Applicant, dated 19 December 2016, with exhibits. The statement dealt with the applications for approval of employment made since 9 September 2016 and exhibited various emails and other documents. Ms Ta's evidence was to the effect that the Applicant had concerns that the Respondent had breached the Conditions and that this was being investigated by the Applicant.

The Tribunal's Decision

55. The Tribunal had regard to the Judgment dated 20 September 2016, the evidence heard and the submissions of the parties.

56. The Tribunal had some observations of a general nature concerning the application and the way in which it had been presented.

57. Firstly, the Tribunal was not addressed on the effect, if any, of the Previous Conditions imposed by the SRA on 16 August 2016, and whether they continued to have any effect. The Tribunal did not have jurisdiction to remove a condition imposed by the SRA. It was not clear to the Tribunal whether those conditions would continue to have effect, notwithstanding the imposition of the Conditions or any variation to them, given that the Previous Conditions were imposed for reasons unrelated to the hearing in September 2016. It may be that the Previous Conditions would remain in effect even if the Tribunal agreed to vary the Conditions which it had imposed; this was something the parties may need to consider in another forum.

58. Secondly, the Tribunal noted that in the written submission for the Respondent it was stated, "The restrictions were clearly not intended to have this effect and this hearing has been expedited in recognition of this." The Tribunal could not accept this

submission; this division had not been involved in the decision to bring the hearing forward to 22 December, which had been done at the request of both parties.

59. Further, the Tribunal noted that the Condition requiring the Respondent to obtain approval from the Applicant before working as a solicitor was within its normal range of conditions/restrictions. It was not unusual or intended to be punitive or oppressive. Rather, it was to ensure that a solicitor was subject to proper supervision, from a properly managed firm or other body, in order to protect the public.

60. Finally, by way of general observations, the Tribunal also noted that, of course, the Condition only applied to work the Respondent wished to undertake as a solicitor; the Tribunal's Condition did not affect his ability to work outside the profession. The Tribunal noted that in his application of 11 November 2016 (which was not supported with a statement of truth) the Respondent had stated that his work was "solely in the criminal field in that I only appear at police stations and magistrates' courts." This was contradicted by the (unsigned) statement of CEL which was appended to the Respondent's witness statement, which referred to the work the Respondent had carried out for CEL; that work was civil in nature. The Tribunal noted that the conduct of litigation is a reserved activity. No doubt the parties would, when appropriate, check whether it was correct for CEL to claim the fixed costs on issue of proceedings where the Respondent's name appeared on the Claim Form and/or Particulars of Claim.

61. This hearing was to determine an application by the Respondent to vary one of the Conditions imposed by the Tribunal on 9 September 2016, namely that he could not work as a solicitor other than in employment approved by the Applicant. The application was submitted by the Respondent on 11 November 2016. The basis of the application was that three firms had applied for permission to employ the Respondent and the Applicant had not dealt with those applications, and that the Respondent could not work and had no income as a result.

62. In the hearing, the application was supplemented by a further suggested justification for a variation of the Condition, namely that as the Respondent worked for a number of solicitors, on a freelance basis, and so it was impractical to apply for permission prior to undertaking work. This aspect of the application was not included in the Respondent's witness statement, signed on the date of the hearing. The Tribunal noted that although the Respondent had now referred to the possibility of working for several firms, only three organisations had submitted applications for permission to employ him, only two of which dealt with criminal cases. No details had been provided about the other potential employers.

63. The Tribunal accepted that it had jurisdiction to vary the Condition, but in order to justify such a variation the Tribunal would need to be satisfied that there was a change of circumstances or the passage of time meant that the Condition was no longer appropriate. The Tribunal noted that there had been no appeal against the Judgment or Order, and that the Respondent's application was made only two months after the Order was made. The Respondent had not contended, by way of an appeal, that the Order was disproportionate or wrong. The Tribunal noted that the Conditions had been imposed after making findings of such serious misconduct that a suspension order was justified. The Tribunal had concluded that the Respondent had lacked

integrity, and had been in breach of other core Principles of the profession. For such serious matters a serious sanction was required. The Tribunal did not consider that there had been any change of circumstances, and certainly there had been no change arising from the passage of time. Even if the Tribunal were to find that the Respondent was, potentially, seeking work from a number of firms, that would not justify any less restrictive Conditions than those which would apply to a solicitor who sought work from just one firm. Indeed, the risk posed where the Respondent worked for several organisations may be greater than if he worked for just one, as a sole employer would have a greater interest in ensuring the Respondent was fully supervised. The Respondent's suggestion that there would be adequate protection for the public if he were to notify the Applicant after carrying out work for a firm was not realistic or reasonable, as it would not afford the public proper protection; the Applicant would not know if the Respondent was or was not being adequately supervised in carrying out his work.

64. The Tribunal was extremely concerned that despite what was clearly stated at paragraph 9 of the Respondent's witness statement, signed on the day of the hearing, the Respondent admitted in his oral evidence that the content of that paragraph was not correct. The Respondent had accepted that the Order was read out in full at the conclusion of the hearing on 9 September 2016. The Respondent knew, when he attended court on 14 September 2016, that he was breaching the Order made by the Tribunal, just 5 days earlier. It was a matter of great concern that the Respondent had given two different accounts about this on the same day. It may be that the Applicant would pursue the apparent dishonesty and lack of integrity which had been displayed in the course of this application and the Respondent's evidence. Mr Halstead's submission that the Respondent should be given credit for admitting that some evidence in his witness statement, signed on the day of the hearing, was untrue was unusual; the Respondent could be given no such credit.

65. The Tribunal had not heard any evidence from Ms Ta. The Respondent had told the Tribunal in his evidence that there had been a telephone conversation on 16 August 2016. The Tribunal had not seen a copy of the email which the Respondent said had notified him of the Previous Conditions. The Tribunal noted that the evidence about whether there was a phone call and what was said (if there were such a call) was disputed. Evidence about whether there had been breaches, in addition to the admitted breach of the Condition, may be dealt with on another occasion. In any event, the Tribunal noted that the Applicant had some reason to object to the application and to consider that the Respondent was in breach of the Condition.

66. The Respondent had failed to show any, or any sufficient, reason to justify the removal or variation of the Condition, or any Condition. He had given no prior notice of what, ultimately, he relied on in support of his application; it was concerning that the ground of the application shifted at the last minute. The Respondent's admitted conduct since the September 2016 hearing confirmed that the Condition was necessary and proportionate in order to protect the public. The Condition would not be varied simply to suit the Respondent's personal convenience; the case of Bolton made it clear that the individual circumstances of a solicitor was less important than the need to maintain the reputation of the profession and protect the public. The application was therefore refused.

67. The Tribunal also considered the oral application made on behalf of the Applicant in the course of the hearing to activate the suspension, such that the Respondent would be suspended for five years from 22 December 2016. That application was made on the basis of the Respondent's admission made in the witness statement and in evidence that he had breached the Condition; it was not known until the day of the hearing that the Respondent would make any such admission.

68. The Tribunal decided that it would not be appropriate to determine that application on this occasion, without a formal application to which the Respondent could respond, given the significant consequences of immediate activation of the suspension. Whilst on its face there was merit in such an application, it would not be fair or right to determine it without giving the Respondent a proper opportunity to respond.

Costs

69. Ms Butler on behalf of the Applicant made an application for the Respondent to pay the Applicant's costs of dealing with this matter and referred to a schedule of costs dated 20 December 2016. That schedule set out total costs of £2,985 (including VAT). It was submitted that the costs sought were reasonable.

70. Mr Halstead submitted that the Respondent had no income, and had not earned anything for three months. Mr Halstead told the Tribunal that he understood that some figures for income had been produced in September 2016, but those figures referred to the period until September 2016. The Respondent no longer had an income of his own.

71. With regard to the amount of costs claimed, Mr Halstead submitted that counsel's fees of £2,000 plus VAT were excessive, unreasonable and disproportionate. Further, the costs claimed were unaffordable as the Respondent was not able to find work. Ms Butler submitted that her fee included advising and preparing written submissions.

72. In response to a question from the Tribunal, about whether the costs order made on 9 September 2016 had been paid, Mr Halstead told the Tribunal that they had not. Mr Halstead went on to state that he understood that there was some sort of appeal against the costs order.

73. The Tribunal considered carefully the application for costs. It was clearly right that the Respondent should pay the Applicant's reasonable costs of dealing with his application, particularly as the application had failed. The Applicant had been justified in opposing the application.

74. The Tribunal noted that Ms Butler had appeared for the Applicant in the hearing in September 2016. There had been merit in instructing someone who was familiar with the case. However, taking that into account, the Tribunal determined that Ms Butler's fee was disproportionate and should be reduced. The work done by the Applicant's in house solicitor appeared reasonable and was carried out at a reasonable rate (£130 per hour). In all of the circumstances, the reasonable and proportionate costs of the application were assessed at £1,985 (inclusive of VAT, where payable).

75. The Tribunal noted the Respondent's submission that he was unable to afford to pay costs. No documentary evidence had been provided to support this contention. The Tribunal noted that there was no reference in the Judgment of 20 September 2016 to any statement of means being provided to that hearing by the Respondent. There had been mention in this hearing that the Respondent had some savings, and it was not known whether he owned any property or other assets which could be used to pay costs. Despite what was said by Mr Halstead towards the end of the hearing, there did not appear to be any ongoing appeal against the costs order made in September 2016. In these circumstances, the reasonable order was that the Respondent should pay the Applicant's costs, as assessed, in the usual way; the Applicant would be expected to proceed proportionately in seeking to enforce both of the costs orders.

Statement of Full Order

76. The Tribunal Ordered that the application made on 11 November 2016 to vary restrictions imposed by the Tribunal on 9 September 2016 be dismissed.

The Tribunal further Ordered that, MICHAEL SCHWARTZ, solicitor, do pay the costs of his application in the sum of £1,985.00.

Dated this 10th day of January 2017
On behalf of the Tribunal

R. Hegarty
Chairman