SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 — Case No. 11876-2018

BETWEEN:

SOLICITORS REGULATION AUTHORITY — Applicant

and

ROBERT HENRY FOSTER — Respondent

Before:

Mr A. N. Spooner (in the chair)
Ms A. E. Banks
Dr S. Bown

Date of Hearing: 2 April 2019

Appearances

Inderjit Johal, barrister in the employ of the Applicant, the Solicitors Regulation Authority, The Cube, 199 Wharfside Street, Birmingham, B1 1RN.

Rory Dunlop QC, counsel of 39 Essex Chambers, 81 Chancery Lane, London WC2A 1DD for the Respondent.

JUDGMENT

Allegations

1. The allegations against the Respondent made by the Solicitors Regulation Authority ("SRA") were that:-

1.1 Between 25 October and 1 November 2010 he prepared an Enduring Power of Attorney ("EPA") for his elderly client, BR, but backdated it to 6 November 2003 and witnessed signatures as if the document was completed on 6 November 2003. In so doing he acted in breach of all or any of Rules 1.01, 1.02, 1.06 of The Solicitors' Code of Conduct 2007 ("the 2007 Code");

1.2 By failing to properly advise his client that the EPA could not be legitimately registered with the Office of the Public Guardian (OPG) and/or that it was invalid, he breached all or any of Rules 1.04, 1.05, 1.06 and 2.02(1)(b) of the 2007 Code.

2. Dishonesty was alleged with respect to the allegation at paragraph 1.1, but dishonesty was not an essential ingredient to prove that allegation.

Documents

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

- Notice of Application dated 2 October 2018
- Rule 5 Statement and Exhibit JRL1 dated 2 October 2018
- Respondent's Answer to the Rule 5 Statement dated 9 November 2018
- Agreed Hearing Bundle
- Applicant's Schedule of Costs dated 26 March 2019
- Skeleton Argument on behalf of the Respondent dated 1 April 2019

Preliminary Matters

4. Mr Johal applied for emails produced by the Applicant and the Respondent to be admitted into evidence. That application was not opposed. The Tribunal considered that as the emails were relevant to the matter they should be admitted, notwithstanding that they were out of time. Accordingly, the application to admit further evidence was granted.

5. Mr Johal applied to amend allegation 1.1 so that it more accurately reflected the dates of the conduct complained of. That application was not opposed. The Tribunal considered that it was appropriate to amend the allegation as requested. The amendment did not affect the substance of the allegation. Accordingly, the application to amend was granted.

Factual Background

6. The Respondent was born in 1954 and was admitted to the Roll of Solicitors in October 1978. He held a practising certificate free from conditions. At all material times, the Respondent was a partner in Foster Law.

7. This matter related to the preparation of an enduring power of attorney. Enduring powers of attorney were legislated for under the Enduring Powers of Attorney Act 1985 ("EPAA 1985"). The EPAA 1985 was repealed by the Mental Capacity Act 2005 ("MCA 2005") and no enduring power of attorney within the meaning of the EPAA 1985 was to be created after 1 October 2007 (section 66(2) MCA 2005). A new power called a 'lasting power of attorney' ("LPA") was introduced by the MCA 2005.

8. Where an EPA has been dated with a date other than that on which it was executed, or it was executed after 20 September 2007 it will be defective and unable to be rectified.

9. Schedule 4 of the MCA 2005 sets out provisions applying to existing enduring powers of attorney. This includes that any attorney must make an application to the OPG for the registration of the instrument creating the power if the donor is, or is becoming, mentally incapable. Registration of the EPA requires the attorney to state the date on which the EPA was made/signed by the donor, and to confirm that the information is true.

10. Section 16 of the MCA 2005 sets out that the Court may, if a person lacks capacity, make an order or orders on their behalf or appoint a person (a "deputy") to make decisions on their behalf. The government website guidance on deputies states that if a person already has a lasting or enduring power of attorney, they do not usually need a deputy.

11. The Respondent had prepared a Will dated 6 November 2003 for an elderly client BR, when he was a partner in his previous firm, Walker Foster ("WF").

12. On 14 July 2009, the Respondent left WF. He began trading with Foster Law on 12 October 2009. On 22 December 2009, the Respondent wrote to BR regarding providing an authority to transfer her Will and other documents to his new firm.

13. In October 2010, the Respondent was contacted by a third party indicating that BR wished to revise her Will following the passing of her brother. The Respondent wrote to BR to this effect on 22 October 2010, confirming he held her previous Will, and met her at her home on 25 October 2010 to take her instructions on her new Will.

14. BR was taken to the Respondent's office by her friend and proposed executor, AP, on 1 November 2010. The updated Will was finalised and signed.

15. The Respondent dictated the EPA on 25 October 2010. At the meeting on 1 November 2010 the EPA was finalised. The Respondent witnessed the signatures of BR and AP. However, the EPA was backdated to 6 November 2003. As set out above, no enduring power of attorney could legitimately be prepared and completed after 1 October 2007.

16. On 28 April 2016 the SRA received a report from WF (who were instructed by AP on behalf of BR) regarding these matters. The report stated that the Respondent had prepared the EPA, but it had been backdated to 6 November 2003. Further, AP (the proposed attorney) was not willing to "deceive the OPG or anybody else" and that it

had been necessary to apply for an Order appointing AP as the deputy of BR, incurring further costs.

Witnesses

17. The following witnesses provided statements and gave oral evidence:

- Robert Henry Foster – Respondent
- Diane Lesley Foster – Respondent's wife

18. The written and oral evidence of the witnesses is quoted or summarised in the Findings of Fact and Law below. The evidence referred to will be that which was relevant to the findings of the Tribunal, and to facts or issues in dispute between the parties. For the avoidance of doubt, the Tribunal read all of the documents in the case and made notes of the oral evidence and submissions. The absence of any reference to particular evidence should not be taken as an indication that the Tribunal did not read, hear or consider that evidence.

Findings of Fact and Law

19. 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. The Tribunal considered all the evidence before it, written and oral together with the submissions of both parties.

Dishonesty

20. The test for dishonesty was that set out in Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67 at [74] as follows:

> "When dishonesty is in question the fact-finding Tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledgeable belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the factfinder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

21. When considering dishonesty the Tribunal firstly established the actual state of the Respondent's knowledge or belief as to the facts, noting that the belief did not have to be reasonable, merely that it had to be genuinely held. It then considered whether that conduct was honest or dishonest by the standards of ordinary decent people. When considering dishonesty, the Tribunal had regard to the references supplied on the Respondent's behalf.

Integrity

22. The test for integrity was that set out in Wingate and Evans v SRA and SRA v Malins [2018] EWCA Civ 366, as per Jackson LJ:

> "Integrity is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members … [Professionals] are required to live up their own professional standards … Integrity connotes adherence to the ethical standards of one's own profession".

23. **Allegation 1.1 - Between 25 October and 1 November 2010 he prepared an EPA for his elderly client, BR, but backdated it to 6 November 2003 and witnessed signatures as if the document was completed on 6 November 2003. In so doing he acted in breach of all or any of Rules 1.01, 1.02, 1.06 of the 2007 Code.**

The Applicant's Case

23.1 Mr Johal submitted that a solicitor upholding the rule of law and the proper administration of justice would seek to ensure that the statutory provisions in their relevant area of practice were complied with, and would not knowingly circumvent them. The Respondent was an experienced solicitor, whose website entry described him as a specialist in Wills, probate/administration of estates and inheritance tax. On his own account (and the account of AP), he informed BR/AP that the law had changed and an LPA should be required. He knew the law had changed, but nevertheless prepared an EPA with a backdated date. The Respondent accordingly deliberately breached statutory provisions of which he was aware. In so doing he failed to uphold the rule of law and the proper administration of justice, in breach of Rule 1.01.

23.2 A solicitor acting with integrity would not backdate a formal document that could potentially be relied on by third parties with serious consequences and in breach of the law. Nor would a solicitor acting with integrity witness a formal document purporting that it had genuinely been completed some seven years earlier - thereby potentially circumventing a change in the law. The Respondent's decision to prepare, backdate and witness the EPA with an incorrect date showed a serious departure from the standards expected of a solicitor and demonstrated a lack of rectitude and steady adherence to a moral code, in breach of Rule 1.02.

23.3 All solicitors were trusted by clients to advise them properly and in accordance with the law, to the best of their abilities. This was particularly the case with potentially vulnerable elderly clients, seeking to put proper provisions in place for their requirements as they age. Preparing and backdating a formal document in breach of the law, and witnessing the document with that incorrect date, was inherently likely to diminish trust in the Respondent and the legal profession, in breach of Rule 1.06.

Dishonesty

23.4 Mr Johal submitted that the Respondent's conduct was dishonest in accordance with the test for dishonesty stated Ivey. In preparing and backdating a formal document, in

breach of statutory provisions of which he was aware, and signing to witness the document as if it were completed at the earlier date, the Respondent had knowingly acted dishonestly by the standards of ordinary decent people.

23.5 His state of mind was evidenced by the following:

- At the relevant time he was a very experienced solicitor.
- From the entry on his firm's website he is a specialist in Wills, probate/administration of estates and inheritance tax.
- The Respondent admitted that he knew the law had changed, meaning that an EPA could no longer be prepared, but nevertheless deliberately prepared and backdated an EPA in breach of the law.
- He was present and in control of all relevant steps in the process.
- Not only did he prepare the document, he also falsely witnessed the document on two occasions – purporting incorrectly to have witnessed it on 6 November 2003, some seven years earlier. This was a deliberate act.
- At the time of the events he kept no record of the events regarding the EPA and did not record his conduct. He also took steps in witnessing the EPA to make it look more likely to have been executed in 2003. Particulars regarding these matters include that:

  a) None of his contemporaneous notes made mention of the issue regarding the EPA;

  b) He wrote no letters noting or advising of the position regarding the EPA;

  c) Although the Respondent stated and accepted that they were in fact prepared, signed and witnessed on the same day at his office, the Will dated 1 November 2010 and the EPA were witnessed by the Respondent in different ways. The Will was witnessed by the Respondent using his business address and stamp, with the EPA witnessed using his home address (his firm not being in existence in 2003).

23.6 The Respondent stated, in correspondence with the Applicant that BR "winced" when told of the registration fee relating to a proper LPA, and that he "went too far" in trying to help her. Even if the Respondent's intention was to help BR, it was submitted that his actions in preparing an invalid document and falsely witnessing it with backdated dates were inappropriate and dishonest.

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

23.7 The Respondent admitted allegation 1.1 including that his conduct had been dishonest. In his Answer the Respondent stated that his admission was made "with profound regret and contrition". He described his conduct as "a one-off isolated incident and a singular departure from habitual adherence to strict standards of

integrity and ethical propriety, which are paramount to me and the reputations of myself, my family, my firm, its clients and the regional community of people and businesses which it serves, my colleagues, other stakeholders and the profession generally". Although he could not be sure of the reasoning for preparing an EPA rather than an LPA, "any benefit, gain or even mere convenience to myself or related interests was absolutely not in my countenance and the predominant intention was to save BR the burden, confusion and potential distress, and expense, of an LPA when, as I genuinely but aberrantly believed (regrettably with complete absence of vision or apprehension of downstream consequences for RB and/or AP) no hurt or damage to any person in any way was envisaged or expected".

The Tribunal's Findings

23.8 The Tribunal found allegation 1.1 proved beyond reasonable doubt, including that the Respondent's conduct had been dishonest, on the facts and evidence. The Tribunal considered that the Respondent's admissions had been properly made.

24. **Allegation 1.2 – By failing to properly advise his client that the EPA could not be legitimately registered with the OPG and/or that it was invalid, he breached all or any of Rules 1.04, 1.05, 1.06 and 2.02(1)(b) of the 2007 Code.**

The Applicant's Case

24.1 Mr Johal submitted that there was no mention of the EPA matters on the Respondent's files and no correspondence explaining the position. AP stated that no advice was given about the effect of the change in rules.

24.2 As detailed above, to properly register a legitimate EPA prepared before the change in the law, a declaration was required to be completed by the attorney(s), declaring the date an EPA was completed. Such a declaration could not properly be given regarding the EPA backdated and witnessed by the Respondent.

24.3 The Respondent stated in correspondence with the Applicant that in his view there could have been "no possible detriment to [or loss suffered by] any person" from his actions. However, there were potential detrimental consequences for AP having signed a backdated EPA and there was actual detriment to BR as the EPA that was prepared was invalid which necessitated an application to the Court of Protection for a Deputyship Order appointing AP as BR's deputy. BR/AP incurred the costs of that application. The Respondent's failure to advise properly did not give his client (or AP) a clear explanation of the issues involved, and did not allow his client (or AP) the opportunity to properly assess the matter, in breach of Rule 2.02(1)(b).

24.4 A solicitor acting in the best interests of a client, and providing a proper standard of service, would not proceed with a serious change for a client (such as a power of attorney) without advising on the consequences of the arrangements. By failing to properly advise of the potential consequences of the position and that the EPA could not be legitimately used/registered with the OPG, the Respondent failed to act in the best interest of his client and failed to provide a proper standard of service, in breach of Rules 1.04 and 1.05.

24.5 A solicitor acting in a way that maintains the trust that members of the public place in them, would give proper legal advice to a client on their options and the consequences of choosing each option. The Respondent failed to provide such advice and acted in a way that is likely to diminish the trust the public, and in particular BR and AP, placed in him as a solicitor, in breach of Rule 1.06.

The Respondent's Case

24.6 The Respondent admitted allegation 1.2, including that he had breached the Rules as alleged.

The Tribunal's Findings

24.7 The Tribunal found allegation 1.2 proved beyond reasonable doubt on the facts and the evidence. The Tribunal considered that the Respondent's admissions were properly made.

Previous Disciplinary Matters

25. The Respondent had one previous matter before the Tribunal (Case No. 9901-2008). On that occasion the Respondent admitted that he been guilty of conduct befitting a solicitor by virtue of his conviction for possessing an offensive weapon (a carving knife) in a public place contrary to Section 1(1) of the Prevention of Crime Act 1953. The Respondent was fined £4,000 and ordered to pay costs in the sum of £434.00.

Mitigation

26. The Respondent gave evidence in mitigation. He considered that BR was of limited means; her estate was not worth a great deal. He accepted that solicitors should be capable of being trusted. The Respondent accepted "entirely and wholeheartedly" that his conduct was in breach of his regulatory obligations. He explained that in preparing the EPA, backdating it and witnessing the signatures, which he also backdated he was being "too kind" and "too helpful". He stated that he bitterly regretted his conduct. The Respondent explained that his expertise and knowledge was important in the areas in which he practised. He said that he currently had four matters in particular that were "delicately poised". The Respondent explained that he held a considerable store of background information about many clients which was very useful and sometimes vital to optimum conduct of their affairs. He had a number of clients that had been dealing with for over 30 years and successive generations. When representing those clients he was able to provide advice without having to start from "square 1" as he knew all the background information.

27. Mrs Foster gave evidence in mitigation on behalf of the Respondent. In her statement, Mrs Foster explained "the (Respondent's] clients (and indeed mine) have become very reliant on our advice and I know that a large number of [the Respondent's] clients would be distressed if they could not speak with him from time to time and would not be disposed to consult a stranger or indeed two strangers ... [In the event that the Respondent were unable to practise] I would be very concerned about our clients, who would inevitably feel cast adrift. To suggest that they consult a different firm would be equally distressing to them because other advisers would not

have the same knowledge of their families and histories, and financial and other circumstances, that [the Respondent] has built up over almost 40 years". Mrs Foster explained that the relationships with clients were such that clients felt able to call at any time. They knew the names of their clients and had acted in some cases for three generations of the same families. Some of their more elderly clients would be quite distressed if the Respondent were no longer able to act for them. Mrs Foster explained that she would not be in a position to take over his cases as her speciality was in a different area of law.

28. As regards the future of the firm, they were planning to retire but wanted to do so in an orderly fashion. They had recruited a solicitor who was a partner and would take over Mrs Foster's work. Mrs Foster remained at the firm so as to ensure a smooth handover. They were looking for someone to replace the Respondent. They would then be able to hand-over to the replacement with that person being introduced to clients while the hand-over process was taking place.

29. Mr Dunlop QC referred the Tribunal to the relevant caselaw as regards exceptional circumstances which set out the following principles:

- Save in exceptional circumstances, a finding of dishonesty will lead to strike off (SRA v Sharma [2010] EWHC (Admin)).
- There is a small residual category of cases where striking off will be a disproportionate sanction in all the circumstances (Sharma).
- Whilst personal mitigation was relevant, it was not in itself decisive. The principal focus should be on the nature scope and extent of the dishonesty and the degree of culpability (SRA v James, MacGregor and Naylor [2018] EWHC 3058 (Admin)).

30. When considering the nature scope and extent of the dishonesty, the Tribunal should consider whether:

(i) the dishonesty was momentary or over a lengthy period (Sharma);

(ii) it was repeated (James et al);

(iii) the purpose of the dishonesty was to benefit the solicitor (Burrowes v Law Society [2002] EWHC 2900 (Admin)); and

(iv) the dishonesty had an adverse effect on others (Sharma).

31. When reading James et al and Burrowes together, it was clear that an important consideration was the nature and degree of dishonesty. A key factor in that consideration was whether the dishonesty had been repeated.

32. Mr Dunlop QC submitted that the incidents giving rise to the allegations occurred over a short period of time. The Respondent considered creating an EPA on 25 October 2010. He dictated the document that evening and gave it no further consideration. The document was 'executed' one week later. The Respondent

accepted that he had time from the creation to the execution of the document to consider its propriety, however he gave it no thought. If this was not considered a single moment of madness, it was close. Further, there had been no repeat thereafter and the dishonesty was not perpetuated over time. The Respondent had admitted from the outset that he had backdated the EPA. This was put to him in a letter from the Applicant dated 5 July 2016. In his response of 12 July 2016, he accepted that the document had been backdated. Mr Dunlop QC submitted that those early admissions were indicative of his honesty; a dishonest person was likely to deny that the document had been backdated.

33. The Respondent's conduct, it was submitted, was clearly an isolated incident – the backdating took place once and once only. This was completely out of character for the Respondent. The Tribunal was referred to a number of testimonials submitted on the Respondent's behalf that attested to his probity and integrity over his 40 years of practise.

34. Mr Dunlop QC submitted that the key consideration was the purpose of the Respondent's dishonesty. In SRA v Imran [2015] EWHC 2572 (Admin), it was held that "at the heart of any assessment of exceptional circumstances … the factor which is bound to carry the most significant weight … 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 on the impact on the reputation of the profession…" The most striking feature of this matter was that the Respondent's purposes were purely altruistic – he was seeking to help an elderly, vulnerable client who might have struggled to pay for the LPA she should have been given. The Respondent stood to gain nothing and in fact gained nothing from his conduct. Such a motive, it was submitted, was extremely unusual in cases of dishonesty. Solicitors ordinarily did not take the risk of acting dishonestly unless tempted by greed or to cover-up wrongdoing. In this case it was not suggested that the Respondent's motivation was anything other than altruistic. The Tribunal was referred to Burrowes. In that matter the Divisional Court found that striking the Respondent from the Roll was too harsh. In that case the Respondent had forged the signatures of two purported witnesses to two Wills when those witnesses had not in fact been present at the time the Wills were signed by the testators. Rose LJ stated:

> "In my judgement, the misconduct here was isolated. It was out of character for a solicitor … of hitherto unblemished record, and of impeccable reputation within the profession. At the time he was suffering from depression. His act was of no benefit financially, or otherwise, to him, and could only have caused any loss to the clients, at whose insistence it was that he did what he did. Of course, a solicitor should resist instructions from clients which produce the sort of result which occurred in the present case. But in fact what happened … is that, within a few days, proper wills had been prepared by [the Respondent] and legally executed in the presence of witnesses."

35. The matter of Sharma also highlighted the importance of motive when considering culpability. Mr Dunlop QC submitted that not all dishonesty was the same. There was a big difference between the dishonesty of a solicitor who had improperly misappropriated client money and the dishonesty admitted by the Respondent. That

there were different types of dishonesty, and that the public appreciated that was demonstrable in so called "white lies"; those lies told to be kind or protect others. Whilst the public would find a lie to be dishonest, its view of "white lies" was very different to lies calculated to cause harm and deceive. In this case, the Respondent had backdated the EPA in an attempt to save his client money. This was hugely different to the dishonesty by solicitors for personal gain.

36. As regards any adverse effect on the client, AP's statement made it clear that BR was not aware of the issues with the EPA, thus it had no adverse effect on her. The payment from BR's estate of the fees and advice in applying for Deputyship had been repaid by the Respondent. Whilst that payment had only been made on 1 April 2019, the Respondent was not aware until 26 March 2019 who the payment should be made to. He waited until 1 April 2019 to obtain counsel's advice as to whether to pay, or to make an offer to pay. In the circumstances, the Respondent's seeking of counsel's advice was not unreasonable. As to AP's statement: "My main concern is that I believe these issues just shouldn't happen … I also feel that we should be able to trust professional and legal people when we want help, and it is sad when we don't, but after what happened I sadly couldn't trust Mr Foster any more", it was submitted that those comments did not go further than the general principle that there was reputation to the damage of the profession in every case where a solicitor was found to have been dishonest. When talking of adverse effects, the authorities looked beyond that general reputational damage to specific damage such as distress and financial loss. In this case there had been no financial loss as the amounts were repaid. AP in her statement, whilst expressing disappointment, did not go so far as to say that she was distressed.

37. Mr Dunlop QC submitted that the purpose of sanction was to serve the public interest. When determining the appropriate sanction, the Tribunal should consider that if it were to strike the Respondent off the Roll, it would be depriving the public of a professional who could not be replaced. The Tribunal was referred to the testimonials submitted on the Respondent's behalf. They demonstrated the Respondent's skill in his area of expertise, making reference to the Respondent's "profound knowledge and ability to set legal matters in their full context", his being one of the best solicitors "based on his extensive experience advising farmers, landowners and families" and his accumulation of a wealth of knowledge to the benefit of his clients. A number of the testimonials attested to the Respondent going the "extra mile" for his clients, citing examples of when this was the case. It was also clear that the Respondent knew a great deal about his clients having represented them and members of their families for a number of years. His clients held him in high regard and he would be difficult to replace. One client described that if deprived of the Respondent's help and expertise, he would not know to whom to turn. This was a client that the Respondent had represented for over 30 years. Another client stated: "It genuinely worries me from whom we will seek our legal advice when, and if, [the Respondent and Mrs Foster] ever retire."

38. In summary, Mr Dunlop QC submitted that the Respondent posed no continuing risk to the public. Members of the public would understand the extent of the Respondent's conduct and allowing him to remain on the Roll would not undermine public confidence in the profession. The public would understand that dishonesty was taken seriously by the Applicant and the Tribunal, and that a dishonest solicitor would

be struck off the Roll in all but exceptional cases. This was a case where the public would understand that in all the circumstances, a lesser sanction than strike off was the appropriate and proportionate sanction. The Respondent's conduct consisted of a one-off act that was not for his benefit and was a misguided attempt to assist his client. It was just and proportionate to recognise in the sanction that this was an exceptional case of dishonesty, where the Respondent was not thinking of himself or his firm and did not make any gain from his conduct. A fine or a suspended sanction would allow the Respondent to serve out the rest of his career in dignity and to find someone who could replace him and continue to serve the interests of the local community and clients. To remove the Respondent from practise would positively harm his clients and the firm. The Respondent and his wife were good people who had dedicated their lives to the local community. They no longer needed to work but continued to do so until they found competent replacements over to whom they could hand the business.

39. As regards the Respondent's previous appearance before the Tribunal, Mr Dunlop QC submitted that that matter had occurred in 2005, quite some time ago. The Respondent had admitted his misconduct. There were no allegations that his conduct lacked integrity or was dishonest. That matter was of a wholly different nature.

Sanction

40. The Tribunal had regard to the Guidance Note on Sanctions (6th Edition). The Tribunal's overriding objective, when considering sanction, was the need to maintain public confidence in the integrity of the profession. In determining sanction, it was the Tribunal's role to assess the seriousness of the proven misconduct and to impose a sanction that was fair and proportionate in all the circumstances.

41. The Tribunal accepted the Respondent's submissions that he did not stand to gain financially from backdating the EPA. His actions were planned. The Tribunal accepted that the Respondent may have acted spontaneously with the initial advice to BR as regards the EPA. Thereafter he had dictated the EPA. He was then present when it was signed. It was the Respondent that had inserted the date onto the EPA at the front of the document, and it was the Respondent that had inserted the dates of the signatures. The Tribunal noted that at the time of the signing of the EPA, BR also signed her updated Will. Both the Will and the EPA were witnessed by the Respondent on the same day, however they were witnessed differently by the Respondent. As the Respondent's firm did not exist as at the date that was placed on the EPA, the Respondent provided his home address, whereas he had used his business address for the Will. The Tribunal found that this was demonstrable of the Respondent's having given some thought as to how to witness the invalid document, such that his conduct could not be described as being spontaneous. That the Respondent had acted in breach of a position of trust was plain. He was clearly trusted to act in his client's best interests and to prepare and execute a lawful document. The Respondent accepted that his client was elderly and vulnerable. She was seeking to ensure that all of her affairs were in order and had instructed the Respondent to assist her in that endeavour. The Respondent failed to do so, instead creating a document that was invalid from the outset. The Respondent was fully responsible for his conduct. This was not a course of action requested by his client, but was one suggested of his own volition with no explanation provided to his client

of the likely consequences of that course of action. The Respondent, on his own case, was a specialist in this area. He was vastly experienced and knew the rules as regards EPA's and LPA's. He had used that experience to circumvent those rules. The Tribunal considered that the Respondent was wholly and solely culpable for his conduct.

42. His conduct had caused harm to the reputation of the profession and had directly affected BR's estate and AP. By virtue of the Respondent's conduct, AP had to apply to the OPG for a Deputyship order, action that she might not have needed to take had the Respondent properly advised BR at the time. He had placed her in the position where, if she sought to rely on the document, she was relying on a document which she knew was not properly executed. Further, she would be relying on the EPA at a time when it was incapable of being rectified as by the time of any reliance, BR lacked capacity. It was clear from AP's statement that her trust in the Respondent had been diminished. That the Respondent's misconduct was a serious departure from the complete integrity, probity and trustworthiness expected of him was plain. Members of the public would not expect a solicitor to knowingly create and execute a document that was invalid from the outset.

43. The Respondent's conduct was aggravated by his proven dishonesty, which was in material breach of his obligation to protect the public and maintain public confidence in the reputation of the profession; as per Coulson J in Sharma at paragraph 34:

> "There is harm to the public every time that a solicitor behaves dishonestly. It is in the public interest to ensure that, as it was put in Bolton, a solicitor can be "trusted to the ends of the earth"."

44. The Respondent's actions were deliberate. The creation of the document had been instigated by the Respondent, who knew (i) when he suggested using an EPA, (ii) when he prepared and dictated the document and (iii) when he met with BR and AP for the document to be executed, that the document was not, and could not be valid. That such conduct was in material breach of his obligations as a solicitor was clear.

45. The Tribunal noted that the previous matter was of a different nature. However, it did demonstrate the Respondent's lack of good judgement, and a repeated disregard for his obligations as a solicitor.

46. In mitigation, the Tribunal found that the Respondent had made good the loss suffered by the estate of BR in reimbursing the legal fees it had incurred as a result of his misconduct. Whilst the Respondent's dishonesty was not a single episode, it was a single course of conduct (from inception to completion) which lasted for a short period of time. The Respondent had demonstrated some insight into his conduct, he had made open and frank admissions at an early stage and had cooperated with the Applicant throughout.

47. Given the serious nature of the allegations, the Tribunal considered and rejected the lesser sanctions within its sentencing powers such as no order, a reprimand, a fine or restrictions. The Tribunal had regard to the case of Bolton v Law Society [1994] 2 All ER 486 in which Sir Thomas Bingham stated:

> "....Lapses from the required standard (of complete integrity, probity and trustworthiness)....may....be of varying degrees. The most serious involves proven dishonesty....In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced by the solicitor, ordered that he be struck off the roll of solicitors."

48. The Respondent had admitted, and the Tribunal had found proved, that the Respondent had acted dishonestly. It was settled law that save in exceptional circumstances, a finding of dishonesty would almost invariably lead to the sanction of being struck off the Roll. Mr Dunlop QC submitted that this case was one which fell into the residual category of cases where striking the Respondent from the Roll was disproportionate in all the circumstances. The Tribunal considered that of prime importance when considering whether there were exceptional circumstances was the nature and extent of the dishonesty, the degree of culpability and the reputation of the profession.

49. The Tribunal considered the authorities cited by the parties, and in particular considered the submissions of Mr Dunlop QC as to their applicability in this case. The Tribunal accepted that the incident lasted for a short period of time, in that the Respondent conceived the idea on 25 October 2010, and the EPA was executed on 1 November 2010. However, it was also of note that the invalid EPA remained a purportedly valid document until at least August 2015 when AP instructed WF. At that point it was clear that BR lacked capacity to either amend her Will or to make an LPA. Accordingly, the application for a Deputyship Order was made. The Tribunal did not consider this to be a one-off such that it could be described as a "moment of madness". The Respondent, as detailed above, had conceived of the idea, prepared the EPA and then backdated it one week later. He knew at the time of conception and preparation, given the prevailing law, that the document would be backdated. It was clear that he considered what would be an appropriate date, as he backdated the EPA to a time when BR had signed her previous Will, also prepared by the Respondent. Such conduct was not properly described as an isolated incident; it was a course of conduct embarked upon by the Respondent in the knowledge that such conduct was improper - there had been planning and preparation to put the dishonest act into effect. This was further evidenced by the differing ways in which the Respondent witnessed the Will and the EPA.

50. Mr Dunlop QC submitted that the key matter for the Tribunal to consider was the Respondent's motivation. He argued that the circumstances in this matter were most closely aligned to Burrowes, where the Divisional Court had considered that a strike off was not in the reasonable range of sentences such that it was not available to the Tribunal to consider. Mr Dunlop QC accepted that there were factual differences between the cases, however the key consideration in that matter was that the conduct was not for personal gain. The Tribunal determined that whilst there was some similarity between the cases there were marked differences. In Burrowes the misconduct was requested by the clients, in this matter it was at the Respondent's own instigation. In Burrowes the misconduct was discovered quickly, and was quickly rectified by the Respondent, whereas in this matter the misconduct was not disclosed until sometime later, at which point rectification was not possible as BR no longer had capacity. Mr Burrowes had advised his clients, at the time, of the invalidity of the documents, however notwithstanding that advice, the clients insisted the documents

be invalidly executed. The Respondent had provided no such advice to his client, despite knowing that the document was not, and could not, be valid given the law as regards EPA's at that time. Mr Burrowes had not created documents that were invalid at the outset, had the Wills been properly witnessed, they would have been valid documents. On the contrary, the Respondent had created an EPA which could not be valid at the time of creation, and could not be validly executed. The conduct of Mr Burrowes was entirely spontaneous, it had occurred instantly and unexpectedly whilst with the clients following appropriate advice. The Respondent had created the EPA, and then backdated the document a week later. That he did not consider the document in the interim was no defence; he had had time to consider the propriety of his suggested course of action. He also had time to consider his conduct when the EPA was signed and backdated; he failed to do so. Whilst it was the position that in both cases the solicitor did not stand to make any personal gain, the factual matrix as regards the matters were so dissimilar that Burrowes was distinguishable from the Respondent's case.

51. The Tribunal did not accept that if the Respondent's motivation was altruistic, it followed that he was not culpable. As detailed above, the Tribunal had found that the Respondent was culpable for his conduct, culpability meaning he was blameworthy, liable, responsible, and in the wrong. The fact that personal gain from dishonesty was more reprehensible than the Respondent's conduct did not negate the Respondent's culpability. Nor did his expressed altruism negate his professional failings. The Respondent knew the correct process, knew the law, and knew that the EPA was not, and could not be valid. Notwithstanding that knowledge he consciously and deliberately created an invalid document. He recognised that other solicitors would not have conducted themselves in that way. During his evidence in mitigation, the Respondent referred to the fact that had Mrs Foster been present for the execution of the Will and the EPA, she would immediately have stopped him. This evidenced the very clear and obvious nature of the Respondent's misconduct. The Tribunal did not consider that the altruistic reasons for the Respondent's dishonest conduct automatically meant that he fell within the residual category; on its own, altruism was not sufficient to make dishonest conduct exceptional but was a factor to be considered and balanced against the professional repute and public interest in allowing a dishonest solicitor to remain on the Roll.

52. Mr Dunlop QC accepted that there had been adverse consequences as a result of the Respondent's conduct, but that there had been no financial loss to anyone as the Respondent had repaid BR's estate the fees it incurred. The reputational damage expressed by AP was no more than the general reputational damage suffered by the profession where any finding of dishonesty was made. The Tribunal noted that in its letter to the SRA, WF described AP as suffering "considerable consternation" and had asked that a complaint be made to the SRA regarding the Respondent's "deliberately inappropriate conduct". That letter further described that AP had "been caused considerable distress dealing with the realisation that she was expected, by a Solicitor, to mislead others". The Tribunal found that the effect on AP of the Respondent's conduct was more than just the general approbation expressed in the caselaw as regards dishonest conduct. It had caused her consternation and distress. Her trust in the Respondent had been so diminished that she sought to have him removed as an executor of BR's Will but was unable to do so due to BR's lack of capacity. Furthermore, the Tribunal found that the general approbation of members of the

public when a solicitor was found to be dishonest was, or itself, sufficient to warrant a dishonest solicitor being struck from the Roll. In this matter the effect on AP of the Respondent's conduct was, as detailed, more than just the general approbation caused by his conduct.

53. The Tribunal read the testimonials provided on the Respondent's behalf in detail. It took account of all that was said on his behalf by clients and other professionals. The Tribunal also took account of the comments of Sir Thomas Bingham in Bolton:

> "Because orders made by the Tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the Tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely to be, so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price."

54. The Tribunal considered that those observations were equally as applicable to the solicitor who, as in this case, cited the hardship that might be caused to clients were he no longer able to practise. The Tribunal noted that the Respondent had been aware that the Applicant was investigating these matters as early as July 2016. In September 2016, the Respondent's firm was required to respond to a Section 44B Notice dated 23 September 2016 requiring the production of documents in relation to this matter. On 2 May 2018, the Respondent's was sent an EWW letter requiring him to answer allegations, including that his conduct had been dishonest. Whilst at that time, the Respondent did not consider that his conduct had been dishonest, he was aware that this was being alleged by the Applicant. The Respondent had had from 2016 (at the earliest) and from 2018 (at the latest) to make provision in the event that matters proceeded to a referral to the Tribunal to put the affairs of his firm in order and to find a potential replacement. The Tribunal understood from the evidence of both the Respondent and his wife that this had been in their contemplation in any event as they were planning for their retirement. The testimonials left the Tribunal in no doubt that the Respondent was liked and respected by his clients, and that they wanted him to continue to represent them. However, of itself, this was not an

exceptional circumstance justifying a derogation from the principle that those found of dishonesty are invariably struck from the Roll. This was something that needed to be considered and weighed against the reputational damage that could be caused where a solicitor who had been found to be dishonest was allowed to remain on the Roll.

55. The Tribunal took account all matters in the round. It considered that the public were indeed capable of understanding an exceptional case where, although dishonesty was found proved, it did not warrant the solicitor being struck from the Roll. The Tribunal did not consider, weighing all the factors in the balance that this was such a case. The Respondent had formulated a plainly dishonest course of action and had carried that through a week later. Members of the public would not find that such conduct, despite the altruistic purposes, was understandable. The Respondent had consciously and deliberately created a document for an elderly and vulnerable client that might need to be relied upon at a future date that was invalid and improper. He had acknowledged that other solicitors would not have done so. He had acknowledged that it was dishonest to do so. The Tribunal, as detailed above, considered that this was more than a moment of madness. The Respondent had given some thought to his conduct; he had dictated the EPA, had considered the date to which it was to be backdated, had considered what address could be used given that his firm did not exist on the backdated date. AP had been caused distress and consternation at the thought of relying on a fraudulent document. The Tribunal considered that the reputational damage that would be caused by allowing the Respondent to remain on the Roll far outweighed the circumstances advanced on his behalf. For the reasons detailed above, the Tribunal found that the nature, circumstances and context of the Respondent's dishonesty were not such that they placed his conduct in the residual category of exceptional circumstances. Having determined that there were no exceptional circumstances, the Tribunal found that the proportionate and appropriate sanction in this case was to strike the Respondent from the Roll.

Costs

56. The parties agreed that the Respondent should pay a contribution to costs in the sum of £7,942.00. This figure represented appropriate reductions for the shortened hearing time. The Tribunal considered that the agreed figure was appropriate and proportionate and accordingly ordered that the Respondent pay costs in the agreed amount.

Statement of Full Order

57. The Tribunal Ordered that the Respondent, ROBERT HENRY FOSTER, solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the agreed sum of £7,942.00.

Dated this 18th day of April 2019
On behalf of the Tribunal

A. N. Spooner, Chairman