The Respondent appealed the Tribunal's decision dated 25 August 2020 to the High Court (Administrative Court) in relation to costs. The appeal was dismissed by consent on 26 October 2021. The SRA agreed to pay a total of £228,000 in respect of the Respondent's costs.

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11955-2019

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

JAMIL AHMUD Respondent

Before:

Mr J Evans (in the chair)
Mr P Jones
Mr S Marquez

Dates of Hearing: 5 and 24-25 August 2020

Appearances on 5 August 2020

Grace Hansen, barrister, of Capsticks Solicitors LLP of 1 St. Georges Road, Wimbledon, Greater London, SW19 4DR, for the Applicant.

The Respondent appeared in person by telephone.

Appearances on 24-25 August 2020

Nimi Bruce, barrister of Capsticks Solicitors LLP, 1 St. Georges Road, Wimbledon, London, SW19 4DR, for the Applicant.

Ben Hubble QC, barrister of 4 New Square, Lincoln's Inn, London WC2A 3RJ, for the Respondent.

JUDGMENT ON AN APPLICATION TO WITHDRAW ALLEGATIONS AND ON AN APPLICATION FOR COSTS

Allegations

1. The allegations against the Respondent, were that, while in practice as a Partner at Bloomsbury Law, formerly Ahmud & Co Solicitors ("the Firm"):

1.1. On or before 1 August 2012 submitted a bill of costs on behalf of Client A in the case against Mr 1 with a greater hourly rate than he charged Client A and he thereby breached any or all of Principles 1, 2 and 6 of the SRA Principles 2011 ("the Principles");

1.2. Between around 30 November 2015 and 23 August 2016 submitted disproportionate bills of costs for:

1.2.1. The Firm's claim against Client A; and/or

1.2.2. The assessment of the Firm's claim against Client A; and thereby breached any or all of Principles 2 and 6 of the Principles.

1.3. Failed to comply adequately with a Production Notice issued by the SRA under section 44B of the Solicitors Act 1974 on 17 January 2019 and thereby breached any or all of Principles 7 and 8 of the Principles.

Dishonesty

2. In addition, allegation 1.1, above, was advanced on the basis that the Respondent's conduct was dishonest. Dishonesty was alleged as an aggravating feature of the Respondent's misconduct but was not an essential ingredient in proving the allegations.

The case proceeded under the Solicitors (Disciplinary Proceedings) Rules 2007.

Factual Background

3. The key procedural dates in respect of this matter are set out below in order to provide context to the Applicant's application to withdraw all allegations faced by the Respondent and the subsequent application by the Respondent for costs.

Date	**Occurrence**
1 May 2019	Rule 5 Statement and Standard Directions issued which included listing of the substantive hearing on 17-19 September 2019.
7 June 2019	Respondent filed and served his Answer to the Rule 5 Statement.
28 June 2019	Applicant filed and served its Reply to the Answer.
6 September 2019	Respondent's application for the proceedings to be dismissed for abuse of process was refused by the Tribunal. The substantive hearing was vacated and re-listed for 14-16 January 2020.
21 November 2019	Respondent applied to the High Court for judicial review of the Tribunal's decision not to dismiss the proceedings for abuse of process.
27 November 2019	Respondent applied to adjourn the substantive hearing listed in January 2020 pending the judicial review decision. The Tribunal refused the application and directed the Respondent to re-apply if necessary after 12 December 2019.

Date	Occurrence
12 December 2019	Respondent re-applied to adjourn the substantive hearing listed in January 2020 pending the judicial review decision. The Tribunal granted the application.
19 December 2019	Respondent's application for judicial review was refused and the Respondent applied to the High Court for an oral hearing of the judicial review application.
4 February 2020	The High Court, at the oral hearing, refused the Respondent's application for judicial review.
28 February 2020	A Case Management Hearing was convened at which the Applicant indicated that further allegations had come to light against the Respondent which required a Rule 7 Statement to be issued to join the new allegations with the current proceedings. Time was sought in order for that to be done. The Respondent opposed that application. The Tribunal granted the application and listed the matter for a substantive hearing on 24-28 August 2020. The Tribunal directed, amongst other matters, that the Applicant do file and serve a Rule 7 Statement by 9 April 2020 if so advised.
7 April 2020	The Applicant applied for an extension of time to file and serve a Rule 7 Statement. The Respondent did not object. The Tribunal granted the application and set a new deadline of 30 April 2020.
7 July 2020	A Case Management Hearing was convened at which the Applicant sought additional time to file and serve a Rule 7 Statement. The delay was said to have been caused by the Respondent's failure to comply with the Section 44B Notice dated 13 March 2020 in relation to bank statements. The Applicant submitted that upon receipt of the bank statements a Rule 7 Statement would be drafted and an application would be made to the Tribunal for permission to serve the same out of time. The Respondent opposed the application and asserted that the bank statements in question had been disclosed two years earlier but now appeared to have been lost by the Applicant. The Respondent made an Application that the Applicant be debarred from filing and serving a Rule 7 Statement and that the substantive hearing listed do remain. The Tribunal granted the Respondent's application to debar the Applicant from adducing a Rule 7 Supplementary Statement out of time and issued further directions that to ensure that the substantive hearing could proceed on 24 – 28 August 2020.

Applicant's Application to withdraw the Allegations

Applicant's Submissions

4. Ms Hansen filed at the Tribunal and served on the Respondent an application dated 29 July 2020 for permission from the Tribunal to withdraw all allegations. That application was heard on 5 August 2020.

5. In her written application, Ms Hansen had stated that;

> "…The [Applicant] sought the Respondent's full client files before issue but the Respondent only provided extracts of those files. The Respondent provided an office copy of *(sic)* client care letter with his Answer, dated 7 June 2019, which had not been obtained from Client A. In light of the new material, the comments made by the Respondent, in the interests of fairness and in order to assist the Tribunal, the [Applicant] sought to obtain a witness statement from Client A. The information provided by Client A during interviews and emails between January-May 2020 has been inconsistent, but parts of Client A's account are consistent or broadly consistent with the account given by the Respondent. In light of the evidence obtained after issue of the proceedings the [Applicant] considers that Allegation 1 is no longer capable of proof.
>
> The remaining Allegations … have a factual nexus to Allegation 1. If Allegation 1 is withdrawn, the [Applicant] considers that the remaining three allegations are insufficiently serious to amount to professional misconduct."

6. Ms Hansen elaborated on the written application in oral submissions at the hearing.

Allegation 1.1

7. Allegation 1.1 related to the different hourly rates claimed in invoices issued to Client A and the final Bill of Costs prepared in relation to Client A's matter which appeared to be a breach of the indemnity principle. A production notice was served on the Respondent at the material time which required him to provide all invoices, the client care letter and the certified Bill of Costs in respect of Client A. That request was not complied with prior to the issue of the Rule 5 Statement and the Respondent asserted that he was unable to do so as Client A's files had been destroyed upon conclusion of the case. The Respondent further asserted that the differing hourly rates reflected the fact that Client A was struggling to sell his home at the material time thus was experiencing financial difficulties which left him unable to meet his costs obligations to the Respondent. The £145 hourly rate was an interim one only and upon conclusion of the case he would be able to meet the full liability for costs.

8. Ms Hansen submitted that the Applicant considered that explanation to have been implausible which, she submitted, was affirmed by the Tribunal having certified that there was a case to answer in respect of the same. Ms Hansen accepted that the Applicant did not obtain a witness statement from Client A prior to the issue of proceedings before the Tribunal.

9. The Respondent, in his Answer to the Rule 5 Statement, included an office copy of Client A's client care letter. That copy was neither on headed paper nor was it signed but it did set out an hourly rate of £270 which was the amount claimed in the Bill of Costs. Consequently the Applicant filed a Reply to the Answer and proceeded to contact/interview Client A in March and May 2020. Ms Hansen contended that Client A gave inconsistent accounts and broadly provided some support to the Respondent's consistent defence to Allegation 1.

10. Ms Hansen submitted that, having reviewed the further evidence obtained from Client A post issue of the proceedings, the Applicant considered it unlikely that it could discharge the burden of proving Allegation 1.1 beyond reasonable doubt.

Allegation 1.2

11. Allegation 1.2 alleged that the Respondent submitted a disproportionate Bill of Costs in relation to the Client A matter. The allegation was predicated on the "fact" that the Respondent had claimed a higher hourly rate than that which was agreed. Having formed the view that the "hourly rate" issue in Allegation 1.1 was unsustainable, Ms Hansen submitted that Allegation 1.2 should also be withdrawn as it "no longer has the seriousness that [the Applicant] first thought."

Allegation 1.3

12. Allegation 1.3 alleged a failure by the Respondent to produce documents required in order for the Applicant to investigate Allegations 1.1 and 1.2. Ms Hansen submitted that as some of those documents were appended to the Respondent's Answer to the Rule 5 Statement and as the Applicant no longer sought to pursue Allegations 1.1 and 1.2, the seriousness of the failure to comply with the production notice inevitably decreased.

13. In summary, Ms Hansen submitted that leave to withdraw all allegations should be granted as a consequence that the Applicant:

    (a) had gained evidence from Client A,
    (b) had assessed the newly obtained evidence,
    (c) considered that the new evidence mitigated against the seriousness of the conduct alleged and
    (d) concluded that it was unlikely to amount to serious professional misconduct.

The Respondent's Position

14. The Respondent "welcomed" the application for leave to withdraw the allegations.

The Tribunal's Decision

15. The Solicitors (Disciplinary Proceedings) Rules 2007 ("SDPR 2007") at Rule 11(6) provided that:

> "No application or allegation in respect of which a case to answer has been certified may be withdrawn without the consent of the Tribunal."

16. Ordinarily the Tribunal would be very reluctant to permit such serious allegations, including dishonesty, to be withdrawn as there was a public interest in such matters being determined in a transparent and public process. However, the Tribunal considered that the procedural background of the proceedings was most unusual in that a witness statement for these proceedings had not been sought from Client A, in respect of whom the allegations were predicated, pre-issue of the proceedings.

17. The Tribunal noted that the Applicant to date had not secured a witness statement from Client A but through further communications with him had concluded that the allegations (a) provided some corroboration to the Respondent's defence and (b) reduced the seriousness of the conduct alleged such that it did not consider the same to amount to professional misconduct.

18. The Tribunal noted that the Respondent supported the application.

19. Having considered all the circumstances the Tribunal acceded to the application and granted leave to the Applicant to withdraw all allegations levelled against the Respondent in the Rule 5 Statement.

Costs Hearing

20. The Respondent informed the Tribunal that he was seeking an order for costs against the Applicant. The Tribunal decided to hear this application on 24-25 August and made directions to enable that hearing to be effective. In advance of the hearing both parties served witness statements and skeleton arguments. The Tribunal was greatly assisted by these. In considering the matter the Tribunal took full account of all the written and oral submissions, which are summarised below.

Respondent's Submissions

21. Mr Hubble QC submitted that the following elements individually and cumulatively amounted to a good reason for the Tribunal to make an order against the Applicant in favour of the Respondent:

- The closing of the investigation file in 2016, and the informing of the Respondent of that fact, leading to the Respondent's destruction of various of his papers relating to this matter following the communication from SRA that the matter was closed;

- The re-opening of the investigation in 2017 in breach of the SRA's own Reconsideration Policy;

- The referral to the Tribunal and the institution of proceedings without making contact with Client A;

- The failure to disclose the fact of the prior investigation and its closure in the Rule 5 statement;

- The continuing reluctance to provide disclosure during the proceedings. By way of example the FI Officer's attendance note of the interview with the Respondent in

2016 was only provided after the application to withdraw the allegations had been made;

- The decision, on two occasions, to use section 44B notices to seek evidence after the decision to refer the matter to the Tribunal;

- The delays and breaches of directions regarding the proposed Rule 7 statement, which was first mentioned in February 2020 but had still not materialised in July 2020;

- The delay from January to July 2020 once the Applicant had, belatedly, made contact with Client A;

- The refusal to acknowledge or engage with three 'without prejudice' costs offers made at an early stage in the proceedings.

22. Mr Hubble submitted that where there was an allegation of dishonesty which turned on the existence of an oral agreement between solicitor and client, a responsible prosecutor should check with that client before rejecting the account provided by the solicitor. In this case the allegations were withdrawn after Client A had been spoken to.

23. Mr Hubble referred the Tribunal to Yuanda (UK) Co Lid v Multiplex Construction Europe Ltd and another [2020] EWHC 468 (TCC) at [31] and [32]:

> "[31] There are special rules concerning fraud, which must be pleaded. A claim alleging fraud may not be made unless the following matters are satisfied:
>
> (1) There must have been some material fact that 'tilts the balance and justifies an inference of dishonesty': JSC Bank of Moscow v Kekhman [2015] EWHC 3073 (Comm), [2015] All ER (D) 273 (Oct) (at [20]) per Flaux J (as he then was). (2) The claimant must have given clear instructions to plead a claim in fraud and there must have been 'reasonably credible material' to support the allegation: Medcalf v Mardell [2002] UKHL 27, [2002] 3 All ER 721, [2003] 1 AC 120 (at [22]) per Lord Bingham. (3) The claimant must be able to plead primary facts ('particulars') from which a claim involving dishonesty may be proven, as the court will not allow a party to prove a claim in fraud other than on the basis of those primary facts: Three Rivers DC v Bank of England [2000] 3 All ER 1, [2003] 2 AC 1 (at [55], [160], [186]).
>
> [32] There are also specific provisions both in the Bar Standards Board Handbook and the Solicitors Regulation Authority Code of Conduct 2011, which govern the professional obligations of both barristers and solicitors so far as pleading fraud is concerned. These substantially reproduce the guidance given in Medcalf which I identify in [31](2), above."

24. Mr Hubble also referred the Tribunal to Competition and Markets Authority v Flynn Pharma Limited and others [2020] EWCA Civ 617, sections of which are referred to below in the Tribunal's analysis. Mr Hubble drew the Tribunal's attention to the test being one of 'good reason' and not exceptional circumstances. If there was any concern

about a 'chilling effect' of making such an order, this had been factored into the principles set out in Flynn.

25. Mr Hubble took the Tribunal through the chronology of the investigation and proceedings, some of which is set out above.

26. The Respondent had been told that the investigation was being closed on 10 October 2016. Following that notification there had been complaints from the cost draftsman, who had raised the issues initially, about that decision. Mr Hubble submitted that this appeared to have prompted the investigation to be re-opened, which it was on 3 February 2017.

27. The Respondent was not told of this re-opening until February 2018 when an Explanation With Warning ("EWW") letter was issued. The Respondent had replied to that letter on 26 March 2018. In that reply he told the SRA what he had been saying throughout, albeit he did not use the specific phrase "oral agreement".

28. The decision was made to refer the matter to the Tribunal on 5 July 2018. The Rule 5 statement made no reference to the previous decision to close and then re-open the investigation. Mr Hubble referred the Tribunal to the Memorandum of an Application to Dismiss for Abuse of Process dated 17 September 2019 ("the Dismissal Memorandum") in which the Tribunal had stated the following at [58]:

> "The Tribunal was troubled by the Applicant's failure to include the full history of the investigation in the Rule 5 Statement. The fact that the case was being brought on substantially the same facts as had been found to warrant no further action was something that the Tribunal ought to have been aware of when it was considering the matter for certification. It may well have led to further questions being asked of the Applicant. The position was entirely unsatisfactory, particularly in circumstances where there was a section of the Rule 5 Statement that dealt specifically with the steps taken to investigate the allegations made against the Respondent. The explanation as to why this had not been included was insufficient and unhelpful. The failure to include this information gave the impression that the Applicant was not being entirely transparent when it submitted its case for certification."

29. In the meantime, in June 2019, the Respondent had served his Answer. This referred to an oral agreement in terms. On 24 June 2019 the Respondent had written to the Applicant on a 'without prejudice' basis and offered to bear his own costs if the Applicant withdrew the allegations. This letter received no acknowledgement and neither did a similar one sent on 29 August 2019. Mr Hubble queried what more the Respondent could have done.

30. In resisting the application to dismiss for abuse of process, the Applicant had maintained that there was credible evidence to support the allegations. Mr Hubble submitted that it was "very difficult to understand the basis on which that submission was advanced". On 27 January 2020, contact was made with Client A for the first time. The proceedings continued for a further six months, during which time the Respondent continued to make disclosure requests, including seeking disclosure of the investigation file. Mr Hubble submitted that the explanation provided in the witness statement of

Grace Hansen, the solicitor with conduct of the matter at Capsticks, did not make sense. In that witness statement Ms Hansen had stated:

> "28. Consideration was given to approaching Client A for a witness statement, but it was decided at this stage that Allegation 1 could be proven on the documentary evidence and that calling Client A would be likely to lead to a significant number of satellite issues, given the history of animosity between Client A and the Respondent."

31. Mr Hubble submitted that the suggestion that the case could be proved on documentary evidence was clearly incorrect and the proof of this was that once Client A had been spoken with, the Applicant applied to withdraw all the allegations.

32. In February 2020 the issue of a proposed Rule 7 statement was raised. The chronology of that matter is set out above. This resulted in the Applicant being de-barred from serving a Rule 7 statement having failed to comply with the Tribunal's directions. The Tribunal had, at a Case Management Hearing on 7 July 2020 directed that the Applicant to pay 50% of the Respondent's wasted costs of that hearing, the precise figure to be agreed between the parties, or otherwise to be assessed at the substantive hearing. The parties informed the Tribunal that this figure had not yet been agreed.

33. Mr Hubble told the Tribunal that it was only at the "last possible moment" that the decision was communicated that the Applicant intended to seek leave to withdraw the allegations. The reason for this was that Client A, having been contacted, did not support the Applicant's case.

34. Mr Hubble submitted that for all these reasons the case had been improperly brought and pursued. There were any number of good reasons in this case as to why a costs order should be made. The Respondent had done everything he could. He had tried to test the Applicant's case and he had sought disclosure. He had suffered stress as the proceedings progressed.

35. Mr Hubble rejected any suggestion that an order for costs would have a 'chilling effect'. He submitted that this concept referred to circumstances in which a case had proceeded to a full hearing and the regulator had been unsuccessful. It did not apply in cases where all the allegations had been withdrawn as a result of procedural defaults. He submitted that if there was ever a case for a costs order against the Applicant, this was it.

<u>Applicant's Submissions</u>

36. Ms Bruce resisted the Respondent's application for costs.

37. Ms Bruce told the Tribunal that she did not seek to shy away from criticism made by the Tribunal of the Applicant in previous hearings and none of her submissions sought to go behind any of them.

38. Ms Bruce told the Tribunal that the case arose out of a referral from a costs draftsman. There was no suggestion that this referral had been made in bad faith. Ms Bruce rejected the suggestion that the SRA had been "browbeaten".

39. The initial decision to close the case was not taken because these allegations were deemed to be "meritless". That word was not used to refer to what became Allegation 1.1 but to other aspects that fell away and never became part of the Rule 5 statement.

40. Ms Bruce told the Tribunal that the Applicant made no excuse for the fact that the Respondent was not told of the decision to re-open the case. The Applicant had already been criticised for this in robust terms. However Ms Bruce submitted that the decision to re-open had not been taken in a frivolous way. In order to fully close the case the SRA had required documents from the Respondent, which were not provided until June 2019. While Ms Bruce accepted that the burden of proof lay on the Applicant, the Respondent was nevertheless under an obligation to respond to reasonable requests made by his regulator. Ms Bruce told the Tribunal that regardless of whether the Applicant considered it was in breach of the Reconsideration Policy, this matter had been dealt with by the Tribunal at the dismissal application in September 2019.

41. When the documents were provided they changed the evidential basis of the case. This was at the heart of the decision not to take a statement from Client A. It was not the case that the Applicant had taken these decisions lightly.

42. The Respondent's reply to the EWW letter did not refer to an oral agreement and it had not been referred to in his email to the FI Officer of 28 September 2016. The Applicant was therefore not aware that an oral agreement was at the heart of the case from the outset. The document that could have saved a lot of time was the client care letter that was produced in July 2019. The Respondent had always had this but had not provided it until then.

43. The first reference to an oral agreement was in the Respondent's Answer which was served on 7 June 2019.

44. Ms Bruce told the Tribunal that the Rule 5 statement had been drafted by a very experienced regulatory solicitor. Ms Bruce explained that such statements were subject to rigorous internal scrutiny and externally and that it was a "dynamic process".

45. Ms Bruce submitted that one example of external scrutiny was the certification process by the Tribunal, which was not a rubber-stamping exercise. Ms Bruce invited the Tribunal to consider whether it would have certified it as showing a case to answer. If it had been a "shambles" at that stage it would not have been certified.

46. There had then been an application to dismiss the case for abuse of process which the Tribunal had refused. This had been followed by an application for judicial review that was refused at the permission stage. Ms Bruce told the Tribunal that the Applicant relied on the fact that the case was certified.

47. Ms Bruce addressed the point about the lack of information in the Rule 5 meaning it might not have been certified had that information been there. Ms Bruce again submitted that there had been no bad faith. At point of certification the solicitor member was dealing with pleadings rather than the narrative. The investigation element was, in essence, narrative. Ms Bruce accepted that disclosure of this information should have been made to Tribunal but it would not have changed the decision to certify. The opinion evidence of a lay investigator or a FI officer did not have a bearing on whether

there was a case to answer. Ms Bruce submitted that the criticism by the Tribunal in September 2019 was not of the pleadings, rather the process. However the Tribunal had not found that the case was a shambles and should not proceed. Ms Bruce submitted that the judge considering the judicial review application would have read the Rule 5 statement as well. Ms Bruce invited the Tribunal to conclude that the case was properly brought.

48. Ms Bruce invited the Tribunal to take account of the fact that many of these criticisms made by the Respondent had already been adjudicated upon. If the Applicant had applied for its costs at the strike out hearing it would have got its costs, albeit with some reduction.

49. The decision to review the evidence after the June 2019 disclosure involved the Applicant looking at the case and deciding whether to speak to Client A and take a statement. Ms Bruce acknowledged the point about the delay between June 2019 and January 2020. She told the Tribunal that during that period the case had not been forgotten about as there was a dismissal application and an application for judicial review. Ms Bruce submitted that such delay as there was in contacting Client A was not unconscionable. Since that point there had been the Covid-19 pandemic and so the Applicant had allowed Client A some latitude in responding. Having spoken to Client A, the Applicant had taken the right decision that the case could not continue. Ms Bruce submitted that disagreement with a judgment made during the course of a case did not mean that it had been a shambles from start to finish.

50. Ms Bruce told the Tribunal that she made "no apology" for talking about the 'chilling effect' that could be caused if the Respondent's application was granted. Ms Bruce submitted that decision-makers had to be able to make decisions. The Applicant was being criticised for taking the responsible course by reviewing the case. This did not make the case a shambles. The case had been properly brought and had stood up to scrutiny. If the change in circumstances had not occurred then the case would have proceeded.

51. Ms Bruce did not accept Mr Hubble's submission that the Respondent had done everything he could. If he had produced the client care letter earlier then the case would have been reviewed earlier. Ms Bruce also addressed the suggestion that the SRA had lost its file. It had not lost the supervision file. The file that was lost was the legal and enforcement file and Ms Bruce therefore described this submission as a "red herring".

52. In relation to the Rule 7 issues, Ms Bruce reminded the Tribunal that this had been dealt with at the Case Management Hearing on 7 July 2020 and a costs order had been made against the SRA on that occasion.

53. In relation to the submissions made as to the timing of the application to withdraw, Ms Bruce told the Tribunal that this was a "very significant" decision for the Applicant. It was a proper, reasoned and fair decision and the Applicant was transparent about it.

Respondent's Further Submissions

54. Mr Hubble, in responding to Ms Bruce's submissions referred the Tribunal to an internal email in 2016 that canvassed the possibility of making contact with the client at that stage.

55. Mr Hubble also responded to the suggestion that the provision of the client care letter in June 2019 was an important moment and it had been asked for before. The EWW had not asked for it in February 2018. It had been requested in January 2019 and provided in June 2019. Mr Hubble submitted that Ms Hansen's witness statement cast doubt on the importance of the client care letter as she had stated that the decision was taken to continue with the case.

The Tribunal's Decision

56. The Tribunal's power to make an order for costs came from Rule 18 of the SDPR 2007:

> "18.—(1) The Tribunal may make such order as to costs as the Tribunal shall think fit including
> an order—
> (a) disallowing costs incurred unnecessarily; or
> (b) that costs be paid by any party judged to be responsible for wasted or unnecessary costs, whether arising through non compliance with time limits or otherwise.
> (2) The Tribunal may order that any party bear the whole or a part or a proportion of the costs.
> (3) The amount of costs to be paid may either be fixed by the Tribunal or be subject to detailed assessment by a Costs Judge.
> (4) The Tribunal may also make an order as to costs under this Rule—
> (a) where any application or allegation is withdrawn or amended;
> (b) where no allegation of misconduct (including an application under Section 43 of the Solicitors Act) is proved against a respondent."

57. In considering whether to make an order for costs against the Applicant, the Tribunal relied on Flynn, a recent Court of Appeal authority. The Court in Flynn had drawn together the principles from earlier authorities including Baxendale Walker v the Law Society (2007] EWCA Civ 233. The principles to be applied when considering an application for costs against a regulator were set out in Flynn at [79]:

> "79. The applicable legal principles to be derived from these cases are, in my judgment, as follows:
>
> i) Where a power to make an order about costs does not include an express general rule or default position, an important factor in the exercise of discretion is the fact that one of the parties is a regulator exercising functions in the public interest.
>
> ii) That leads to the conclusion that in such cases the starting point or default position is that no order for costs should be made against a regulator who has

> brought or defended proceedings in the CAT acting purely in its regulatory capacity.
>
> iii) The default position may be departed from for good reason.
>
> iv) The mere fact that the regulator has been unsuccessful is not, without more, a good reason. I do not consider that it is necessary to find "exceptional circumstances" as opposed to a good reason.
>
> v) A good reason will include unreasonable conduct on the part of the regulator, or substantial financial hardship likely to be suffered by the successful party if a costs order is not made.
>
> vi) There may be additional factors, specific to a particular case, which might also permit a departure from the starting point."

58. The Court also dealt directly with the question of whether making a costs order could have a 'chilling effect' at [100]:

> "100. I would not regard the "chilling effect" on the CMA as self-evident. But in so far as it has potential to exist, I consider that it is already accommodated within the principles developed by the cases in this court."

59. The Tribunal was not, therefore required to make a determination as to whether the case had been a 'shambles from start to finish'. The starting point was that there should be no order for costs where the Applicant had brought proceedings in its regulatory capacity. The question for the Tribunal was whether there was good reason to depart from that starting point. The fact that the Applicant had applied to withdraw all the allegations was not, in itself, sufficient to do so. It was clear from Flynn that a good reason could include unreasonable conduct on the part of the regulator, and this was the basis of the submission by the Respondent.

60. The Tribunal noted the distinction between unreasonable conduct and an abuse of process. This was relevant to Ms Bruce's submission that the matter had survived an application to dismiss in September 2019. The test for dismissing a case for abuse of process was different to the question of whether there was good reason to make a costs order on account of unreasonable conduct on the part of the regulator. A submission of abuse of process was a very specific application. The fact that the Tribunal had not found the case to be an abuse in September 2019 did not automatically mean that there is no good reason to order costs in accordance with Flynn. This Tribunal had the benefit of more retrospection and material now than the previous Division in September 2019. The Tribunal obviously had regard to that position but it was not binding.

61. Similarly, the fact that a case was certified as showing a case to answer did not automatically mean that there could be no subsequent finding that it had been improperly brought. The test for certification was whether, on the material presented to the solicitor member, there was a prima facie, or arguable, case. Ms Bruce had made reference to the fact that the case had been certified a number of times in her submissions. Clearly if the case had not been certified then that would have been the end of the matter. However the fact that it had been certified could in and of itself not

be a bar to any costs order being made in the future, once the full circumstances of the proceedings were known. If that were the case then no costs orders adverse to an applicant in respect of proceedings certified could ever succeed.

62. The Tribunal reviewed the chronology of matters carefully and took account of all the submissions made by both parties.

63. The Tribunal noted that an allegation of dishonesty was the most serious allegation a solicitor could face. It was therefore incumbent on the Applicant, particularly where it was accusing someone of dishonesty, to take reasonable investigatory actions before bringing those proceedings. The Applicant was under a duty to verify information that it was using as the basis for bringing serious allegations to ensure that it had a solid basis for doing so. This was in line with the observations in Yuanda. The burden on proving any allegation, including dishonesty, lay with the Applicant. In the circumstances of this case, taking a witness statement from client A was an obvious step and indeed one that was canvassed internally within the SRA as far back as December 2016.

64. The Tribunal recognised that the Respondent had been the subject of significant criticism by a costs judge and it was therefore right that the SRA investigated matters in light of that criticism. The Tribunal did not consider that the Applicant had been unreasonable in doing so. Thereafter, however, the Tribunal found that the Applicant had made a series of grave errors.

65. The FI officer had interviewed the Respondent in 2016 and he had provided an explanation for what had gone on. The client care letter subsequently produced was consistent with that explanation. There was nothing in that client care letter that indicated professional misconduct. The FI officer had met the Respondent and asked about the bills and he was given an explanation that was, on face of it, credible. The FI officer had concluded that the matter was going to go no further, which was an understandable decision.

66. If the SRA had wanted to take matters further, or test the explanation given by the Respondent, they should have gone to Client A then, and they did not do so. The first error was therefore not verifying the solicitor/client arrangements with client A at that stage. In these proceedings the Respondent was alleged to have been dishonest. Given that such a finding would usually result in the complete loss of a professional career such cases were clearly not to be taken lightly. Two of these allegations were advanced on the basis that the Respondent was dishonest and yet no-one had thought to interview the principal witness until January 2020.

67. The second error was that having told the Respondent, on more than one occasion, that the investigation was closed, the matter was re-opened, not because of fresh evidence but because ostensibly the cost draftsman raised a complaint about the closure of the investigation. The Tribunal found that bringing proceedings against the Respondent on Allegation 1 when the Applicant had previously informed him that no further action would be taken and to regard as inapplicable and/or to dis-apply its own Reconsideration Policy whilst simultaneously failing to inform him for a year that the case was to be reopened (due to a “presumed” oversight), was at best, in the words of the Division that heard the dismissal application, “lamentable”.

68. It was one thing to investigate and bring proceedings but it was quite another to fail to investigate thoroughly and notwithstanding that omission, prosecute nonetheless. In this case there was a fundamental failure to obtain crucial witness evidence, instead erroneously relying upon a witness statement taken for very different proceedings in a completely dissimilar context.

69. The third error was that the Applicant had produced a Rule 5 statement that made no reference to the previous investigation and its closure. The Division hearing the dismissal application in September said the following on this point:

> "58. The Tribunal was troubled by the Applicant's failure to include the full history of the investigation in the Rule 5 Statement. The fact that the case was being brought on substantially the same facts as had been found to warrant no further action was something that the Tribunal ought to have been aware of when it was considering the matter for certification. It may well have led to further questions being asked of the Applicant. The position was entirely unsatisfactory, particularly in circumstances where there was a section of the Rule 5 Statement that dealt specifically with the steps taken to investigate the allegations made against the Respondent. The explanation as to why this had not been included was insufficient and unhelpful. The failure to include this information gave the impression that the Applicant was not being entirely transparent when it submitted its case for certification."

70. The Tribunal agreed with those observations. Such a lack of diligence and transparency did the Applicant nothing but harm when, as the regulator of the solicitor's profession it demanded understandably high standards of its members, and yet on this occasion it fell demonstrably below those standards itself. The Tribunal rejected the submission that all the criticisms were merely about "process".

71. The fourth error was that upon receipt of the client care letter in 2019, contrary to the submissions that it changed the basis of the case, the matter continued. The Tribunal noted the following paragraph from the witness statement of Ms Hansen:

> "33. One of the documents provided on 7 June 2019 was a client care letter, dated 18 January 2006, which was reviewed along with the Answer and other documents received. The client care letter was not on headed note paper and was not signed by Client A. The claim number on the client care letter was different to the claim number on the bill of costs. If this was the client care letter which had been explicitly requested pursuant to the Production Notice, no explanation was given as to why it had not been previously provided. Therefore despite the receipt of this document, it was considered that it remained proper to bring Allegation 1."

72. This was inconsistent with any suggestion that the delay in producing the client care letter was in some way responsible for the problems in this case. The client care letter was received along with the Answer, both were reviewed and the Applicant chose to continue to pursue the case.

73. The fifth error was that having received the client care letter in June 2019, no approach was made to Client A until January 2020. As Ms Bruce pointed out, in that time the Tribunal and Divisional Court were required to consider an application to dismiss for abuse of process and an application for judicial review respectively. This could all have been avoided had Client A been spoken to in June 2019, or indeed at any time after 2016. The proof of this point was that when Client A was spoken to it became apparent to the Applicant that, contrary to its submissions at the dismissal hearing in September 2019, it in fact had no credible evidence against the Respondent. This precipitated the correct, but woefully late, decision to apply to withdraw.

74. The Tribunal found that Allegation 1 was brought improperly and unreasonably. Similarly Allegation 2 whilst framed differently to Allegation 1 was clearly predicated upon almost entirely the same factual matrix. To suggest that it was a new allegation would be unrealistic within the overall contextual landscape of the case.

75. The third and final allegation was also linked to the original alleged misconduct. The Respondent could not fully comply with the requirement to produce documents when those documents had been destroyed following the SRA's previous confirmation that the investigation into these matters was closed.

76. The Tribunal concluded that all matters were infected from the outset with a regrettable injudicious and peremptory lack of professional assiduousness. Each of the failings identified was a serious matter and taken together the Tribunal was entirely satisfied that Applicant had not acted reasonably in the way in which it had brought and pursued the proceedings. The Tribunal therefore found that there was "good reason" to depart from the starting point and make an order for costs in the Respondent's favour.

77. The Tribunal did not consider that making such an order would have a 'chilling effect'; on the contrary, it may make it more likely that prosecutions would be undertaken and pursued in a more diligent manner than this one had.

78. The Tribunal rejected the suggestion that the Applicant should have its costs of the unsuccessful applications by the Respondent in the course of the proceedings. Those applications were proper applications to have made and took place in the context of proceedings that, on full review of all the facts, should not have been brought in the first place.

79. The Tribunal decided that the Applicant should pay the Respondent's costs of the proceedings, such costs to be subject to detailed assessment. The Tribunal considered that summary assessment was not appropriate in this case given that the costs claimed were significant and the case had been unusual and complex.

Basis of costs assessment

Respondent's Submissions

80. Mr Hubble invited the Tribunal to indicate that the costs should be assessed on the indemnity basis as opposed to the standard basis. Mr Hubble told the Tribunal that the costs judge would apply the standard basis in default. Mr Hubble submitted that the costs should be assessed on the indemnity basis as these were costs incurred in

defending allegations of dishonesty. He submitted that proportionality was an inapplicable term when defending an allegation of dishonesty and that it was difficult to see what could be disproportionate in the circumstances.

81. Mr Hubble accepted in the course of exchanges with the Tribunal that orders of the Tribunal did not distinguish between the standard or indemnity basis. The concern on the part of the Respondent was that the Applicant would seek to deploy arguments on proportionality. Mr Hubble suggested that it may be that no more was required than for the Tribunal to simply say that the distinction did not apply in regulatory proceedings.

Applicant's Submissions

82. Ms Bruce submitted that there was no basis to award costs on an indemnity basis and that the Tribunal had no jurisdiction to consider this on an indemnity basis. Ms Bruce told the Tribunal that given that the Applicant performed a public function it would certainly argue the question of proportionality.

The Tribunal's Decision

83. The Tribunal noted that Rule 18 of the SDPR made no reference to the standard or the indemnity principle when making an order for costs. In the course of the exchanges with Mr Hubble it was accepted that the Tribunal did not usually specify the basis on which costs should be assessed when it made its orders. The Tribunal was not satisfied that it had the jurisdiction to direct the costs judge to apply a particular basis, but in any event it declined to do so. The Tribunal had directed that the costs be subject to detailed assessment and therefore any submissions as to costs should be directed to that assessment and determined by a costs judge, not the Tribunal.

84. The Tribunal therefore declined to give any indication as to the basis on which costs should be assessed, consistent with its usual practice and procedure.

Application for interim payment of costs

Respondent's Submissions

85. Mr Hubble applied for an order that the Applicant make an interim payment in the sum of £115,000. This was based on 60% of the Respondent's claimed total costs of £191,875.80 inclusive of VAT, rounded down.

Applicant's Submissions

86. Ms Bruce opposed the application for an interim payment, submitting that this would amount to "plucking a figure out of the air". Ms Bruce further submitted that it was incompatible with saying the matter should be the subject of detailed assessment and that it would be premature to come up with an abstract figure.

The Tribunal's Decision

87. The Tribunal was satisfied that there should be some interim payment made given that it had decided that the Respondent should receive his costs. However it was right not

to pre-empt, or to appear to pre-empt, the determination of the costs judge. The Tribunal decided that an appropriate sum was approximately 20% of the Respondent's claim for costs and ordered that the Applicant pay £40,000 by way of interim payment.

Application for anonymity

Respondent's Submissions

88. Mr Hubble applied for a direction that the Respondent and the firm be anonymised in the Tribunal's judgment. He put this application on the basis that it was not opposed (the Applicant subsequently changed its position on this) and that there was likely to be some publicity given the nature of the Tribunal's decision on costs. This could cause prejudice to the firm and to the Respondent.

89. The Tribunal, having been on notice of this application, had asked Mr Hubble at the commencement of the hearing if he was applying to sit in private. The Tribunal had explained that the reason for this was that the hearing was taking place in public and any member of the public could obtain a copy of the audio recording upon request. Mr Hubble had confirmed that he was not seeking to sit in private.

90. Mr Hubble recognised that the audio recording could be released but submitted that this was not a reason not to make an anonymity direction.

Applicant's Submissions

91. Ms Bruce had initially told the Tribunal at the start of the hearing that the Applicant considered that this was a matter for the Tribunal. Ms Bruce took further instructions following the Tribunal's ruling and submitted that the "risk profile" had changed and that "sunlight [was] the best disinfectant".

The Tribunal's Decision

92. The Tribunal had regard to the Publication Policy (6 May 2020), the relevant sections of which stated as follows:

> "In the case where no allegations are found proved - the Tribunal will consider an application made by the respondent at the hearing for an Order that the Judgment published on the Tribunal's website be anonymized. Following the guidance of the High Court in Solicitors Regulation Authority v Spector [2016] EWHC 37 (Admin), and in recognition of the common law principle of open justice, such an application by or on behalf of a respondent is unlikely to be granted where the hearing has taken place in public under the Solicitors (Disciplinary Proceedings) Rules 2019 ("SDPR"), Rule 35(1).
>
> The fact that a Tribunal has directed that a hearing or part of it be held in private under SDPR Rules 31(2), (4) and (5) does not determine that the Tribunal must decide (on application by a respondent) that the Judgment should be anonymized; each case must be decided on its own facts and merits;"

> "In the case where either or both parties to the proceedings (including for the avoidance of doubt the applicant in the proceedings, usually the Solicitors Regulation Authority ("SRA")) applies at the hearing for an Order that the Judgment published on the Tribunal's website be anonymized - such an application is also unlikely to be granted where the hearing has taken place in public under the SDPR, Rule 35(1). The fact that a Tribunal has directed that a hearing or part of it be held in private under SDPR Rules 31(2), (4) and (5) does not determine that the Tribunal must decide (on application by a party or parties) that the Judgment should be anonymized; each case must be decided on its own facts and merits;"

93. In Spector the Court stated as follows at [19]-[20]:

> "19. Open justice is a fundamental principle of the common law. Scott v Scott [1913] AC 417 is one of the key twentieth century authorities that emphasised its importance, but it has been repeated on many occasions since. There are two particular aspects to the principle. The first is that the public should be free to attend court proceedings. In this case, that aspect was observed. The SDT did sit in public for each of the days that the hearing took place. We were told that, on at least some of the days, one or more members of the public did in fact attend. However, that is irrelevant. If the court hearing is open to the public, then it is treated as a public hearing, whether or not any member of the public avails himself or herself of the right to be present.
>
> 20. The second aspect of open justice is that the proceedings are freely reportable – Attorney-General v Leveller Magazine Ltd [1979] AC 440, 450. For the overwhelming majority of the public physical attendance at a court hearing is not a practical option. If they are to learn about what took place, it will be at second hand, often through the media, but sometimes via other sources. Once again, the authorities establish beyond dispute that this is a key component of the open justice principle."

94. Rule 12(4) of the SDPR 2007 stated:

> "Any party to an application and any person who claims to be affected by it may seek an order from the Tribunal that the hearing or part of it be conducted in private on the grounds of—
> (a) exceptional hardship; or
> (b) exceptional prejudice,
> to a party, a witness or any person affected by the application"

Although this rule applied to hearings taking place in private, the principles were also relevant to applications for anonymity.

95. The Tribunal had specifically asked Mr Hubble if he was seeking a hearing in private and he had confirmed that he was not. The Tribunal therefore considered whether there was a proper basis to depart from the starting point that a judgment should be published in the normal way, naming the Respondent and his firm. This would require the Tribunal to be satisfied that there was exceptional hardship or exceptional prejudice.

The highest that Mr Hubble had put matters were that there was "some" risk of prejudice.

96. The Tribunal had heard and seen no evidence of any prejudice to the Respondent that rose to the level required to permit a departure from the principle of open justice that was clearly set out in Spector. The Tribunal noted that any reader of this Judgment would see that the Tribunal had found that the case had been improperly brought and pursued and would note its finding that the Applicant had not acted reasonably. The Respondent's application for anonymity was therefore refused.

Statement of Full Order

97. The Tribunal GRANTS the application of the Applicant, the Solicitors Regulation Authority, that all the allegations made against the Respondent JAMIL AHMUD, solicitor, be withdrawn.

The Tribunal further Ordered that the Applicant do pay the Respondent's costs of these proceedings, such costs to be subject to detailed assessment unless otherwise agreed and that the Applicant make an interim payment to the Respondent in the sum of £40,000.00 within 14 days of the date of this Order.

Dated this 28th day of September 2020
On behalf of the Tribunal

J Evans
Chair