The Respondent appealed the Tribunal's decision dated 5 May 2021 to the High Court (Administrative Court). The appeal was heard by Mr Justice Linden on 1 and 2 February 2022 and Judgment handed down on 18 March 2022. The appeal was dismissed. Gray v Solicitors Regulation Authority [2022] EWHC 624 (Admin).

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12018-2019

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

PETER MATTHEW JAMES GRAY Respondent

Before:

Mr R Nicholas (in the chair)
Mr B Forde
Mr P Hurley

Date of Hearing: 8-16 March 2021

Appearances

Grace Hansen, barrister, of Capsticks Solicitors LLP, 1 St George`s Road, London, SW19 4DR, for the Applicant.

Lewis MacDonald, barrister, of 2 Hare Court, Temple, London, EC47 7BH, instructed by Howard Kennedy LLP, No.1 London Bridge London SE1 9BG, for the Respondent.

JUDGMENT

Allegations

The Allegations faced by the Respondent were that:

1. While in practice as a solicitor and a Partner in Gibson Dunn & Crutcher LLP ("the Firm") and in the course of acting in litigation before the High Court on behalf of Client A:

1.1 On or about 4 September 2013, swore an affidavit in support of Client A's application to the High Court for a freezing injunction and other orders ("the Application") which was misleading as to matters of fact known to the Respondent, and known by him to be material to the Application, and in doing so allowed the court to be misled, and in doing so breached one or more of Principle 1, Principle 2 and Principle 6 of the SRA Principles 2011 and Outcomes O(5.1) and O(5.2) of the SRA Code of Conduct 2011;

1.2 On or about 10 and/or 11 September 2013, during the hearing before the High Court of the Application, allowed submissions to be made to the Court by Leading Counsel acting for Client A which were known by the Respondent to be misleading, and in doing so breached one or more of Principle 1, 2 and Principle 6 of the SRA Principles 2011 and Outcomes O(5.1) and O(5.2) of the SRA Code of Conduct 2011;

1.3 On or about 7 November 2014, sent, or caused or allowed to be sent, written correspondence to Byrne and Partners that he knew to be misleading and in doing so breached Principles 2 and 6 of the SRA Principles 2011;

1.4 On or about 10 November 2014, sent correspondence to a more junior colleague at the Firm in which he sought to induce his colleague to make, or cause to be made, statements to third parties in relation to litigation which, if made, would be misleading and in doing so breached Principles 2 and 6 of the SRA Principles 2011;

1.5 On or about 11 November 2014, swore an affidavit in litigation before the High Court which was known by the Respondent to be misleading, and in doing so breached one or more of Principle 1, Principle 2 and Principle 6 of the SRA Principles 2011 and Outcomes O(5.1) and O(5.2) of the SRA Principles 2011;

2. It is further alleged that the Respondent's conduct in respect of any or all of Allegations 1.1, 1.2, 1.3, 1.4 and 1.5 was;

2.1 dishonest;

2.2 reckless;

but a finding of dishonesty or recklessness is not a necessary ingredient of a finding that any of the allegations set out at 1.1 – 1.5 above or any of them are proved.

Documents

For the Applicant

- Rule 5 Statement dated 17 October 2019 and Exhibit DWRP/1.

- Witness statement of Michael Smith dated 31 January 2020.
- Witness statement of Mark Handley dated 11 February 2021.
- Statement of Costs at issue of proceedings dated 25 October 2019.
- Statement of Costs at the substantive hearing dated 1 March 2021.

For the Respondent

- Answer to the Rule 5 Statement dated 31 January 2020 and supporting documents.
- Respondent's first witness statement (undated) and Exhibits PG01-PG06.
- Respondent's second witness statement (undated) and Exhibits PG01–PG03.
- Character references x 20.
- Witness statement of Rewa Cooper dated 12 February 2021.
- Skeleton argument dated 3 March 2021.
- Chronology (content agreed by the Applicant).
- Skeleton argument regarding closing submissions dated 15 March 2021.

Preliminary Matters

3. The Respondent's First Application

3.1 Mr MacDonald submitted that in order to assist with the case and to defend himself properly before the Tribunal, the Respondent has had to provide and refer to privileged documents. During the High Court proceedings, Djibouti waived privilege over a limited number of documents. Their waiver was expressly limited to those documents, and to the purposes of the proper determination of the application to discharge the freezing injunction.

3.2 The remaining privilege was Djibouti's, but, Mr MacDonald averred, the Respondent was entitled and right to provide and refer to additional documents, because his disclosure of them to the Applicant and the Tribunal did not breach privilege (R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax [2003] 1 AC 563, and Parry-Jones v Law Society [1969] 1 Ch 1).

3.3 However, once the documents were referred to in open court, Djibouti's privilege would inevitably be breached. Mr MacDonald contended that the waiver made in the High Court proceedings did not apply at all to the Tribunal proceedings. To the extent that some documents were referred to in Flaux J's judgment, they were of course in the public domain. But the Tribunal had a much greater selection of material before it.

3.4 Mr MacDonald submitted that unlike in many cases before the Tribunal, anonymity would not assist, because Flaux J's judgment in Boreh v Djibouti [2015] EWHC 769 (Comm), and indeed other judgments involving the same parties, was already in the public domain. It would therefore be immediately apparent to everyone following the Tribunal proceedings who the parties involved were.

3.5 Mr MacDonald further submitted that neither was this a case where the proceedings could enter private session for select parts of the evidence. The subject matter almost entirely concerned matters which were privileged. Additionally, because the Tribunal did not have sight of all of the material that was before Flaux J, it was almost

impossible to know exactly what documents might have been subject to a waiver and that which was not.

3.6 Mr MacDonald referred the Tribunal to a combined index of documents provided by the Respondent at various stages of the Tribunal proceedings, all of which were before the Tribunal. The index set out documents that were either before Flaux J, or were not privileged for some other reason as well as documents that were not before Flaux J at all to the Respondent's knowledge, let alone referred to in his public judgment. Mr MacDonald stated that it was plain that the vast majority of the Respondent's exhibits remained privileged.

3.7 Mr MacDonald reminded the Tribunal that the Respondent had previously made an application for the proceedings to be heard in private on the grounds now advanced, which was refused. That did not preclude the renewed application at the outset of the substantive hearing which required the Applicant to properly engage with the issue in accordance with their duties as the regulator, and for the Tribunal to consider whether any order was required.

3.8 Mr MacDonald submitted that whilst the Respondent was cognisant of the interest in open justice, and indeed welcomed the long-awaited opportunity to publicly clear his name, he was mindful of his professional duties to Djibouti as a former client. The Respondent considered that only the following measures would protect both his ability to defend himself in these proceedings, and Djibouti's privilege:

- Cross-examination of Mark Handley to take part in private;
- The Respondent's evidence to take part in private;
- The Respondent's closing submissions to take part in private.

3.9 Mr MacDonald concluded that there may be further measures which need to be taken, depending on how the Applicant intended to present their sections of the case.

3.10 The Tribunal enquired of Mr MacDonald whether the former Djibouti clients had been notified of the application and whether they had made any representations. Mr MacDonald advised that, to his knowledge, they had not. He further advised that the documents in question were either retained by the Respondent after he left the Firm or disclosed by the Applicant during the course of the Tribunal proceedings. Mr MacDonald maintained that all of the privileged documents were relevant to the Respondent's defence to the allegations.

<u>The Applicant's Position</u>

3.11 Ms Hansen acknowledged the difficult position faced by the Tribunal in balancing two competing bedrocks of the adjudicative process namely the principle of open justice and the right of a client to exert privilege in relation to documents/advice given. Resolution of those competing bedrocks was, Ms Hansen submitted, ultimately a matter for the Tribunal to determine. Whilst Ms Hansen made plain that the Applicant did not advance a strong position either way, she made the following observations:

- There have already been multiple public hearings which considered the key issues that fall to be determined by the Tribunal.

- The majority of the documents the Respondent sought to rely upon that would, in his application, necessitate much of the hearing being heard in private, were not relevant to the key issues that fall to be considered by the Tribunal.

- The Applicant's case is predicated on material that was before Flaux J as well as his 83 page judgment which set out at length and in detail communications between the Respondent, the Firm, counsel and the Djibouti Clients.

- Privilege was a right exercisable by the client but Djibouti was entitled to expect that any material between them and the Respondent/Firm would remain confidential.

- Anonymisation served no useful purpose in the present proceedings.

- It was impractical to go in and out of private/public session in the present proceedings.

- The index prepared by the Respondent was not an exact exercise in that the Applicant cannot say with precision what documents were before Flaux J and therefore cannot gainsay the Respondent's categorisation of remaining privileged documents.

3.12 Ms Hansen concluded that the Respondent had made a very full application regarding the extent to which the hearing should be heard in private and that if the Tribunal determined that maintaining privilege overrode the overarching public interest, then the minimum restrictions should be imposed. Ms Hansen suggested that the imposition of press restrictions could assist in that regard which would enable the hearing to be in public but prohibiting the publication of any matter not referred to in Flaux J's judgment.

Press Observations

3.13 Ms Martina Hogg, a freelance journalist, was observing the hearing. The Tribunal sought her observations in relation to the application. Ms Hogg stated that she was aware of Flaux J's judgment which was already in the public domain. Ms Hogg further stated that for a reporting restriction, as suggested by Ms Hansen, to be effective there would need to be clear identification of the documents already within the public domain and those that are not.

The Tribunal's Determination

3.14 The Tribunal retained the power to order that all or part of the hearing be conducted in private pursuant to Rule 12 of the Solicitors (Disciplinary Proceedings) Rules 2007 which provides:

> "(3) Subject to paragraphs (5) and (6) every hearing shall take place in public.

(4) 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.

(5) If it is satisfied that those grounds are met, the Tribunal shall conduct the hearing or part of it in private and make such order as shall appear to it to be just and proper.

(6) The Tribunal may, before or during a hearing, direct that the hearing or part of it be held in private if—

(a) the Tribunal is satisfied that it would have granted an application under paragraph (4) had one been made; or
(b) in the Tribunal's view a hearing in public would prejudice the interests of justice…"

3.15 The default position was that hearings be heard in public save for in circumstances where to do so would cause exceptional hardship or exceptional prejudice. The Tribunal applied that test to the application and in its careful consideration of the parties' submissions.

3.16 The application advanced was predicated on the Respondent's reliance on documents which were said by him to be privileged and confidential. The fundamental tenet of privilege did not, however, equate to an absolute right for a hearing (or large parts thereof) to be conducted in private. Exceptional prejudice and/or hardship had to be shown.

3.17 There were no submissions before the Tribunal as to any prejudice or hardship that would be caused to the former Djibouti clients; indeed their views had not been sought on the matter. Mr MacDonald contended that the Respondent, in order to advance his defence, has had to rely upon privileged documents. Those documents had already been filed at the Tribunal and served on the Applicant thus it was plain to the Tribunal that the Respondent intended to rely upon them irrespective of the outcome of the application. Further, no submission had been made as to any exceptional hardship or prejudice that would be caused to the Respondent if the application was refused. Weighing those factors in the balance with the countervailing principle of open justice, the Tribunal concluded that the test promulgated in Rule 12(4) had not been met.

3.18 The Tribunal therefore refused the application.

4. The Respondent's Second Application

4.1 Mr MacDonald applied for leave from the Tribunal to take the Respondent's evidence in chief orally as opposed to him adopting his 88 page statement as his primary

evidence. Mr MacDonald submitted that there was no Rule preventing him from presenting the Respondent's evidence by way of questions posed. Mr MacDonald further submitted that it was in the interests of justice for the Respondent to be able to advance his defence as he saw fit.

The Applicant's Position

4.2 Ms Hansen remained neutral on the application but observed that (a) it was an unusual approach, (b) ordinarily witnesses' statements stood as their primary evidence with liberty for supplementary questions from their representative if required and (c) it was a matter for the Tribunal to determine.

The Tribunal's Determination

4.3 The Tribunal carefully considered the application and the submissions made by the parties. Whilst it was the usual practice of the Tribunal for statements to stand as the witnesses' primary evidence, the Tribunal acknowledged that there was no prohibition on the approach sought by Mr MacDonald. The Tribunal was cognisant of the fact that the Hearing Timetable filed and served on behalf of the Respondent indicated the approach sought and estimated that the time required for Mr MacDonald to take the Respondent through his evidence in chief was approximately three hours.

4.4 The Tribunal paid significant regard to the fundamental tenet of fairness to the Respondent and in so doing determined that he should not be prevented from presenting his case as he saw fit.

4.5 The Tribunal therefore granted the application.

5. The Respondent's Third Application

5.1 Mr MacDonald applied for leave to call Ms Cooper (witness of fact) and three of the twenty character referees to give oral evidence. Mr MacDonald submitted that, again, that it was in the interests of justice and fairness for the Respondent to present his evidence in a manner that best served him.

The Applicant's Position

5.2 Ms Hansen opposed the application. Ms Hansen averred that she had no questions for any of the Respondent's witnesses and, so long as the Tribunal did not have any questions, they were not required to give oral evidence. Ms Hansen submitted that their written statements/character references would suffice and that it was a matter of weight to be attached to the same by the Tribunal.

The Tribunal's Determination

5.3 The Tribunal considered that it was highly unusual for witnesses to be called when the opposing party had no questions for them in cross examination. Notwithstanding that fact, there was no Rule that vitiated such an approach. Essentially it was a matter of discretion for the Tribunal to determine in accordance with its wide ranging power

promulgated in Rule 21(1) of the Solicitors (Disciplinary Proceedings) Rules 2007 namely that the Tribunal may regulate its own procedure.

5.4 The Tribunal determined that, in the interests of fairness, the Respondent should be permitted to adduce his evidence in the manner that best served him even if that departed from the norm.

5.5 The Tribunal therefore granted the application.

Factual Background

6. The Respondent was admitted to the Roll of Solicitors in November 2002. At all material times, the Respondent was a salaried Partner in the Firm from April 2012 until April 2015. He practised, predominantly, from the Firm's Dubai office. The conduct complained of related to the Djibouti Litigation and came to the attention of the Applicant by way of the Respondent's self-report (25 February 2015) and the Firm's report (26 February 2015).

The Djibouti Litigation

7. At all material times the Respondent acted on behalf of the Republic of Djibouti and two related bodies under its control namely Autorite des Ports et des Zones Franches de Djibouti and Port Autonome International de Djibouti ("the Djibouti Client" referred to as Client A in the allegations). In October 2012, proceedings were issued in the High Court on behalf of the Djibouti Client ("the Djibouti Litigation) against Abdourahman Mohamed Boreh ("Mr Boreh"). Mr Boreh had previously held a senior position in the two entities Ports controlled by the Republic of Djibouti. The Djibouti Litigation was a claim for the recovery of funds (at least US $77 million) that Mr Boreh had allegedly misappropriated whilst in office.

The Freezing Injunction Application

8. During the course of the Djibouti Litigation, on 22 April 2013, an application was made to the High Court for a freezing injunction and an associated propriety injunction against Mr Boreh. The purpose of the application was to prevent Mr Boreh from dissipating his assets which included the alleged US$77 million misappropriated from the Djibouti Clients.

9. The Respondent swore three affidavits in support of the application dated 22 April 2013, 28 May 2013 and 4 September 2013. He instructed Leading Counsel, Mr Khawar Qureshi QC, on behalf of the Djibouti Client. The application was heard by Mr Justice Flaux ("Flaux J") on 10-11 September 2013, the content of which is addressed in more detail below.

10. Additionally, during the course of 2013, the Respondent and Mr Qureshi QC assisted another firm (Al Tamimi) within the United Arab Emirates ("UAE"), also acting for the Republic of Djibouti, in relation to extradition proceedings in respect of Mr Boreh from Dubai to Djibouti. A copy of the extradition request was exhibited to the Respondent's Third Affidavit which is addressed in more detail below.

The misdated transcripts of the intercepted telephone calls ("the dating error")

11. One of the documents relied upon in support of the extradition request was a transcript of intercepted telephone calls to which Mr Boreh was a party. The transcripts were erroneously dated 5 March 2009 when, in fact, the telephone calls took place on 4 March 2009. The dating error was relevant in that it either was (a) wrongly imputed or (b) wrongly strengthened the imputation of the involvement of Mr Boreh in terrorist attacks.

12. The misdated transcripts were relied upon in the criminal prosecution of Mr Boreh in Djibouti for terrorist offences of which he was convicted in his absence and sentenced to 15 years imprisonment.

The Respondent's knowledge of the dating error

13. On 23 August 2013, the Respondent received an email from Ms Merchant, an employee of the Firm and member of the Djibouti Team working under the Respondent's supervision. She alerted the Respondent in that email of the dating error and stated:

> "… If the phone conversations took place on 4th March before the grenade attacks which took place in the evening of 4th then the conversations don't swing in our favour…"

14. Ms Merchant's email included an earlier email from Ms Ngo Yogo II, also a member of the Djibouti Team, which stated:

> "… Please find attached the call log related to the two conversations which were supposed to have taken place on March 5, 2009.
>
> The problem is that the call log shows that the conversations occurred on March 4, 2009 at 2.23pm and 2.35pm i.e. before the grenades attack (at Nougaprix) took place.
>
> It is a critical discrepancy that must be cleared. I call *(sic)* the agent from the National security services tomorrow first thing in the morning to have some explanations *(sic)*. According to him the call log are *(sic)* automatically saved and cannot be changed by a technician…"

15. The Respondent replied on 25 August 2013 in the following terms:

> "… I should add that it was very well spotted of you to notice the dates. Many people would not have checked and disaster would most certainly have followed. At least in our current situation we have not submitted anything that is incorrect – or at least we think!"

16. On 26 August 2013 the Respondent sent an email to the Djibouti Team in which he stated that, having spoken to Mr Qureshi QC (via a telephone call that lasted 28 minutes):

> "… We can get away with the error. It is only in the judgment, which is awful anyway, and not in the evidence…"

17. Later on the same day the Respondent emailed Mr Qureshi QC in the following terms:

> "…The extradition request did not labour point, so changing the date by one day was all I needed to do…"

The Kroll meeting on 27 August 2013

18. Kroll is a risk management consultancy who were engaged in connection with the work being undertaken for the Djibouti Client. The minutes of the meeting, which were not verbatim and were not signed by those in attendance, recorded the Respondent as having stated:

> "… Basically we want the extradition submitted before the High Court hearing… Going to fudge the error of the date, it doesn't affect the underlying evidence…"

19. The minutes further recorded the following exchange:

> "YD – the dates of the recorded conversations?
> PG – 4th and not 5th March…"

20. At the meeting the Djiboutian legal experts confirmed that, if extradited, Mr Boreh would face, and was entitled to as of right, a re-trial for the terrorist offences of which he was convicted in his absence.

The Al Tamimi meeting on 27 August 2013

21. Al Tamimi consisted of the Dubai qualified lawyers who were instructed on the extradition request. The minutes of the meeting, which were not verbatim and not signed by those in attendance, recorded that the Respondent stated:

> "… Had a meeting to deal with the outstanding factual issues. The most important of these is that we think we need to change it to a retrial rather than enforcement of the sentence…
> We had the wrong date for the phone conversation as it took *(sic)* a date earlier. It is correct in the underlying evidence but not in the conviction. The conversation took place on the 4th of March and not the 5th…"

The Respondent's Third Affidavit dated 4 September 2013 (Allegation 1.1)

22. The purpose of the Third Affidavit was to support the application for a freezing injunction and respond to affidavits filed by and on behalf of Mr Boreh which alleged political persecution on the part of the Djibouti Client. The "offending" paragraphs of the Respondent's Third Affidavit were:

"…

[163.4] The terrorism offences would lead to a sentence of six months to two years or even a suspended sentence, and were based on mere suspicions that Mr Boreh instigated such acts. This is wrong. in Djibouti acts of terrorism are punishable by way of imprisonment. Mr Boreh was convicted on 23 June 2010 and sentenced to 15 years imprisonment. It is plain that Mr Boreh misrepresented the severity of his crimes and failed to inform the Spanish court of his prison sentence…

[163.6] Extradition would prevent Mr Boreh from campaigning as an opposition Presidential Candidate in elections in Djibouti. This is irrelevant, a further point made again and again, that the request is politically motivated is unsustainable - not least in the face of the evidence which led to Mr Boreh's conviction in Djibouti…

[164] Mindful of the serious nature of these matters, I have provided an English language version of the extradition request submitted by the Djibouti Authorities to the LAP at [PMJG7]. This evidence in support is at the very least reflective of a case to be answered by Mr Boreh…"

The freezing injunction hearing on 10–11 September 2013 ("the September Hearing") before Flaux J (Allegation 1.2)

23. Flaux J heard the application in the Commercial Court of the High Court. The Djibouti Client was represented by Mr Qureshi QC. Mr Boreh was represented by Mr Butcher QC. The Respondent was in attendance along with members of the Djibouti Team.

24. The following exchange occurred between Flaux J, Mr Qureshi QC and Mr Butcher QC:

"…

FLAUX I don't have to decide today whether Mr Boreh has participated in terrorist acts. All you're saying is that you have at least an arguable case that part of your case against Mr Boreh is that he participated in terrorist attacks.

QURESHI My Lord, I go further than that. I say its simply outrageous for the defendant to maintain a position which of course suits him, and he articulates through those he has instructed, that somehow the Djiboutinan Government is pursuing a vendetta against him which is reflected in trumped up charges…

FLAUX [directed at Mr Butcher QC] The transcripts of the telephone conversations, in themselves, seem to me to give rise to an arguable case that what Mr Boreh was discussing … was the explosions which had taken place the previous night…"

25. The freezing order injunction was granted and Flaux J, in his ex tempore judgment, held:

> "…it seems to me that there is, on the basis of the telephone transcript of conversations between Mr Boreh and … an arguable case that [Mr Boreh] was involved in and directing terrorist acts in Djibouti. Whilst it is undoubtedly right that somebody who has acted as a terrorist would not necessarily be somebody who would dissipate his assets, in view of all the other evidence, it does seem to me that the court is entitled to take a common sense view, and to take the view that somebody who is at least arguably engaged in terrorism is well able and likely to divert his assets to make himself judgment-proof. So it does seem to me that there is a real risk of dissipation here…"

Reliance on the injunction

26. Having obtained the freezing injunction, reliance was placed on it for the benefit of the Djibouti Client which included (a) the extradition proceedings, (b) submissions to INTERPOL, (c) to support requests made to agencies in respect of money laundering investigations into Mr Boreh and (d) to support requests for development banks to investigate corruption allegations against Mr Boreh.

Correspondence with Byrne and Partners ("Byrne") on behalf of Mr Boreh (Allegation 1.3)

27. Almost a year later Byrne alerted the Firm to its concern that the High Court had been misled at the September Hearing in relation to the dating error. The following communications ensued:

- **Emailed letter from Byrne to the Firm dated 4 September 2014**

> "… We have revisited the late evidence you served for the purpose of the freezing injunction application to see what basis your clients had for alleging that the calls took place on **5 March 2009**. We note that despite your clients' case that the calls occurred on **5 March 2009**, the evidence served in support was internally inconsistent and in places refers to the calls taking place on **4 March 2009**…
>
> In the first instance, a number of questions arise to which we consider it is vital that your clients should give full and prompt responses:
>
> 1. Do your clients accept that the telephone calls between Mr Boreh and the Abdillahi brothers took place on 4 March 2009, as opposed to 5 March 2009?
>
> 2. If so, then:
>
> a. Given that this fundamentally underpins the reasoning of the Court which convicted Mr Boreh of involvement in terrorism, what steps (if any) do your clients intend to take in relation to that conviction, and particularly, will they seek to have the conviction quashed?

b. Given that this also calls into question the confessions of the Abdillahi brothers that they were reporting to Mr Boreh on the Nougaprix grenade attack, what steps (if any) do your clients intend to take to investigate the circumstances of their interrogation?

3. What steps do you propose to take to inform the Court that it was misled by the submission advanced before Mr Justice Flaux?..."

- **Emailed letter from the Firm to Byrne mistakenly dated 11 September 2014 but amended by hand to read 18 September 2014**

  "…It seems to us that your client's somewhat disingenuous approach means it is unfortunate, to say the least that you see fit to accuse our clients of misleading the English Court…

  As you have pointed out, the extradition request refers to the calls having been made on 4 March 2009. It was the narrative of the conversations [which erroneously stated 5 March 2009] set out in the extradition request that was relied upon before Mr Justice Flaux …

  Accordingly, the Court was not misled…

  We accept that the transcripts refer to a date of 5 March 2009; we understand this was an error. That error in turn was repeated in the Djibouti Court's judgment. However the Djibouti judgment was not relied upon at the September Hearing, nor was it relied upon it *(sic)* the extradition request…"

- **Emailed letter from Byrne to the Firm dated 30 September 2014**

  "… We therefore require you to confirm, as a matter of urgency and in clear terms, whether your, your clients or your counsel were aware of the dating error (i) at the time when the extradition request was drafted, or (ii) at the time of the [September] hearing before Mr Justice Flaux…"

- **Emailed letter from the Firm to Byrne dated 14 October 2014**

  "…However, what we will not do is entertain any suggestion that we sought to mislead the Court in any way. Equally, we do not accept that the dale issue impacts upon the nature and impact of the evidence itself…"

- **Emailed letter from Byrne to the Firm dated 3 November 2014**

  "…It is clear that Mr Justice Flaux did not appreciate that that was so, and that the submissions made on behalf of your clients did nothing to disabuse him of that mistake. In circumstances where a major part of Mr Boreh's case at the September hearing was that he was being unfairly persecuted by the Republic of Djibouti, that is a serious matter. We note your denial that the Count was deliberately misled as to the date of the conversation, but you still have not answered our question as to whether you, your clients or your counsel were aware of that error and its significance (i) at the time when the extradition

request was drafted, or (ii) at the time of the hearing before Mr Justice Flaux. Please now do so.

Please also respond to the outstanding questions from our letter of 4 September 2014 namely 2 and 4…"

- **Emailed letter from the Firm to Byrne dated 7 November 2014**

  "…Neither Leading Counsel nor Mr Peter Gray were alive to the issue of the 4/5 March date discrepancy at the September 2013 hearing…"

- **Emailed letter from Byrne to the Firm dated 9 November 2014**

  "…We, of course, accept your word that neither Leading Counsel nor Mr Peter Gray was aware that they were relying, at the hearing in September 2013, on false and misleading documents produced concerns. by your clients. We had not expected anything else…"

Internal communications (Allegation 1.4)

28. On 10 November 2014, Mark Handley (Senior Associate at the London Office of the Firm) convened a conference call with Mr Qureshi QC and members of the Djibouti Team. The Respondent was not present on that call after which the following communications ensued between Mr Handley and the Respondent:

- **Mr Handley to the Respondent at 08:47 hours**

  "…SM and AK have been asked to complete what they can with the affidavit and asked to go back through their emails and see if there is an explanation for how we got the right dates in the extradition request but mischaracterised the dates for the freezer…"

- **The Respondent to Mr Handley at 13:49 hours**

  "… This is a waste of time. Please do not do that. All you are likely to find is that on date X we realised the error, addressed it and moved on. Is that something you think is appropriate to admit to the court? Would you like me to publicly apportion blame on other lawyers? All you are doing is falling into their trap. And it would not end there. The fact is we were not alive to it at the [September] hearing, we did not mean to mislead the court and we are addressing it that way…"

- **Mr Handley to the Respondent at 14:03 hours**

  "… We just need to know what happened.

  So far we have not answered Byrne's two fundamental questions: 1) when did we know, and 2) how is it that we got the dates right for the extradition, but used other dates for the Freezer?

> If the realization occurred before evidence was served for the freezer or before the Freezer hearing, or before Byrne's letter of September 2014, then yes I do think that this is something we have to admit to the Court…"
>
> Obviously no one meant to mislead the court, but it has turned out that we have. We can either find out what happened now or we can leave it a few weeks after they've applied to lift the Freezer. They are clearly signalling that they are considering that option…"

The Fourth Affidavit dated 11 November 2014 (Allegation 1.5)

29. The sole purpose of the Fourth Affidavit was for the Respondent to address the concerns raised by Byrne regarding the submissions and evidence before the High Court at the September Hearing in relation to the dating error. The "offending" paragraphs of the Respondent's Fourth Affidavit were:

> "…
>
> 38. Although they [Byrne] no longer suggest that leading counsel or I intended to mislead the court, the defendants contend, without any evidence, that our clients must have done. As I set out below, there was no intention to mislead the court by our clients or this firm. If this court was misled, I apologise.
>
> 39. Byrne have asked who knew of the dating error within the firm and when. Without any way waiving privilege, it is correct we provided advice regarding the extradition request. This was one of a number of parallel work streams. The internal work of the firm is, of course, privileged. Given the enormous volume of internal email traffic and the number of lawyers involved in the overall matter, it would be a significant task to work out who exactly knew what and when. If that exercise was undertaken I do not believe the information would have any utility in this matter. I am confident in the event no lawyer in the team intended to mislead either this court or the Dubai courts.
>
> 40. In short, the error was in my affidavit and I take responsibility for its contents. I repeat that the error was inadvertent and I sincerely apologise to the Court is that error caused it to be misled…"

Interlocutory hearing on 13 November 2014 ("the November Hearing") regarding the dating error before Flaux J

30. The Respondent was not present at the hearing. Mr Qureshi QC appeared on behalf of the Djibouti Client and he maintained that the Respondent was not aware of the dating error as at the time of the September Hearing. Flaux J held that (a) he had been inadvertently misled regarding the dating error, (b) the internal investigation sought by Byrne into who knew what and when within the Firm was required and (c) the terrorist conviction against Mr Boreh was unsafe and should not be relied upon to external agencies pending the final hearing.

31. Later in the day, at 13:52 hours (GMT), the Respondent emailed Mr Handley in the following terms:

> "…Well it looks like you were right…"

Mr Handley replied:

> "… Really wish I hadn't been …"

The Respondent responded:

> "…Obviously I will have to fall on my sword re being told about the date discrepancy, and take the heat for it…"

32. At 13:58 hours (GMT) the Respondent sent a text message to Mr Qureshi QC which stated:

> "…It turns out I was told about the error in august. I completely forgot about it, in the midst of so much. However I can see that I will be accused of all kinds of things…"

Application to set aside the Orders made at the September Hearing on 2-5 and 9 March 2015 ("the March Hearing") before Flaux J

33. Mr Boreh applied on 9 January 2015 for the freezing injunction, proprietary injunction and other relief granted in favour of the Djibouti Client at the September Hearing to be set aside. The application was predicated on the basis that the Respondent deliberately misled the court in relation to the September Hearing.

34. Flaux J considered the application and received evidence from the Respondent. He found that the Respondent had allowed the Court to be misled at the September Hearing and that he had done so dishonestly. Consequently, Flaux J ordered that the freezing injunction (but not the proprietary injunction) be discharged on the basis that the Respondent had deliberately misled the Court.

35. The particulars of the relevant findings made by Flaux J are set out below under each allegation.

Live Witnesses

36. The Tribunal received live evidence from a number of witnesses, a summary of which is set out below. The evidence referred to will be that which was relevant to the findings of the Tribunal, and to the facts 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 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.

For the Applicant

37. Mark Handley

37.1 Mr Handley confirmed that the content of his witness statement dated 22 February 2021 was true to the best of his knowledge and belief. In so doing he confirmed that on 10 September 2013 the Respondent contacted him to relay that the first day of the September Hearing had gone better than expected and it was likely going to be a successful application. He wanted Mr Handley to assist with the service and roll out of the likely freezing injunction and ancillary matters. He further wanted Mr Handley to attend the second day of the hearing which Mr Handley did for half of the day. Mr Handley had not read any of the material relating to the case at that point.

37.2 Mr Handley's involvement in the Djibouti Litigation was initially in relation to the implementation of the freezing injunction and latterly the substantive dispute relating to claims of fraud and corruption. He was not involved in matters relating to the evidence underlying the freezing injunction until the letter from Byrne dated 4 September 2014 was received in that regard.

37.3 The Respondent asked Mr Handley to draft a holding response to that letter so that he had time to draft the substantive response. With regards to the subsequent correspondence Mr Handley reviewed the Firm's responses for formatting and sense checking purposes. He had not read any of the material relating to the case at that time.

37.4 On 10 November 2014 Mr Handley convened a telephone conference with Ms Merchant, Ms Kahn, Mr Qureshi QC and a London associate. During that call Ms Kahn confirmed that "we", being the Firm, knew of the dating error prior to the freezing injunction application. Mr Handley asked her and Ms Merchant to review their emails to ascertain why that knowledge was not reflected in the evidence supporting the freezing injunction application.

37.5 Later that day Mr Handley advised the Respondent via email of the steps that he had taken. Mr Handley was not aware at that time of when the Respondent had first become aware of the dating error. The Respondent replied that his approach was a waste of time and to not embark on the same. Further emails ensued discussing their difference of opinion and culminated in a telephone call during the course of which the Respondent said "if we are ordered to investigate we will, but not before". Mr Handley was certain that the Respondent did not tell him during that call that he had known of the dating error prior to the September 2013 hearing.

37.6 Mr MacDonald put to Mr Handley that there were numerous discussions between the Respondent, Mr Qureshi QC, the Djibouti Team and junior counsel regarding the response to the Byrne correspondence and the Respondent's Fourth Affidavit. Mr Handley agreed that was the case. Mr MacDonald put to Mr Handley that in October 2014, when the Respondent was in London for mediation in relation to the Djibouti Litigation, he asked Mr Handley to get involved with the dating error issues raised by Byrne. Mr Handley denied that had occurred. Mr MacDonald put to Mr Handley that the Respondent made him aware of the dating error in August 2013. Mr Handley denied that had occurred.

For the Respondent

38. The Respondent

38.1 The Respondent confirmed that the content of the following documents were true to the best of his knowledge and belief:

- First response dated 29 September 2017 to the Applicant's "Explanation of Conduct" letter.
- Second response dated 19 November 2018 the to the Applicant's further "Explanation of Conduct" letter.
- Answer to the Rule 5 Statement dated 31 January 2020.
- "First" witness statement (undated) filed in support of his application to stay proceedings as an abuse of process.
- Exhibit PMJG6 dated 4 September 2013 relied upon to demonstrate the Respondent's workload at the material time.
- Undated witness statement.
- "Second" witness statement (undated) filed for the purpose of the Substantive Hearing.

38.2 In so doing, the Respondent confirmed that a vast amount of material was not before Flaux J at the March Hearing as the Djibouti Client and the Firm wanted to keep disclosure to a minimum on the grounds of legal professional privilege. The additional documents that were before the Tribunal were obtained in consequence of the Respondent's request to the Applicant for disclosure (which led to an s44B production order being issued) as well as documents he retained on his Firm's laptop all of which the Firm was aware that he was relying upon; they had no issue with that.

38.3 The Respondent stated that the Djibouti Litigation was predicated on alleged corruption and embezzlement on the part of Mr Boreh from 1997 – 2008. Alleged terrorism did not feature until 2013. The Djibouti Litigation throughout was extremely bitter, hard fought and tainted with animus in that Byrne accused him of misleading the court several times.

38.4 The Djibouti Team's workload was extremely busy, they were undermanned, he was the only partner on the case and he never had the benefit of more than one Senior Associate. The Respondent stated that despite repeated requests to the Firm, he was never given additional resources let alone partner support and the Djibouti Team was "brutally overworked".

38.5 The Respondent stated that his Third Affidavit was sworn to address Mr Boreh's suggestion that the Djibouti Litigation was politically motivated. Associates within the Djibouti Team had been working on his Third Affidavit since June 2013.

38.6 With regards to the transcript of the intercepted telephone calls, the Respondent stated that there were a number of iterations of the same. In its original form it was in Somali, then transcribed into French then into English thereafter. The transcript was relied upon in the Djiboutian criminal proceedings against Mr Boreh and the Respondent did not notice the dating error at that time. The Respondent was first notified of the dating error by Ms Ngo Yogo II by way of an email on 23 August 2013. He congratulated her on spotting the error and asked her to analyse the correctly dated transcript with the 3 March 2009 attack in mind. Ms Ngo Yogo II was further asked by the Respondent on 26 August 2013 to look into the confession of Mohamed Ahmed Abdillahi in that:

> "…On a separate note (but still related) the problem we have now is that Mohamed Ahmed Abdillahi has made a false confession saying in the minutes dated March 25, 2009 that "we were talking about the grenades attack that we did at Nougaprix" whereas the attacks had not occurred yet…"

38.7 The Respondent stated that as at 26 August 2013 he did not think that the dating error was that important as the Firm had obtained the correctly dated transcript. He discussed the matter with Mr Qureshi QC on that day in a telephone conference which lasted 28 minutes. During that conference he told Mr Qureshi QC of the dating error on the original transcript but asserted that the "story still made sense and that [the Third Affidavit] was a fresh document which needs to set out what we think happened not what we previously thought had happened as there was no overt connection between the intercepted call and the Nougaprix attack".

38.8 Following that telephone conference the Respondent sent an email to the Djibouti Team in which he stated:

> "…I've spoken with [Mr Qureshi QC] and we agree that having reviewed the evidence, we can get away with the date error. It is only in the judgment, which is awful anyway, and not in the evidence…"

38.9 The Respondent explained that what he meant was that whilst the dating error was relied upon in the criminal judgment, if the Firm exhibited the correctly dated transcript with an amended narrative that would suffice. He believed that Mr Qureshi QC shared that view.

38.10 The Respondent stated that the Kroll meeting was convened for the Djibouti Client, their lawyers (Al Tamimi) and the prosecution lawyers in respect of the criminal proceedings to discuss progress of the Djibouti Litigation. The Respondent denied having stated at that meeting that they could "fudge" the dating error. He asserted that he would not have used such a phrase at a meeting where English was not the first language of the majority of the attendees. The Respondent disputed the accuracy of the minutes. His recollection was that he advised exhibiting the extradition request with the correctly dated transcripts and to not draw attention to the dating error in the body of the affidavit as it "was not relevant" as Mr Boreh, once extradited, would face a re-trial in Djibouti for the terrorism offences.

38.11 The Respondent stated the Al Tamimi meeting was convened and one of the items on the agenda was the extradition request. The scope of the discussion was intended to cover the preparation of the document and its exhibits, as well as overall strategy namely to change it from enforcement of sentence to re-trial. The Respondent raised the dating error and none of the Al Tamimi lawyers suggested that they were obliged to tell the Dubai Court of the same.

38.12 The particulars of the Respondent's evidence is set out below under each allegation.

39. Rewa Cooper

39.1 Mrs Cooper confirmed that the content of her witness statement dated 12 February 2021 was true to the best of her knowledge and belief. In so doing she confirmed her close involvement in the Djibouti Litigation (as an assistant to the Respondent and supporting associates within the team). She stated that, having worked on huge corporate deals previously she was experienced on such matters and familiar with the level of support/composition of the teams required to do so. Her view was that the Djibouti Team was not enough as the Respondent was the only partner supervising and his workload was extensive and multi-jurisdictional.

39.2 Mrs Cooper was surprised that the Djibouti Litigation was supervised by just the Respondent who was not based in London and whom had extensive travel commitments for the Firm in the UK, United States, France and Dubai. She surmised that the Djibouti Litigation was governed by English Law, being run from Dubai and led by an English based QC when the Respondent was out of the jurisdiction or travelling.

39.3 Ms Hansen put to Mrs Cooper that, in addition to employees within the Firm, the Djibouti Litigation was led by a QC and two junior barristers which was unlike corporate matters. Mrs Cooper acknowledged that she had never worked with counsel on a corporate matter but asserted that she was concerned about the support from within the Firm in relation to the Djibouti Litigation or lack thereof which required the Team to be working 16, 17 and 18 hour days.

39.4 Ms Hansen put to Mrs Cooper that, as at the time of the substantive hearing, she was employed by the Respondent as his Personal Assistant. Mrs Cooper confirmed that she was his "virtual" assistant.

40. Mark Beer

40.1 Mr Beer confirmed the content of his character reference dated 11 February 2021 in particular that:

- He was admitted to the Roll of Solicitors in 1996.
- He was a Registrar of the Dubai Courts (DIFC).
- He had known the Respondent for around 11 years initially socially and subsequently professionally.

- The Respondent appeared before him in relation to the winding up of his former firm. In that litigation, Mr Beer stated that the Respondent acted selflessly in order to obtain the best outcome for staff which impressed him.

40.2 Mr Beer was aware of the criticisms levelled at the Respondent by Flaux J and the allegations he faced at the Tribunal. They came as a surprise to him as his experience of the Respondent was that of an honest man who acted with integrity. Mr Beer stated that in all of his interactions with the Respondent he found him to be a man who took his professional responsibilities seriously who always "did what he said he was going to do".

40.3 Ms Hansen put to Mr Beer that the Respondent was a salaried partner at his former firm and as such, would have benefitted financially from the approach he took regarding the winding up of his former firm. Mr Beer acknowledged that that may have been the case as he knew that the Respondent was a creditor in that litigation. However, Mr Beer stated that if the Respondent was motivated by personal gain in that regard he could have easily called the Insolvency Practitioner in the winding up proceedings "to do a deal to get his money". The Respondent did not do that and instead issued a claim with the intention of assisting all of the staff who were in a much worse (financial) position than he. Ms Hansen put to Mr Beer that the Respondent's approach was not entirely selfless as he held a vested interest which Mr Beer accepted. Mr Beer confirmed that he and the Respondent had not seen each other since 2018 but that he would "like to think" that they remained friends.

41. Nicholas Rochez

41.1 Mr Rochez confirmed the content of his character reference dated 4 February 2021 in particular that:

- He was a retired solicitor having been admitted to the Roll in 1980.

- He recruited the Respondent in 2000 and worked with him for 10 years.

41.2 Mr Rochez was aware of the criticisms levelled at the Respondent by Flaux J and the allegations he faced in the Tribunal proceedings. They were "totally out of character" as he found the Respondent to be straightforward, honest and a solicitor who would not deliberately mislead the Court.

42. Reverend Tim Heaney

42.1 Rev. Heaney confirmed the content of his character reference dated 2 February 2021 in particular that:

- He had known the Respondent for five years.

- The Respondent was part of a pastoral group who support individuals in crisis within and beyond their parish in Dubai.

- The Respondent was very generous both with this time and his knowledge.

- The Respondent was someone to whom Rev Heaney turned to for advice as they had a very honest and open relationship where he and others valued his opinion greatly.

42.2 Rev. Heaney was surprised to hear of the allegations faced by the Respondent in the Tribunal proceedings and stated that they were not in keeping with his character. Rev. Heaney stated that his experience of the Respondent was nothing other than that of a consummate professional in the time that he had known him.

Findings of Fact and Law

43. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondent's rights to a fair trial and to respect for their private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

44 **Allegation 1.1 - Misleading Third Affidavit**

Applicant's Submissions

44.1 Ms Hansen submitted that the Respondent was first aware of the dating error when the freezing injunction application was being prepared; by way of the email chains between him, Ms Merchant and Ms Ngo Yogo II on 23 August 2013 alerting him to the same. The Respondent replied on 25 August 2013 in an email that commended the fact that the dating error had been identified and in which he asserted that had it not been "disaster would most certainly have followed. At least in our current situation we have not submitted anything that is incorrect – or at least so we think!".

44.2 Ms Hansen contended that the Respondent's position as at 25 August 2013 demonstrably showed that he was aware of the evidential significance of the dating error and the potential adverse consequences of reliance on incorrect materials. Notwithstanding that knowledge, two days later at the Kroll meeting, the Respondent stated that the extradition request (which exhibited the telephone transcripts) was relevant to the freezing injunction application and should be relied upon namely; "we want the extradition submitted before the English High Court hearing … Going to fudge the error of the date, it doesn't affect the underlying evidence".

44.3 Ms Hansen therefore submitted that the Respondent was well aware of the dating error and the significance thereof yet advanced a position at the Kroll meeting which was at odds with that which he relayed via email to Ms Merchant and Ms Ngo Yogo II. That revised position was formalised in the "offending" paragraphs of the Respondent's Third Affidavit in which he stated that; [163.4] "Mr Boreh was convicted by the [Djibouti] court on 23 June 2010 and sentenced to 15 years imprisonment"; [163.6] "It is Djibouti's case that these conversations [revealed in the transcripts of the intercepted telephone calls] refer to the successful attack on 4 March 2009 [the Nougaprix attack]; and [164] "[the extradition request was] "at the very least reflective of a case to be answered by Mr Boreh".

44.4 Ms Hansen submitted that those aspects of the Third Affidavit were misleading as the Respondent failed to address his knowledge of the dating error which materially affected their evidential weight such that it undermined the credibility of the Djibouti conviction.

44.5 Ms Hansen relied upon Flaux J's findings at the March Hearing to support her submissions which included:

> "…
>
> [69] … swore his Third Affidavit in support of the freezing order application and in answer to Ms Boulton's affidavits and affidavits that Mr Boreh had sworn. In a section headed "The extradition proceedings in Dubai" Mr Gray refers to the fact that he has been informed by Mr Ali about the detention of Mr Boreh in Dubai and the extradition request that he be returned to Djibouti for re-trial. He does not disclose that he had been involved in drafting the extradition request himself. He goes on to deal with the fact that Mr Boreh was making much of the decision of the Spanish court not to extradite him, but says that the arguments made there by the lawyer for Mr Boreh were based on a number of wrong or misleading which he then enumerates.
>
> [70] One of these, at [163.4] was that Mr Boreh misrepresented to the Spanish court: *"the severity of his crimes"* because he had said that the terrorism offences would lead to a sentence of 6 months to 2 years, possibly suspended and were based on mere suspicions that he had instigated terrorist acts. Mr Gray stated that this was: *"wrong, in Djibouti acts of terrorism are punishable by way of imprisonment. Mr Boreh was convicted on 23 June 2010 and sentenced to 15 years imprisonment."* No mention is made there of the fact that Mr Gray was aware, because of the misdating of the transcripts that the conviction was unsafe. Far from it, as at the outset of this Third Affidavit, he incorporates by reference to his first and second affidavits and attests to their accuracy. Mr Kendrick QC put to him that the appendix to the second affidavit … set out details of matters concerning the terrorism conviction, stating that Mr Boreh had been convicted in June 2010 for actions to incite the bombing of a supermarket and that: *"although the Spanish Court refused to extradite Mr Boreh, that does not mean that his conviction is unsound."* Mr Kendrick QC put that all of that cried out for correction, which Mr Gray accepted, saying that he did not notice this when finalising his Third Affidavit.
>
> [71] Mr Kendrick QC then put another of the matters which he had said in his Third Affidavit, at [163.6] were misleading submission put before the Spanish court by Mr Boreh, that the request for extradition was politically motivated. Mr Gray said in the affidavit that this was unsustainable: *"not least in the face of the evidence which led to Mr Boreh's conviction in Djibouti"*. Mr Kendrick QC put to Mr Gray that this was misleading, on the basis that the evidence on which he had been convicted was the incorrectly dated telephone transcripts. He

would not accept that it was misleading, although he accepted it was a mistake not to think about this when he finalised the affidavit. As he accepted in answer to questions from me, he did not say in the affidavit that the evidence on which Mr Boreh had been convicted was unreliable, because the date of 5 March on the transcripts relied upon was wrong nor did he say that the conviction was unreliable. He accepted that it was a mistake not to do so. In my judgment, the failure to inform the court about the unreliability of the conviction and the evidence on which it was obtained is quite remarkable. There would have been no reason for a judge reading the affidavit to know that there was any problem with the conviction or the evidence.

[72] This misleading impression was compounded by the next paragraph [164] of the affidavit which stated: *"Mindful of the serious nature of these matters, I have provided an English language version of the extradition request submitted by the Djibouti Authorities to the UAE* [which he then exhibits]. *This evidence in support is at the very least reflective of a case to be answered by Mr Boreh."* Mr Kendrick QC put that *"reflective"* was deliberately equivocal, which Mr Gray would not accept, seeking to justify what he said in the affidavit on the basis that he believed Mr Boreh had a case to answer. However, I agree with Mr Kendrik QC that, where the evidence on which the conviction itself was unsafe, the confession of Mohammed Abdillahi was unsafe and Mr Gray knew that Djibouti had not produced any reliable evidence of an attack or incident on 3 March 2009, the suggestion which he made that what he had said in the affidavit could be justified, on the basis that he thought there was a case to answer., was insupportable. Paragraphs 163.4, 163.6 and 164 of this affidavit involved equivocation, the use of ambiguity to hide the truth, a technique which regrettably Mr Gray continued to use in his misleading Fourth Affidavit and in correspondence with Byrne and Partners when they raised the issue of the misdating of the transcripts with Gibson Dunn in September 2014.

[73] The extradition request exhibited to the Third Affidavit was in the form which asked the court in Dubai to extradite Mr Boreh to Djibouti where he had been convicted in absentia for terrorism offences and where he would be entitled to a retrial. It referred only to offences on 4 and 8 March 2009. It referred in the section headed "Telephone Interception Evidence" to extracts from the telephone calls with the Abdillahi brothers with the correct date of 4 March 2009 and then stated that: *"It is Djibouti's case that these conversations refer to the successful attack on 4 March 2009"*. The reference to Mohamed Abdillahi's confession stated that he had admitted during the telephone conversation that he: *"was reporting on the grenade attack at Nougaprix supermarket"*. It is difficult to see how that statement could be justified, given that the attack had yet to occur at the time the call took place. Nowhere in the extradition request was any mention made of the fact that the evidence on which the original conviction had been obtained was unreliable and the conviction was therefore unsafe. This

> was in line with Al Tamimi's reference at the meeting on 27 August 2013 to being careful to avoid implying that the judgment of the Djibouti court was incorrect…"

44.6 Ms Hansen averred that significant weight could and should be attributed to Flaux J's findings.

Principle Breaches and Outcomes not met

44.7 Ms Hansen therefore submitted that, in swearing the misleading Third Affidavit, the Respondent (a) failed to uphold the proper administration of justice contrary to Principle 1, (b) undermined public confidence in him and in the legal profession contrary to Principle 2, Outcome O(5.1) and O(5.2) and (c) lacked integrity contrary to Principle 2.

Respondent's Evidence

44.8 The Respondent stated that from 1 September 2013 he was travelling extensively, from Dubai to London to Paris and was working long hours in respect of the imminent freezing injunction application which included the finalisation of his Third Affidavit. The Respondent conducted a final review the same on 4 September 2013 whilst on a train from Paris to London. The Third Affidavit had been drafted predominantly by the Firm and the barristers instructed. Post review the Respondent emailed Ms Holmes (Senior Associate) in the following terms:

> "…Change last sentence to "the Djibouti authorities are now sending this request through diplomatic channels" I don't thin! [sic] I will get to review the exhibit. Too much there. Any particular docs I need to check?.."

44.9 The Respondent stated that the Djibouti Team, predominantly Ms Kahn with the assistance of others, were tasked with drafting and proofreading the Third Affidavit. He further stated that he was unaware that the misdated transcript had been exhibited to the Third Affidavit at the material time and only became aware on December 2014 following the Firm's investigation. With regards to the "offending" paragraphs, the Respondent stated that:

> "[163.4] was a proper correction of what he perceived to be a misrepresentation by Mr Boreh as to the seriousness of his crimes and his failure to inform the Spanish Court of his prison sentence. [163.6] made the point that as things were understood when the matter was before the Spanish Court, this was correct. It was not intended to be seen as a statement of how the matter subsequently came to be understood. [164] reflected the Respondent's state of mind (and also what he understood at the time to be that of Mr Qureshi QC) in relation to the strength of the evidence overall. It did not say that he believed the conviction was sound, but rather that there was an arguable case against Mr Boreh.

44.10 With regards to the Djibouti conviction and sentence, the Respondent asserted that neither he nor the Djibouti Client was concerned with the "safety" thereof, he was simply recording in the Third Affidavit the fact of the offences found proved and the

sentence imposed by the criminal court. The Respondent stated that the conviction was the basis upon which he formed the view that there was a case for Mr Boreh to answer in respect of the terrorism offences. He did not address his mind to the dating error as he did not consider that to have been material to the freezing injunction application which was why his affidavit did not address it. Mention of the conviction was only made to rebut the allegation of political motivation advanced by and on behalf of Mr Boreh. The Respondent stated that he did not turn his mind to the safety or otherwise of the conviction as a consequence of the erroneous transcript relied upon by the criminal court at the material time. He therefore did not believe that his Third Affidavit was misleading in respect of facts that he considered to have been material at the time nor did he consider that he was reckless in that regard.

44.11 The Respondent was cross examined at length by Ms Hansen, during the course of which he asserted that:

- The extradition request was relied upon to counter Mr Boreh's allegation of political motivation on the part of the Djibouti Client.

- The underlying litigation was fraught and he endeavoured at all times to be as proactive as possible which was why the Djibouti Team were looking at the evidence relied upon with regards to the terrorism conviction.

- The transcripts of the intercepted telephone calls were important but because Mr Boreh was convicted in absentia (and therefore was entitled to a re-trial as of right) it "didn't matter what the evidence was as he would've been convicted".

- The misdated transcripts were key and Abdullahi's confession was relevant as they linked Mr Boreh to the Nougaprix attack of which he was convicted.

- He did not recognise the relevance of the misdated transcripts and Abdullahi's confession in August 2013 as "there was other evidence".

- When the dating error was discovered by Ms Ngo Yogo II in August 2013 that called the conviction and the "whole story" regarding Mr Boreh into question which was why he asked for further investigation but that he thought that "it worked even if Mr Boreh hadn't done anything". The further investigation was to ascertain whether "there was something on 3 March" to make sense of the transcripts which referred to "last night".

- Even though no incident was found on 3 March, "what was said [on the intercepted telephone calls] was not innocent".

- The conviction was considered unsafe earlier in August 2013 which was why the re-trial discussions took place at the Kroll and Al Tamimi meetings in late August.

- The note of the Kroll meeting was inaccurate and it represented "poorly worded minutes" but that he knew at that time that the conviction judgment was based on an error of fact. The Respondent maintained that the error would have come out had Mr Boreh been extradited for a re-trial.

- The Respondent denied having "brushed the factual error under the carpet" and averred that "they weren't going to flag it" as "they didn't have to tell anyone".

- The Respondent did not recall using the words "fudge the dating error" at the Kroll meeting.

- With the benefit of hindsight the Respondent acknowledged that it "would've been advisable" to tell the English High Court that the conviction was unsafe but that he "did not think [he] was obliged to".

- He reviewed his Third Affidavit in its draft and final form.

- The "offending" paragraphs were carefully drafted and did not mention the safety or otherwise of the conviction. It would have been advisable for the Third Affidavit to have addressed that point but that "wasn't a requirement" and "what [he] said in there was correct".

- The correctly dated transcripts were exhibited to the extradition request and "if [one] read it, it's obvious" that the telephone calls took place before the Nougaprix attack.

Respondent's Submissions

44.12 Mr MacDonald submitted that it was easy, looking at the case now, to imagine that eight days after the meetings in Dubai, when the Third Affidavit was being finalised, the terrorism issue was at the forefront of everyone's mind. However, at the time, the intervening seven days were filled with other issues, which had substantially more importance for the freezing injunction. The Respondent was travelling between various countries, working long hours, meeting experts and addressing those issues.

44.13 Mr MacDonald referred the Tribunal to contemporaneous records (not before Flaux J), which showed that most of the initial drafting of the Respondent's Third Affidavit was undertaken by the associates within the Djibouti Team. At the time of approving the draft the Respondent was travelling between Paris and Cambridge and whilst that did not absolve the Respondent from responsibility, it meant that he may not have been in a position to undertake the forensic analysis which had been undertaken in the Tribunal proceedings.

44.14 Mr MacDonald further submitted that even on such an analysis the affidavit was not misleading. It was the exhibits to it which were misleading. At the very least it took a very careful reading to establish that the affidavit was misleading, and it was entirely plausible that the Respondent did not notice it at the time.

44.15 A summary of the relevant parts of the affidavit showed that (a) the Djibouti Client was submitting the extradition request in Dubai as requested, (b) Mr Boreh was entitled to a full re-trial, having been convicted in absentia, (c) the refusal in Spain not to extradite Mr Boreh was flawed, and procured on the basis of misleading submissions by Mr Boreh's Spanish legal team and (d) evidence in support of the extradition request was at very least reflective of a case to be answered by Mr Boreh.

44.16 With regards to the "offending" paragraphs of the affidavit, Mr MacDonald submitted that the wording criticised in respect of each was inserted by other members of the Djibouti Team as a matter of chance. Whilst the Respondent was ultimately responsible for it, the fact that those nuances did not even originate with his drafting made it even less likely that he was thereby deliberately misleading the court.

44.17 Mr MacDonald submitted that the Applicant criticised two parts of the extradition request.

44.18 The first was the phrase "It is Djibouti's case that these conversations refer to the successful attack on 4 March 2009". Mr MacDonald submitted that was not misleading in circumstances where the telephone call was correctly referred to as having taken place on 4 March 2009, and it was intended that the correctly dated transcripts would have been exhibited, reflecting that date. Djibouti's case was the conversations, which included a discussion about a further act that night, referred to the attack at Nougaprix which took place only a few hours after the call. Whilst the evidence had previously been interpreted as referring to the Nougaprix attack having already happened, and the attack "tonight" in the end having taken place on 8 March, the new understanding of the call still made sense as referring to the attack at Nougaprix.

44.19 The second was the reference to "reporting on the grenade attack at Nougaprix". Mr MacDonald accepted that was misleading, because although that is what Mr Abdillahi was recorded as having confessed to, he could not have been reporting on the attack at that stage, as it had not yet taken place. Mr MacDonald submitted that the retention of that sentence was clearly simply an error which everyone missed. It would not make any sense to change the dates of the calls, but not to change a sentence reflecting the new understanding. It was not overly surprising that the use of the single word "reporting" was overlooked.

44.20 Finally, the Applicant relied on a failure to identify that the misdating of transcripts undermined the credibility of the conviction, and that the conviction was known, at least in part, to be erroneous. Mr MacDonald averred that given that Mr Boreh was entitled to a full retrial the safety or basis of the conviction was of little relevance to the extradition request let alone the freezing order. That was why the Third Affidavit referred to the evidence in support being reflective of a case to answer. That was again reflected by the comments of Flaux J during Mr Qureshi QC's submissions in reply:

> "It seems to me, I indicated this to Mr Butcher yesterday. On the basis of the telephone transcript of the conversations that Mr Boreh had with the two brothers, for my purposes it is arguable that Mr Boreh was implicated in acts of terrorism. Leaving entirely to one side whether he's been convicted of them, and the basis on which he was convicted of them and whether it was a fair conviction and so forth, but there is evidence before the court in the form of telephone transcripts that he was involved in, and directing, terrorist acts".

44.21 Mr MacDonald submitted that those submissions exactly mirrored the Respondent's thinking, and the wording of his Third Affidavit. It was naturally not for the court to decide whether Mr Boreh was guilty, and both the Respondent and the court were

deliberately not opining on that, but there was clearly an arguable case against him. Mr MacDonald submitted that the Applicant conceded that the fact that the "telephone transcripts" Flaux J was referring to were the wrong ones as a result of a simple error, which the Respondent was unaware of.

44.22 Mr MacDonald submitted that, on the evidence, the 'safety' of the conviction in Djibouti was simply a matter which no one was particularly focused upon in 2013. Mr Boreh was entitled to a re-trial in any case, and so efforts were focused on gathering further evidence for that re-trial.

44.23 Mr MacDonald contended that the key factor that did lead to the court being misled was the wrong transcripts having been exhibited to the extradition request. That was rightly not relied upon by the Applicant, because it was accepted by them, was accepted by Flaux J, and the evidence established, that the exhibiting of the wrong transcripts was an accident in which the Respondent had no involvement in that:

- On 17 August 2013, Mr Qureshi QC said it was essential that the English translations were dated.

- On 18 August 2013, correctly dated versions of the transcripts were sent to Mr Qureshi QC and the Respondent.

- On 22 August 2013, the Respondent reiterated Mr Qureshi QC's request that all original documents should be checked for consistency with the extradition request.

- On 30 August 2013, Ms Collett flagged up to Mr Fitzgibbon and Ms Merchant (but not the Respondent) that the date on the transcripts exhibited to the extradition request were incorrect. It appeared that Ms Merchant was not aware that correctly dated transcripts had been obtained, and thought raising the matter with the Respondent would be a "rehash" of the discussion when the issue was first raised, so took no further action. In December 2014 when the Respondent discovered this, he explained to Ms Merchant that this should have been corrected.

- Ms Merchant had since explained that she was unaware that there were newer transcripts with the correct dates on them. It was her decision to put the old transcripts into the bundle, and she did not re-raise the issue as she thought it had already been discussed.

- On 4 September 2013 another page turn of the exhibit was completed by Ms Merchant and Mr Fitzgibbon, but the use of the wrong transcript did not appear to have come up again. The Respondent was not able to review the exhibit as he was travelling, and was told it was uncontroversial. He had checked a previous version. At that stage, it was in fact unclear whether the extradition request would be finished in time to be served with the affidavit.

- As the Respondent was travelling the associates liaised with Mr Qureshi QC about service of the extradition request and its exhibit. He reiterated that the documents should be checked carefully, and was assured they would be.

- When the Respondent discovered this in December 2014, after Flaux J's granting of the order to have the Firm investigate and explain what had happened, he re-emphasised to Ms Merchant that the point of the page-turns had been to pick up an error like this and ensure the correct documentation was exhibited, as Mr Qureshi QC had also repeatedly requested. It was clear from the Respondent's email that he had only recently learned of the error.

44.24 Mr MacDonald submitted that it was hardly surprising that the Respondent was not intimately involved in the thousands of pages of exhibits to his affidavit. In as far as the extradition request is concerned, there was a single misleading word identified which he failed to amend, despite consulting counsel and asking two associates to independently check the request. In as far as he was criticised for his own failure to check the exhibit, this was not the allegation against him in the Tribunal proceedings.

44.25 Mr Qureshi QC himself made the point, when reviewing the matter in November 2014, that the error was in the exhibits, not the Respondent's affidavit. Even Byrne's letters largely focused on the transcripts, rather than any wording of the Third Affidavit.

44.26 Flaux J found that the exhibiting of the wrong transcripts was an error in which the Respondent had no involvement. Ms Hansen also conceded that fact when outlining the case for the Applicant before the Tribunal. Mr MacDonald submitted that both Flaux J and the Applicant had failed to follow the reasoning of that through. If the Respondent changed the dates of the telephone call in the extradition request, and intended to exhibit the correctly dated transcripts which he had seen existed then how could he have intended anyone to have been misled? As far as there was any strategy to conceal anything from any court, it would be an entirely incoherent strategy. Mr MacDonald contended that the far more plausible interpretation was that the Respondent was attempting to ensure the extradition request and the documentation were correct, and he was not entirely successful purely by negligence rather than design.

44.27 Mr MacDonald submitted that for those reasons the Applicant's criticism of the phrase "the evidence in support" at [164], as relying on evidence that the Respondent knew to be unreliable, could not stand. The Respondent intended that "evidence in support" would be the correctly dated telephone transcripts.

44.28 Mr MacDonald therefore submitted that Allegation 1.1 was not made out. The affidavit itself, which the allegation is focused upon, was not misleading. In as far as it or the exhibits were misleading, the Respondent was not aware of that fact.

The Tribunal's Findings

44.29 In order to determine whether the Applicant had proved Allegation 1.1 beyond reasonable doubt, the Tribunal firstly considered the facts known by the Respondent prior to him swearing the Third Affidavit. The Tribunal found the following facts in that regard:

- The Respondent was alerted by Ms Merchant on 23 August 2013 of the dating error on the transcripts of the intercepted telephone conversations.

- The Respondent replied on 25 August 2013 and the content of his reply made plain that he appreciated the significance of the dating error in that he stated "…disaster would most certainly have followed" had the error not been identified.

- The Djibouti Team were aware of the importance of accuracy, Ms Ngo Yogo II responded to the Respondent on 25 August 2013 in the following terms; "…This case is so tricky that fortunately we are a large team so we can rely on each other to look at things like that…"

- On 26 August 2013, further to discussions with Mr Qureshi QC, the Respondent made a deliberate decision not to emphasise the dating error on the transcripts in that he emailed the Djibouti Team in the following terms; "…I've spoken with [Mr Qureshi QC] and we agree that having reviewed the evidence, we can get away with the date error. It is only in the judgment, which is awful anyway, and not in the evidence…"

- On 27 August 2013 at the Kroll meeting, the Respondent made plain that the extradition request was to be relied upon in the freezing injunction application and exhibited to his Third Affidavit. The minutes of that meeting recorded the Respondent as having said that they were going to "fudge" the dating issue. The Respondent denied having used those words and asserted that the minutes were not accurate in that regard. The Tribunal noted that the minutes were very detailed, appeared to be practically verbatim and that the Respondent did not take issue with any other part thereof. Weighing those factors in the balance, the Tribunal rejected the Respondent's evidence in that regard and determined that the phrase "fudge the issue" was accurately recorded.

- On 27 August 2013 at the Al Tamimi meeting the Respondent was open about the dating error. However, the purpose of that meeting was to finalise the extradition request. The strategy deployed in that regard was amended to request a re-trial of Mr Boreh in Djibouti as opposed to the imposition of sentence.

44.30 It was against that backdrop that the Third Affidavit was drafted and sworn by the Respondent. It was a crucial document that was relied upon by the Firm in support of its application to the High Court in England and Wales for a global freezing injunction against Mr Boreh so as to prevent the dissipation of his assets.

44.31 The Tribunal noted and accepted that the drafting of the Third Affidavit was a team effort and that it went back and forth in various iterations between the associates and the Respondent as well as consultation with Mr Qureshi QC. However, the Tribunal found that did not vitiate the Respondent's ultimate responsibility for its content as it was his affidavit which bore his name and signature against the statement of truth.

44.32 The Tribunal was cognisant of and accepted that the Respondent was working long hours, travelling extensively at the material time as well as working in a different time zone to the Djibouti Team on occasion. However, that did not detract from or militate against the Respondent's ultimate responsibility for the content of the Third Affidavit.

44.33 With regards to the "offending" paragraphs of the Third Affidavit, the Tribunal found that:

- [163.4] laboured the severity of the fact that Mr Boreh had been convicted of terrorism offences and sentenced to 15 years imprisonment by the Djibouti Court. It failed to mention or address the fact that the conviction was predicated on the erroneously dated transcripts and the erroneous confession of Mr Abdillahi both of which attributed the telephone conversations to the Nougaprix attack which had not taken place at that time. The Tribunal found that the Respondent's failure in that regard rendered [163.4] misleading.

- [163.6] expressly referred to the evidence upon which Mr Boreh was convicted. It made no mention of erroneous nature of that evidence. It did not allude to the dating error or the unreliability of Mr Abdullahi's confession that the telephone conversation referred to the Nougaprix attack when it could not have done as that had not taken place as at the 4 March 2009.

- [164] exhibited the extradition request, which was not required but which the Respondent chose to rely upon, to the Third Affidavit. [164] referred to the evidence upon which the conviction was predicated as being at the "very least reflective of a case to be answered" by Mr Boreh. It did not indicate nor imply that there were reliability issues with regards to that evidence. Whilst the correct date of 4 March 2009 was cited in the body of the extradition request, the incorrectly dated transcripts were exhibited in error. The Tribunal received significant evidence in that regard but found it to be of limited relevance. Allegation 1.1 related to the content of the Third Affidavit as opposed to the exhibited extradition request and the transcript exhibited thereto. In short, the gravamen of the allegation was predicated on the content of the "offending" paragraphs within the Third Affidavit. The Tribunal determined that [164] was misleading in that regard.

44.34 Having reached its own decision on the factual matrix of Allegation 1.1, the Tribunal considered and concurred with Flaux J's findings in that regard and in so doing determined that the Respondent:

- Failed to uphold the rule of law and proper administration of justice contrary to Principle 1 as the High Court was misled.

- Failed to act with integrity contrary to Principle 2 as no solicitor acting with integrity would have misled the High Court.

- Undermined public trust in him and in the provision of legal services contrary to Principle 6. The public was entitled to expect solicitors not to mislead the Court by filing misleading sworn statements in support of an application.

- Failed to achieve Outcome 5.1 which required him not to mislead the Court.

44.35 The Tribunal therefore found Allegation 1.1, breach of Principle 1, 2, 6 and failure to achieve Outcome 5.1 proved beyond reasonable doubt.

44.36 Outcome 5.2 provides that solicitors should not be complicit in another person deceiving or misleading the court. Having found that the content of the Third Affidavit was ultimately the Respondent's responsibility and did not impinge on the

conduct of others, the Tribunal determined that the alleged breach of Outcome 5.2 was not proved beyond reasonable doubt.

45. **Allegation 1.2 - Misleading submissions before Flaux J**

Applicant's Submissions

45.1 Ms Hansen submitted that the submissions of Mr Qureshi QC as set out above at paragraph 24 were misleading in that they proceeded on the basis that the transcripts were correctly dated 5 March 2009. The misapprehension under which the court was proceeding must, she submitted, have been apparent to the Respondent given his knowledge of the dating error and the fact that he was present in court for both days of the September Hearing.

45.2 The Respondent was aware that the dating error had not been disclosed to Mr Boreh's legal team. Mr Butcher QC made submissions on behalf of Mr Boreh at the September Hearing which adopted the erroneous premise that the intercepted calls occurred on 5 March 2009. Flaux J put to Mr Butcher QC that:

> "…the transcripts of the telephone conversations, in themselves, seem to me to give rise to an arguable case that what Mr Boreh was discussing … was the explosions which had taken place the previous night…"

45.3 Ms Hansen therefore submitted that the Respondent was aware, at various stages over the two day September Hearing, that:

- Mr Qureshi QC made submissions which indicated that he was not aware, thus had not made the court aware, of the dating error.
- Mr Butcher QC's submissions were predicated on the erroneous date.
- Flaux J considered the application for a freezing injunction on the mistaken understanding that the transcripts were correctly dated, were potentially relevant to the freezing injunction application and were capable of interpretation in a manner that was favourable to the Djibouti Clients.

45.4 Ms Hansen contended that the Respondent was aware of the Flaux J's reliance on the misdated transcripts in reaching his decision to grant the application for a freezing injunction. Notwithstanding that fact the Respondent did not take any steps during the course of the hearing or in the period thereafter to correct the misleading submissions that were made.

45.5 Ms Hansen relied upon Flaux J's findings at the March Hearing in that regard which included:

> "…
>
> [83] … if Mr Gray was listening to the submissions and concentrating on them, which was clearly a major reason why he was at the hearing, because he was the partner in charge of the case, it is difficult to see

how he could have failed to appreciate that Mr Qureshi QC was making submission on the false basis that he thought the conversations were after the Nougaprix attack. He was aware of the dating error, which he had initially considered a "big issue" and he was also aware that the conviction in Djibouti was unsafe and the evidence on which it was based (principally the wrongly dated transcripts) unreliable. Yet here was his own counsel putting forward submission which only made sense of counsel thought the transcripts were dated 5 March 2009 after the Nougaprix attach. If he was listening and concentrating, then it beggars belief that he did not appreciate that Mr Qureshi QC was still working on the wrong dates and thereby inadvertently misleading the court. In those circumstances, in my judgment, any honest solicitor would have immediately taken steps to correct his own counsel's misapprehension and thereby ensure that the court was not misled…

[117] Having considered all the evidence I am unable to accept Mr Gray's explanation that he was not aware at the hearing that both the court and counsel were labouring under a complete misapprehension about the date of the telephone transcripts. In my judgment, Mr Gray was well aware at the hearing of the implications of the discussions taking place between the court and both leading counsel and that those discussions were proceeding on the false basis that calls took place on 5 March 2009, after the grenade attack on the Nougaprix supermarket the previous evening. In the circumstances, I have concluded that Mr Gray did deliberately mislead the court at the 10-11 September 2013 hearing and that there is cogent evidence to that effect.

[118] My reasons for reaching the conclusion that Mr Gray did deliberately mislead the court are as follows:

(1) The issue of the misdating of the transcripts had first cropped up less than three weeks previously and Mr Gray had immediately recognised that it was, as he later said, "a massive issue". Although he sought to downplay it as a minor matter which just required changing a few dates in the extradition request, he know it was in fact a lot more serious than that. As he accepted in cross-examination, the misdating meant that the conviction was unsafe and the evidence on which it was based, the transcripts and the confession of Mohamed Abdillahi, were unreliable. That was precisely why it was a big or massive issue and I consider that it is inconceivable that less than three weeks later, he would not have been acutely aware if both counsel and the judge were proceeding on an interpretation of the evidence which did not appreciate that the transcripts were misdated.

(2) Despite his knowledge that the conviction was unsafe and the evidence on which it was based was unreliable, from 26 August 2013 onwards he adopted a strategy of not revealing this to any court or outside agency such as Interpol. Hence the tactic of "getting away with the date error" or "fudging the error of the date"

rather than being entirely open and frank with the Dubai court (and thereafter the English court) about the unreliability of the evidence and the unsafety of the conviction. As I have already held, "fudging the error of the date" was the language of concealment and not the approach of a solicitor of integrity.

(3) That evasive approach could not be justified by the assertion in his evidence that he thought that, even when the transcripts were given the correct date, Mr Boreh had a case to answer. The truth is that he appreciated that the case that the "set last night" was a grenade attack was dependent upon there having been a grenade attack on the evening of 3 March 2009; hence the search for evidence of such an attack. Some false evidence was produced by his clients, which conveniently not only asserted there had been an attack, but also explained why no-one had heard about it. However, by 28 August 2013, Mr Gray knew to put it at its lowest that this so-called evidence would not bear scrutiny and, by the time of the hearing on 10 and 11 September 2013, he knew that he had no evidence of any grenade attack on 3 March 2009.

(4) In any event, even if he had convinced himself that Mr Boreh still had a case to answer on the basis of the telephone transcripts with the correct date, the proper and honest course to have taken would have been to ensure that the Dubai court and, in due course, the English court was made aware that the original conviction was unsafe and the evidence on which it was based unreliable, so that the conviction could not stand and would have to be quashed. Then any extradition request could and should have been put forward only on the basis that Djibouti considered there was a case for Mr Boreh to answer at a fresh trial on the basis of the transcripts bearing the correct date. However, I suspect that the problem with taking that course might well have been that Mr Boreh would be handed back his passport and able to leave Dubai before the extradition request on that proper basis was presented and considered, something which, as the meeting at Kroll reveals, was to be avoided at all costs. That is why the strategy was developed at those meetings on 27 August 2013 of not disclosing to the Dubai court or the English court thereafter that the original conviction was unsafe and the evidence on which it was based was unreliable. Those meetings were attended by representatives of Djibouti, Mr Sultan (at Kroll) and Mr Djama Ali (at both meetings). As I held at [63] above, it is to be inferred that they agreed with the strategy and in following it Mr Gray no doubt thought he was acting in the best interests of his client.

(5) Contrary to Mr Gray's purported recollection in his evidence, I do not consider that he explained the full implication of the dating error to Mr Qureshi QC either in their telephone call on 26 August 2013 or at any time thereafter. In particular, I do not consider that he ever told Mr Qureshi QC that the conviction was

unsafe or that the evidence on which it had been obtained was unreliable. I consider that Mr Gray only told him that there was an error in one document referred to in the extradition request. Not only is this consistent with the contemporaneous documentation, such as Mr Gray's own email referred to at [46] above, but as I have already held at [40] above, since Mr Simpson QC on behalf of Mr Gray expressly disavowed any allegation of professional misconduct against Mr Qureshi QC, Mr Gray simply cannot have explained the full extent of the problem to him. If Mr Qureshi QC had been aware that the conviction was unsafe and the evidence on which it was based (specifically the telephone transcripts and the confession of Mohamed Abdillahi) was unreliable because the calls had in fact taken place before the Nougaprix attack, Mr Qureshi QC simply could not and would not have made the submissions he made to the court on 10 and 11 September 2013 which I have quoted above.

(6) The strategy of not revealing to any court or outside agency that the conviction was unsafe and the evidence on which it was based was unreliable continued into the Third Affidavit in support of the freezing order application, which Mr Gray had sworn only a week before the hearing, As I have already found, paragraphs 163.4, 163.6 and 164 of that affidavit involved equivocation, on any view conduct which fell a long way short of the standard of professional integrity and candour which the court is entitled to expect of an English solicitor.

(7) I accept that Mr Gray did not deliberately include the wrong transcripts in the exhibit to his affidavit and this was an inadvertent mistake by the Gibson Dunn staff who put the exhibit together so that when the hearing started he would not have known that the wrong transcripts had been exhibited. However, once Mr Qureshi QC started making the submissions he did on the morning of the first day of the hearing quoted at [81] above, Mr Gray must have appreciated that the discussion with the court was proceeding on the false basis that the phone calls had been after the Nougaprix attack, not before, as he knew was in fact the position. It beggars belief that he did not realise that counsel and the court were under that misapprehension. Furthermore, as the passages from the transcript of both days of the hearing which I have set out at [81] to [95] above demonstrate, the issue about the telephone calls being evidence that Mr Boreh was implicated in a grenade attack on the Nougaprix supermarket the night before the calls was not the subject of some passing reference, but was an issue to which counsel and the court returned again and again. In those circumstances, I simply do not accept Mr Gray's evidence that because he was tired or doing his emails or leaving it all to Mr Qureshi QC, he was not listening or concentrating. On the contrary, the fact that immediately after the hearing had finished on 11 September 2013, he asked Ms Kahn to include in the draft

Interpol letter references to the transcript of the previous day where the court had said there was an arguable case that Mr Boreh was involved in terrorism, demonstrates that he was listening and concentrating as one would expect of the partner in charge of a case of this seriousness, sitting behind counsel in court. Of course what I had said about the case being arguable was on the basis of my reading of the transcripts, which was that they were on 5 March 2009, referring to the Nougaprix attack the previous night. Mr Gray knew that the court was proceeding on the wrong basis.

(8) Furthermore, at Mr Gray's request, Ms Ngo Yogo II highlighted in yellow extensive sections of the transcripts of the hearing which I am quite sure he did go through and discuss with the associates which passages should go into the draft letter to Interpol. The excerpts which went into the draft which Ms Kahn sent him on the evening of 13 September 2013 included the passage from p. 136 of the first day's transcript which I highlighted at [90] above, from which it was obvious that the basis upon which I was saying that there was an arguable case that Mr Boreh Was implicated in terrorism was that the telephone calls were talking about the Nougaprix attack and so were after the attack. Even if, contrary to the findings I have already made, Mr Gray was not aware at the hearing that the court and counsel were proceeding on a false basis, he was aware of it when he read this and it was incumbent upon him to come back to court straightaway to correct the error.

(9) The final reason why I have concluded, regrettably, that Mr Gray deliberately misled the court at the hearing in September 2013 concerns his behaviour and reaction when Byrne & Partners wrote to Gibson Dunn on 4 September 2014 drawing attention to the misdating and pointing out that the court had been misled. I will set out my findings about this later in the judgment, but for the present I simply record that he treated their perfectly reasonable letter and subsequent correspondence with disdain and then engaged in a course of thoroughly evasive and positively misleading conduct, up to and including at the hearing on 13 November 2014. Whilst I accept that different people react to problems in different ways and it is not inconceivable that someone might try to cover up in a deliberate manner an inadvertent error, that is unlikely. Accordingly, although his subsequent evasive and misleading conduct is not determinative evidentially, it is strong support for the conclusion I have reached that Mr Gray did deliberately mislead the court at the hearing in September 2013 and that in the period from September to December 2014 he was being deliberately evasive in the hope that it would not emerge that he had been aware of the misdating error at the September 2013 and had not taken steps to correct what he appreciated was a misapprehension on the part of counsel and the court…"

45.6 Ms Hansen averred that significant weight could and should be attached to Flaux J's findings as to the Respondent's conduct which was particularly serious given that (a) it was apparent to the Respondent that Mr Qureshi QC was making misleading submissions to the Court in relation to the dating error which was known by the Respondent but not readily known or discoverable by others present, (b) the Respondent was the only member of the Djibouti Team who was present in Court with knowledge of the dating error, (c) it was apparent to the Respondent that Mr Butcher QC's submissions were predicated on the erroneous date and (d) Flaux J's questions to Mr Qureshi QC made plain that he was proceeded on an incorrect premise which emanated from the Respondent's Third Affidavit.

Principle Breaches and Outcomes not met

45.7 Ms Hansen therefore submitted that, in allowing misleading submissions to have been made, the Respondent (a) failed to uphold the proper administration of justice contrary to Principle 1, (b) undermined public confidence in him and in the legal profession contrary to Principle 2, Outcome (5.1) and (5.2) and (c) lacked integrity contrary to Principle 2.

Respondent's Evidence

45.8 The Respondent stated that by the time of the September Hearing he was "utterly exhausted, having worked long hours for several weeks as the Djibouti Team raced to prepare for the September Hearing." He advanced that by way of explanation of the reason that, even in 2014, he had limited recollection of the hearing. At the date of his Sixth Affidavit, he had (and continued to have) no independent recollection of the exchanges between the Judge and counsel, which he realised, much later, should have led him to tell Mr Qureshi QC that the Court was proceeding on a wrong basis."

45.9 The Respondent stated that much of the Djibouti Team were present at the September Hearing including Mr Sultan (for the Djibouti Clients), Mr Qureshi QC, Ms Hayward (junior counsel), Ms Bullock, Ms Kahn, Ms Ngo Yogo II, a host of paralegals and Mr Handley "for a bit". He did not remember the hearing at all other than it being a small court room that was packed with him sitting next to the Djibouti Client, sending emails throughout the hearing and having conversations with the Djibouti Team in court.

45.10 The Respondent stated that he did not realise that Mr Butcher QC (for Mr Boreh) was reading from the wrongly dated transcript, he did not believe he had a copy of the voluminous pleadings to follow in court due to the limited space. The Respondent stated that he knew it was not a good idea to have been sending emails in court during the course of Mr Butcher QC's submissions but he believed that as Senior Associates were in attendance they would have been paying attention. He further stated that by lunchtime on day 1 of the hearing it was clear that the freezing injunction application was likely to be granted so he was sending emails in relation to the enforcement thereof.

45.11 The Respondent did not expect Flaux J to rely on the terrorism conviction as one of his four grounds for granting the freezing injunction. The Respondent denied realising during the hearing that Flaux J had been misled.

45.12 The Respondent was cross examined at length by Ms Hansen, during the course of which he asserted that:

- In hindsight he accepted that Flaux J considered the freezing order application on an erroneous basis in respect of the misdated transcripts but he was not aware of it at the material time.

- No mention was made of the dating error in the Third Affidavit or in the submissions made to the court by Mr Qureshi QC.

- It "would've been advisable" for him to have paid attention at the September Hearing but he did not think "[he] was obliged to pay attention at all times and [he] would've liked to without distraction but [he] didn't".

- A Senior Associate, Ms Bullock, was paying attention and she "knew more than [him]" but did not know of the dating error.

- He billed $800 per hour to the Djibouti Client who was calling him during the September Hearing and who "wasn't paying [him] to sit and listen".

- He was not aware during the September Hearing that Flaux J had misunderstood as a consequence of his Third Affidavit and the submissions of Mr Qureshi QC.

- He did not choose not to correct the position in the September Hearing in the knowledge that it was being misled as "it would've been stupid" not to had that been the case.

- He only became aware that Flaux J considered the terrorism conviction as relevant to the risk that Mr Boreh would dissipate his assets which formed the basis of the freezing injunction so ordered at the conclusion of the September Hearing.

- He did not know at the time that Flaux J had relied upon the incorrect dates during the course of the September Hearing.

Respondent's Submissions

45.13 Mr MacDonald submitted that there were two reasons why Allegation 1.2 was not proved. Firstly, the submissions made by Mr Qureshi QC were not misleading. Secondly, in as far as the court was misled, the Respondent did not know that.

45.14 The relevant part of Mr Qureshi's submissions were on Day 1 and Day 2 of the September Hearing. The relevant part of Mr Butcher QC's submissions on behalf of Mr Boreh, which included the only mention of the erroneous date of the transcript was on Day 1.

45.15 Mr Qureshi QC's submissions were in the context that the Applicant's reliance on the terrorism material was simply to rebut the Respondent's claims of political motivation. At a very early stage in the hearing Flaux J described those claims as "background music", or "white noise", and emphasised that they likely had very little relevance to the application before him.

45.16 As part of Mr Qureshi QC's submissions Flaux J was taken to the telephone transcripts exhibited to the extradition request, which had in turn been exhibited to the Respondent's Third Affidavit. Mr MacDonald submitted that it appeared that Mr Qureshi QC was reading from the English transcripts, but Flaux J was looking at the French ones.

45.17 The date of the transcripts was not mentioned during Mr Qureshi QC's submissions. The wrong transcripts had been exhibited to the Respondent's affidavit in error, and no one had realised this. Mr MacDonald submitted that was not overly surprising if the Respondent was not following the September Hearing with his own bundle of pleadings.

45.18 Mr Qureshi QC's conclusion was "Doesn't sound like a conversation about fixing a gate, I'm sorry to say". That reflected the crux of the Applicant's suggestion about the transcripts that they were referring to acts of terrorism, and not to the distribution of political leaflets or to fixing a gate, as had variously been claimed by Mr Boreh or the Abdillahi brothers. Mr MacDonald submitted that that suggestion remained perfectly arguable on the new dating of the transcripts, as did the exchange which concluded Mr Qureshi's submissions on terrorism namely:

> "Flaux J: I don't have to decide today whether Mr Boreh has participated in terrorist acts. All you're saying is that you at least have an arguable case that part of your case against Mr Boreh is that he has participated in terrorist acts.
>
> Mr Qureshi: My Lord, I go further than that. I say it's simply outrageous for the defendant to maintain a position which of course suits him, and he articulates this through those he has instructed, that somehow the Djiboutian government is pursuing a vendetta against him which is reflected in trumped up charges."

45.19 Mr MacDonald submitted that the Applicant's suggestion that "submissions were made on the basis that the calls took place after the terrorist attacks" was unfounded as they did not cite any section of Mr Qureshi QC's submissions to support that suggestion and simply quoted the exchange set out above. Nowhere did Mr Qureshi QC say anything that indicated he was suggesting the telephone call took place after the grenade attack at Nougaprix.

45.20 Mr MacDonald submitted that the only time that occurred, was during Mr Butler's submissions. He referred once to the incorrect date of 5 March for the telephone conversation and he directly linked "the criminal act you undertook the previous evening" with "the grenade attack at Nougaprix". Flaux J ultimately stated to Mr Butcher QC that "the transcripts of the telephone conversations, in themselves, seem to me to give rise to an arguable case that what Mr Boreh was discussing with the Abdillahi brothers was the explosions which had taken place the previous night and the proposal that further explosions should take place".

45.21 Mr MacDonald submitted that the Applicant had selected a handful of lines which now took on far greater significance than they would have during the hearing. The crux of the exchanges between Mr Butcher QC and Flaux J was better encapsulated

by Flaux J when he made plain that although he could and would not decide the point, the conversations seemed much more consistent with discussing terrorist attacks than the alternative explanations put forward. That point remained perfectly accurate on the new understanding of the dates of the telephone transcripts. Once it was appreciated that the Respondent was not aware that the wrong transcripts had been exhibited to the Third Affidavit and the terrorism issue would not have seemed particularly crucial, it was not particularly surprising, Mr MacDonald submitted, that he missed a few lines of submissions made by opposing counsel which revealed the court was proceeding on an erroneous basis. As the partner he was there for strategic oversight, and in case any key decisions needed to be made during the hearing. Mr MacDonald contended that there were a number of associates present at the September Hearing who would have been more focused on the detail.

45.22 Mr MacDonald reminded the Tribunal of the number of other factors which were likely to have contributed to his failure to notice the position at the September Hearing. On the more relevant day in terms of submissions regarding terrorism, he received 46 emails between 10.00am and 4.30pm, and sent 16. Notably, all of those that are sent were between 1.48pm and 3.20pm. Mr Butcher's submissions on terrorism started very soon after the lunch break, the afternoon session having begun at 2.23pm. Mr MacDonald further reminded the Tribunal that Mr Butcher QC began his submissions with various other points, all of which were given short shrift by the court. Mr Butcher QC had made similar submissions at the previous strike-out hearing which had also been dismissed. Set against that context Mr MacDonald submitted that it was perhaps not totally surprising if the Respondent's mind turned to other matters during the submissions.

45.23 Mr MacDonald submitted that whilst the Tribunal inevitably needed to undertake a close reading of the transcripts to decide whether, and if so how, the court was misled by Mr Qureshi QC's submissions, it should take a step back when considering the Respondent's knowledge. He was not sitting in the hearing wondering whether the court was being misled about the dating of the transcripts. Terrorism was a miniscule issue in the context of the case. Mr MacDonald submitted that on the totality of the evidence it was far from inconceivable that the Respondent could have sat through the hearing and not noticed any misleading submissions.

45.24 Mr MacDonald contended that his submission was reinforced by the knowledge and views of the following lawyers:

- Ms Kahn was present for at least Mr Qureshi QC's submissions and most of the afternoon on the first day, but did not notice anything wrong, even when reviewing the transcripts the next day. Even when Ms Kahn was asked by the Respondent to go back through the transcripts in September 2014, after Byrne had raised the dating issue, to consider whether the court had been misled, she still came to the conclusion that it had not.

- Ms Merchant was present for at least Mr Qureshi QC's submissions, but did not notice any issue.

- When Mr Qureshi QC reviewed the matter in 2014 he came to the view that his submissions had not been misleading, and communicated that view to the court by way of his letter to Flaux J.

45.25 Flaux J relied on the fact that after the hearing Ms Ngo Yogo II sent the Respondent a highlighted version of the transcript, which included excerpts which went into a draft letter to Interpol. Flaux J focused on the implausibility of the suggestions put forward on Mr Boreh's behalf that the telephone conversation was about political leaflets, or fixing a gate, which remained at the centre of Djibouti's case against Mr Boreh, whatever the date of the telephone call. Neither Ms Ngo Yogo II or Ms Kahn, who respectively highlighted this passage and then included it in the draft sent to the Respondent, noticed anything wrong either. The Respondent's evidence, in his Sixth Affidavit (which the Applicant did not challenge) was that it was unlikely that he read the transcripts of the September Hearing in detail at the time that they were sent to him.

45.26 Mr MacDonald submitted that had the Respondent been aware that Flaux J's judgment had been improperly obtained, he would be less likely to have used it in correspondence with various law enforcement agencies. Doing so would only increase the likelihood that the impropriety would be discovered, and the Respondent caught out. Rather, it was more likely that his use of the judgment was consistent with him not being aware of any impropriety in obtaining it.

45.27 Mr MacDonald reminded the Tribunal that on 18 November 2013, the Firm sent Byrne the original telephone call recordings, with the correctly dated file names. That was, he submitted, inconsistent with a strategy of withholding the dating error from any court or third party.

45.28 Mr MacDonald averred that if Allegations 1.1 and 1.2 were found not proved by the Tribunal, then the remainder of the allegation must surely fail. As Flaux J acknowledged it was unlikely in the extreme that a solicitor who had done nothing wrong would then deliberately mislead the court in order to hide their lack of wrongdoing.

45.29 Mr MacDonald contended that the Respondent's views in 2014 - and importantly, those of the team including Mr Qureshi QC and Ms Haywood of counsel, were instructive regarding events of 2013 - because they did not think that the court had been misled in 2013. That conclusion was wrong, but it demonstrated that it was one which honest lawyers could come to.

<u>The Tribunal's Findings</u>

45.30 The Tribunal considered Allegation 1.2 against the incontrovertible fact that the Respondent was notified, less than three weeks before the September Hearing, of the dating error on the transcripts. The significance of the dating error was discussed that at length with Mr Qureshi QC, Djibouti Team, at the Kroll meeting and at the Al Tamimi meeting. The Tribunal found it inconceivable that the Respondent would not have the error fresh in his mind at the September Hearing.

45.31 The Tribunal proceedings were concerned with the Respondent's conduct and knowledge at the material time. It was not required to, and quite properly did not, make findings as to Mr Qureshi QC's knowledge at the September Hearing.

45.32 The Tribunal acknowledged that the Respondent was working long hours and travelling extensively at the material time but did not accept that vitiated the duty incumbent on him as an officer of the Court to ensure that the Court was not misled.

45.33 The Tribunal acknowledged that other members of the Djibouti Team were present in Court but that did not detract from the fact that the Respondent was the partner in the case who led the Djibouti Team with regards to the case strategy, evolvement thereof and manner in which the dating error was to be addressed.

45.34 The Tribunal was cognisant of the email traffic sent to and by the Respondent during the course of the September Hearing and noted the Respondent's admission that he may have been distracted. However, the Tribunal rejected the assertion that would have prevented him from following the oral submissions being made.

45.35 The Tribunal accepted that there may not have been sufficient space in Court for the Respondent have a copy of and follow the pleadings as the September Hearing progressed. However, that did not inhibit the Respondent's ability and duty to listen to the submissions being made and correct any inaccuracies that arose. Indeed, that was the Respondent's role as partner in the case charging $800 an hour to the Djibouti Client. The Respondent's duty to the Court was paramount. That duty extended to ensuring that submissions made were factually correct, accurate and not misleading.

45.36 The Tribunal noted and found it relevant that the Respondent produced a handwritten note of the judgment at the time Flaux J was delivering it.

45.37 The terrorism issue was addressed at length by Mr Butcher QC on behalf of Mr Boreh and responded to at length by Mr Qureshi QC. It was not an issue that was raised briefly then moved on from. Flaux J interposed Mr Qureshi QC's submissions to seek confirmation that he was not being asked to make findings as to whether Mr Boreh had participated in terrorist acts. Mr Qureshi QC's response went much further than confirmation. He repeatedly stated that Mr Boreh's position was "outrageous". Such emotive language could not, in the Tribunal's view, have passed the Respondent by as (a) evidence upon which the terrorism conviction had been undermined by the dating error which the Respondent was well aware of shortly before the September Hearing and (b) the significance of the dating error was profound in that it required amendment to the litigation strategy adopted by the Respondent in respect of the extradition request (namely re-trial as opposed to enforcement of sentence).

45.38 The Tribunal therefore rejected the Respondent's evidence that he was not aware that the Court was being misled during the September Hearing. The Tribunal found that the Respondent was aware and made a conscious decision not to correct Mr Qureshi QC or otherwise bring to the Court's attention that it was proceeding on a mistaken basis.

45.39 Having reached its own decision on the factual matrix of Allegation 1.2, the Tribunal considered and concurred with Flaux J's findings in that regard and in so doing determined that the Respondent:

- Failed to uphold the rule of law and proper administration of justice contrary to Principle 1 as the High Court was misled.
- Failed to act with integrity contrary to Principle 2 as no solicitor acting with integrity would have misled the High Court.
- Undermined public trust in him and in the provision of legal services contrary to Principle 6. The public was entitled to expect solicitors not to mislead the Court by filing misleading sworn statements in support of an application.
- Failed to achieve Outcome 5.1 which required him not to mislead the Court.
- Failed to achieve Outcome 5.2 which required him not be complicit in another person deceiving or misleading the court.

45.40 The Tribunal therefore found Allegation 1.2, breach of Principle 1, 2, 6 and failure to achieve Outcome 5.1 and 5.2 proved beyond reasonable doubt.

46. **Allegation 1.3 - Misleading correspondence with Byrne and Partners**

Applicant's Submissions

46.1 Ms Hansen submitted that the letter from the Firm dated 7 November 2014 to Byrne was misleading as to the Respondent's state of mind regarding the dating error at the September Hearing in that (a) he was aware of the dating error, (b) failed to correct the submissions made in that regard, (c) failed to correct the Court's misunderstanding of the same. With all of those factors in mind the letter stated "Neither Leading Counsel nor Mr Peter Gray were alive to the issue of the 4/5 March date discrepancy at the September 2013 hearing".

46.2 Ms Hansen relied upon Flaux J's findings at the March Hearing in that regard which included:

> "…
>
> [142] On 4 September 2014 Byrne & Partners wrote a detailed letter to Mr Gray referring to their discovery that the transcripts were misdated and that the court had been misled. The letter stated that once the transcripts were given the correct date, Djibouti's case against Mr Boreh was unsustainable because (1) the calls cannot have been reporting on the Nougaprix attack which had yet to take place; (ii) the confession of Mohamed Abdillahi was unsafe and (iii) the account that the calls were about distribution of leaflets was the only one that made sense of the transcripts. Byrne & Partners also complained about the dissemination of my judgment. The letter asked a series of perfectly proper and reasonable questions: (i) whether Djibouti accepted that the

calls were in fact on 4 March 2009; (ii) if so, what steps Djibouti intended to take to have the conviction quashed and to investigate the circumstances of the interrogation of Mohamed Abdillahi and whether it was accepted that the conversations related to distribution of leaflets; (iii) what steps they proposed to take to inform the court that it was misled by the submissions advanced and (iv) what dissemination there had been of the judgment accompanied by what representations.

[143] As Mr Dutton QC fairly and correctly accepted on behalf of Gibson Dunn, the court and Byrne & Partners should have been informed straight away after receipt of that letter in September 2014 of the misdating issue, that Mr Gray had known about it at the time of the hearing and that the court had been misled. It is not necessary or appropriate for the purposes of this judgment, to say more than that, in failing to come straight to the court, there may well have been an error of judgment by the English lawyers other than Mr Gray. However, Mr Gray was in a different position from all the other English lawyers, since he alone knew about the strategy devised at the 27 August 2013 meetings and he alone knew that he had been aware of the dating error at the time of the September 2013 hearing, that the court was proceeding on a fundamental misapprehension and that he had done nothing to correct the position.

[144] I have no doubt that if London partners and associates (specifically the senior London Disputes Resolution partner Mr Philip Rocher and the associate who became involved Mr Mark Handley) had been aware at the time in September to November of last year that Mr Gray had known of the dating issue before and at the time of the September 2013 hearing, they would have appreciated that the court had been seriously misled and they would have come straight to court the moment they learnt that he had been aware of the dating error at the time of the hearing, a fortiori if they had learnt that he had deliberately misled the court. However, unfortunately, Mr Gray did not inform them then or at any time until the weekend of 29/30 November 2014, that he had known about the misdating issue at the time of the hearing in September 2013. Instead he embarked on a course of evasive and misleading conduct which only came to an end when, following my order of 13 November 2014 requiring Gibson Dunn to file an affidavit setting out, inter alia, whether any of its lawyers was aware at the time of the 10-11 September 2013 hearing that the transcripts were misdated, he was forced to come clean about what he had known and swore his fifth affidavit dated 29 December 2014.

[145] In cross-examination Mr Gray said that he took Byrne & Partners' letter of 4 September 2014 seriously, but it is fair to say that his immediate reaction was one of disdain describing it in an email to Mr Qureshi QC on 9 September 2014 as *"bollocks" and "a storm in a teacup"*. He claimed in cross-examination that the whole thing had slipped his memory, which I found difficult to accept, given what I

have held to have been his state of mind at the time of the hearing in September 2013.

[146] On 8 September 2014 Ms Kahn (who had been seconded to Gibson Dunn's Dubai office since March 2014 and who had gone to Djibouti to investigate) sent Mr Gray an email reporting on a meeting with Mr Djama Ali (and someone else whose name has been redacted) and saying:

> *"...this means... that we must find out what happened the day before [3 March]. Djama vaguely remembers some events taking place on March 3, 2009. He told me that the first week of March 2009 was a very troubled one, with something happening almost every day. He contacted both the police and gendarmerie, so that they would search for any report, minutes, statement... dated from March 3, 2009 or reporting on any event that would have occurred on such date".*

[147] How Djibouti had previously dealt with this problem of no-one having reported any grenade attack of any description on 3 March 2009 has been seen from the false statement from the police officer dated 27 August 2013 which was dropped almost as soon as it was produced. There is an echo of that in what appears to be being said at this meeting which follows through into the evidence which was subsequently produced, referred to below.

[148] The precise sequence of the emails to and from Mr Gray on 9 September 2014 is difficult to establish because Ms Kahn was in Djibouti, Mr Gray was travelling on the other side of Africa, apparently in Cameroon, and Mr Qureshi QC was in England. However, it seems that what is set out below is the correct sequence. Mr Gray responded to Ms Kahn's email of 8 September 2014 by asking her: *"to get back to me re my questions yesterday please? i.e. how we can now accept the date is wrong and why we thought it was right in the first place?"* She responds saying that the problem came from the initial transcripts prepared by the gendarmes referring to the conversations as being on 5 March 2009. She goes on to say: *"The recordings do still make sense in that [Mohamed Abdillahi] and Boreh are planning the attacks which occurred on the following days ('tomorrow we'll do it again'), To restore full credibility, however, it is key that we find evidence on what happened on March 3. If the Djiboutian court-which relied on the transcripts-got the date wrong, it seems even more important to offer retrial. "*

[149] Mr Gray then asks Ms Kahn: *"What did we say to the English Court? Extradition Request was part of that"*. She responds setting out some transcript references and states that I formed my opinion not on the decision of the Djibouti court but on the transcripts which in my opinion indicated that Mr Boreh was involved in terrorist activity. Mr Gray then asks her to send him the extradition request as filed which

he couldn't easily locate. As he explained in cross-examination, it was difficult to search for emails when he was travelling in Africa. He asks her. *"Did we anywhere explain why we put the correct date in the extradition (Thank God!) but why the transcript one was wrong?"*

[150] He then sends Ms Kahn another email (timed at 22.50 in Cameroon or 18.50 in London) before she sends him the extradition request in which he says:

> *"I've looked through all this again.*
>
> *What you need to do is look at your old emails. I can see we originally thought it was 5 March and then changed it to 4.*
>
> *This was between mid-August and us finishing the extradition. You are on all the emails I have looked up, but I don't have time to go through them.*
>
> *Please re-read the extradition requests in full, as well as sending to me. I actually don't see the date issue as a big deal. The extradition was accurate but I can see we didn't mention the date disparity in court, otherwise we were satisfied it was ok…*
>
> *Was Nougaprix also 4 March? If so, it took place a few hours after the call"*

[151] The next email in the sequence appears to be one from Mr Gray to Mr Qureshi QC a few minutes later stating: *"The whole thing in the Byrne letter about dates is bollocks- we identified it as 4 March in the extradition request. The date on the transcripts was wrong but we dealt with that. This is all a storm in a teacup. I am still getting all the info though."* Mr Qureshi QC replied a few minutes later. "Ok good. We know they are slimey but really important we verify because they have gone to town" a further indication it seems to me that Mr Qureshi QC had never appreciated the full implications of the misdating issue.

[152] Miss Kahn initially responded to Mr Gray's email set out at [148] above explaining how the discrepancy had been discovered, that the right date was on the call logs and that as they were drafting the extradition request, they realised the disparity between the date in the Djiboutian judgment and the date of the recordings, which they then knew from the call logs was 4 March. She pointed out that the Nougaprix attack did take place a few hours after the call. She then sent him another email attaching the extradition request and an English translation. She went on to say:

> *"I do not think that we ever developed on the date discrepancy nor try to explain why the date of the transcripts (and consequently the date referred to in the Djiboutian decision)*

> *was different from that of the extradition request). As this had not been directly challenged by Boreh, it somehow would have been shooting ourselves in the foot".*
>
> *Mr Gray responded: "You have to go back through the emails. We did all discuss it. It was a massive issue".*

[153] Ms Kahn came back later the same evening, still 9 September 2014, in these terms:

> *"The initial extradition request referred to the conversation as intercepted on 5 March 2009...*
>
> *We became aware of the date issue on 25 August 2013. See your email 'extradition' attached followed by your email of 26 August 2013 ('FW CONFIDENTIAL...') 'I have spoken with Khawar and we agreed that having reviewed the evidence we can get away with the date error. It is only in the judgment, which is awful anyway, and not in the evidence.'*
>
> *On 26 August 2013 you circulated a revised version of the extradition request where the date of the recordings had been changed to 4 March (see DRAFT V2)"*

[154] Although Mr Gray was not disposed to agree with what Mr Kendrick QC put to him about this particular email exchange, it seems to me clear that what Ms Kahn was saying to him was that, it was he who decided not to disclose the discrepancy in the date, in circumstances where Mr Boreh had not raised the point, because to do so would be "shooting ourselves in the foot". In other words, disclosing the misdating of the transcripts would run into the whole issue about the original conviction and the evidence upon which it had been obtained (the transcripts and the confession) being unsafe. Mr Gray was quite right in his reaction that this was a "massive issue". I asked him if he could explain how he had gone in such a short time from saying in the email set out at [150] above that he did not see the date issue as a "big deal" to saying it was a "massive issue". He accepted there was an inconsistency, but could not explain it. It seems to me that the obvious explanation is that, by the time of the later email he was beginning to appreciate that it was going to be difficult to go on "fudging the date issue" as Ms Kahn realised he had made a conscious decision not to disclose the discrepancy in the dates.

[155] Mr Gray's response the following day 10 September 2014 to MsKahn's email set out at [153] above is instructive as well. He tells her that none of what she has sent him is very helpful and then sets out a strategy for a reply to the Byrne & Partners letter which would involve going through the extradition request noting why no-one was misled because the request referred to 4 March 2009 and saying that although the evidence referred to the 5 March date, there was to be a

re-trial so any errors in the court documents are immaterial. Although he denied this, the rest of the strategy seems to have been to throw as much mud as possible at Byrne & Partners and their client rather than facing up to the point they were asking about.

[156] 156. Later the same day he emailed Mr Handley and Miss Haywood in London about a proposed response to Byrne & Partners, saying:

> *"So you know re the terrorism letter, when we went back to the files we realised they were being misleading. The extradition refers to the correct date which is 4 March, it does still all make sense. There is a document where it's showing wrongly. we think in error, and that error was repeated in the Djibouti court documents. None of this changes the facts, and none of us relied on those court documents. We are double checking various other issues including the language points, but overall we are fairly comfortable about it."*

[157] As Mr Gray accepted in cross-examination, this was telling Mr Handley that it was no big deal but, although again he was not disposed to accept this, it clearly did not give Mr Handley anything like the full picture. Apart from anything else, it does not tell him that Mr Gray had sat through the hearing in September 2013 knowing that the court and counsel was proceeding on the basis of the wrong date, without being told that the conviction and the evidence on which it was obtained were unsafe.

[158] A letter was prepared in response to Byrne & Partners' letter which was dated 11 September 2014 but which was in fact sent on 18 September 2014. That letter sought to maintain that the court had not been misled at the hearing in September 2013 on the basis that the extradition request bore the right date and the court had relied on the narrative of the conversations. This was an extraordinary suggestion, since Mr Gray was well aware that the attention of the court had not been drawn to the discrepancy between the dates in the extradition request and in the transcripts, and that this failure to alert the court was deliberate, as Ms Kahn had reminded him only days previously (if, which I doubt, he had forgotten), since to reveal the discrepancy would be "shooting ourselves in the foot". The letter goes on to state that they do not know what was being referred to in the call of 4 March 2009 call as having happened on the previous day, but it could be a reference to a number of possibilities including an unreported grenade attack or the distribution of leaflets.

[159] Ms Kahn in Djibouti was then occupied in seeking to gather some evidence of what had allegedly happened on 3 March 2009. She obtained three statements from anonymous police officers dated 25 September 2014, claiming that they had been in the police station in the Place Harbi on the evening of 3 March 2009 when they heard an explosion. Two of them say that when officers arrived at the site of the

explosion they found nothing abnormal and no physical damage, which is why there was apparently no subsequent detailed investigation. The third says he saw a cloud of dust rising from behind the wall where the explosion took place and then says that the relevant wall to this day shows traces of something having exploded against it. As Mr Kendrick QC put to Mr Gray, wisely they have not deployed those inconsistent statements. I suspect that, as with the statements produced in the immediate aftermath of the discovery of the dating error, they would not bear close scrutiny. Furthermore, neither Mr Sultan nor Mr All has attended to be cross-examined on their affidavits, specifically to explain in this context how it is, if this is evidence of a genuine incident, no mention is made of it in the discussions with the U.S. Embassy in June 2009, referred to at [67] above.

[160] Byrne & Partners responded on 30 September 2014 to Gibson Dunn's letter. Their letter rightly pointed out that the court was given an inaccurate account of the evidence in the transcripts. It continued that given Gibson Dunn's perplexing stance that the submissions were not misleading despite this material error, they were left with the distinct impression that Gibson Dunn were aware of the error prior to the hearing but nonetheless thought it acceptable for matters to proceed as they did, They asked Gibson Dunn to confirm who was aware of the error at the time of the extradition request and at the time of the September 2013 hearing. They urged Gibson Dunn and their client to consider taking appropriate steps to quash the conviction with immediate effect and to set the record straight in the English proceedings, for which the minimum should be a joint letter to me inviting me to retract that part of the judgment where I had said Mr Boreh was arguably involved in terrorism.

[161] It is striking that Mr Gray did not take up that invitation which is what it seems to me any honest solicitor conscious of his duties to the court would have done, His failure to do so and his descent into what became even more evasive conduct provide further support for the conclusion I have reached that he deliberately misled the court. When the letter from Byrne & Partners of 30 September 2014 was provided to Mr Qureshi QC his response in an email of 1 October 2014 was to say it needed to be addressed carefully. He said this:

> *"We were not aware of the dating issue.*
>
> *THIS IS GOING TO BE PROBLEMATIC AS THEY ARE LIKELY TO WRITE TO THE JUDGE"*

[162] In response Mr Gray said: *"We did know about the dating issue. I recall we took the view as set out in our first letter - it was an error, but not one relied upon. The extradition request uses the correct dates."* That response still does not tell Mr Qureshi QC the full implications of the issue, in particular it does not tell him that Mr Gray had appreciated at the hearing in September 2013 that the court and

counsel were proceeding on the false basis that the transcripts were dated 5 March 2009 whereas he knew they should be dated 4 March 2009.

[163] Byrne & Partners responded to Gibson Dunn's letter of 14 October 2014 in a letter of 3 November 2014. They deal first with the suggestion that there might have been some other incident on 3 March 2009: "But even if there were such interpretation, Mr Boreh was not prosecuted on the basis of this after-invented, alternative case and it is not the ground of his conviction. The case actually brought against him was false". not be put off: They then repeat the request previously made. As Mr Kendrick QC put it, they would not be put off:

> *"We note your denial that the court was deliberately misled as to the date of the conversation, but you still have not answered our question as to whether you, your clients or your counsel were aware of that error and its significance (1) at the time when the extradition was drafted or (it) at the time of the hearing before Mr Justice Flaux. Please now do so."*

[164] Mr Gray's response was not to provide a straight answer to what were perfectly reasonable and proper questions but to say to Mr Qureshi QC: "I suggest we leave a response until the last minute. This is becoming a non-point".

[165] On 4 November 2014, Byrne & Partners issued an application for an Order that affidavits be sworn stating when the dating errors were discovered by Gibson Dunn and the claimants. The reaction of Mr Gray on 5 November 2014 was to write back saying that Byrne & Partners' queries "have been fully and properly addressed". which was simply not the case. The letter asked what amendments to the affidavit evidence Byrne & Partners were seeking. Byrne & Partners wrote back to Gibson Dunn the same day setting out in detail the evidence that needed to be corrected, The letter said what was expected at the very least was: (i) an affidavit confirming that the transcripts of the calls dated 5 March 2009 exhibited at PMJG7 were misleading and that the court's conclusion that there was an arguable case of terrorism was reached as a result of my having been misled and (ii) an explanation on affidavit as to how the misleading transcripts came to be put before the court, whether Gibson Dunn, their clients or counsel had known that the transcripts were not dated 5 March 2009 at the time of the hearing and if not when Gibson Dunn, their clients and counsel discovered this. Again, in the circumstances, this was an entirely proper and reasonable request.

[166] Mr Gray discussed this letter in an email exchange with Mr Qureshi QC headed "The famous tape transcript" in which having quoted extensively from Gibson Dunn's letter of 14 October 2014, he said:

> *"So the question is what next? The fact is that there is nothing to correct in my affidavit. I am referring to the evidence and not to the conviction itself at 163.6 and I go on to say at 164 that this evidence in support is at the very least reflective of a case to be answered by Mr Boreh... The only question is how we address the fact you didn't correct Flaux's obvious misunderstanding. I can't remember it happening but obviously it did, and I guess we say that you were unaware of the error and we did not notice it at the time...*
>
> *We can't concede this one even if we wanted to."*

[167] There are a number of aspects of this reaction which are deeply unsatisfactory. First, as I have already held, far from his Third Affidavit not requiring correction, it consisted in the relevant part of complete equivocation, Second, this email recognises that I was under an "obvious misunderstanding". How Mr Gray could square that with continuing to maintain that the court was not misled, given what was in fact his state of mind about this, at the time of the September 2013 hearing, escapes me. Third, on the basis of his evidence to the court at the present hearing that he had told Mr Qureshi QC everything about the misdating issue on 26 August 2013, by suggesting that Mr Qureshi QC say to the court that he was unaware of the misdating error, he was effectively inviting Mr Qureshi QC to lie to the court. In fact of course, saying that he was unaware of the dating error is entirely consistent with what Mr Qureshi QC has said in his letters to the court, that Mr Gray did not in fact explain to him the full implications of the misdating error.

[168] Fourth, the statement he was proposing that he should make that: "We did not notice it at the time" is essentially the thin line he has sought to take throughout the present hearing and the lead up to it that he was not listening or concentrating to what was happening at the September 2013 hearing, evidence which I do not accept for reasons I have already given. Fifth and finally, despite his denial in cross-examination, the reference to not being able to concede this one "even if we wanted to" was, as Mr Kendrick QC put to him, because he recognised, even though Mr Qureshi QC did not, that to do so would be to admit that he had deliberately misled the court and would mean that the strategy of concealing the unsafety of the extradition proceedings would begin to unravel.

[169] I found Mr Gray's attempt in cross-examination to explain away this email deeply unsatisfactory. Equally unsatisfactory was his attempt to explain away the reference in the transcript to the act being heard by westerners and having resonance, in stances where he knew that there was no evidence that would pass muster of a grenade attack on 3 March 2009, by saying that he thought it was just the Abdillahi brothers giving Mr Boreh reassurance.

[170] Mr Qureshi QC responded to this email later on 6 November 2014 in these terms:

> *"1: I will review all the correspondence and see where the letter can be sent. We really do not want this issue to be considered by Flaux J once more, because we have pretty much got what we wanted/ were likely to get from the freezing order variation application.*
>
> *2: I have no recollection of the date issue. We discussed at length the need for accuracy in the transcription translation. It is obvious the Djibouti authorities messed up in terms of translation typo.*
>
> *WAY FORWARD*
>
> *A. We will have to send a letter making it clear it was an error, not material. The evidence implicates Boreh, no attempt to mislead.*
>
> *B. We can hopefully avoid this being ventilated in open court because It's bound to generate adverse comment from the Judge."*
>
> *As Mr Kendrick QC rightly put to Mr Gray, this demonstrates that leading counsel was on a different plane of understanding from Mr Gray. He was saying he had no recollection of the dating issue. He only recollected discussing that the extradition request had to be accurate."*

[171] Mr Qureshi QC then drafted a letter to be sent to Byrne & Partners in the concluding section of which he said:

> "...We accept that the tape dating issue is an unfortunate error - it is certainly *nothing more than that, and* *we are grateful to you for drawing it to our attention.*
>
> *It is after examining the terrorism documents in the light of [the Byrne letter of 4 September 2014] that Mr. Gray. and Leading Counsel became aware of an understood the nature of the tape dating issue and why we maintain that a proper reading of the transcript in fact supports the position that the conversation referred to the attack which took place later that day." (emphasis added).*

[172] Whilst what this draft letter said was no doubt true for Mr Qureshi QC, the underlined passages presented obvious difficulties for Mr Gray because it was not the Byrne letter which had alerted him to the misdating issue and its implications. Rather he had known all that since

before the September 2013 hearing. It was in those circumstances that he redrafted the letter so that the second paragraph above read:

> *"Neither Leading Counsel nor Mr Peter Gray were alive to the issue of the 4/5 March date discrepancy at the September 2013 hearing. They have re-examined the terrorism documents in light of your allegations and maintain that a proper reading of the transcript in fact supports the position that the conversation referred to the attack which took place later that day..."* (emphasis added)

[173] The highlighted passage was his redraft. He sent it in a marked up version to Mr Qureshi QC as an attachment to an email on 7 November 2014 which stated:

> *"I think we're on thin ice if we say we didn't ever know about this from the beginning until their letter [of 4 September 2014]. Remember, they know we've been to see Interpol lots of times.*
>
> *I think it's better we say we were not alive to the distinction at the hearing, which is true. I've re-read the transcript, and it's only Butcher who cites the wrong date... "*

[174] Mr Qureshi QC said this was ok to be sent, so the letter went out in this form. In my judgment, Mr Gray's attempt in cross-examination to justify this letter or the email he sent was hopeless. On any view, the reference to being on thin ice was not the comment of an honest solicitor, but of someone who was practising equivocation. Although he denied this in cross-examination, it is quite clear that he thought he would be on thin ice because, since it might well come out that Gibson Dunn had sent both the original incorrectly dated transcripts and the ones with the correct date to Interpol, if he said that he didn't know about the misdating issue until the Byrne letter, he would get caught out in a lie. So his redraft of the letter continued his strategy of equivocation and saying something which, whilst literally true, failed to disclose the full picture and gave a thoroughly misleading impression. Despite the careful changes he made to the second paragraph quoted at [172] above, Mr Gray appears to have overlooked the words underlined in the first paragraph quoted which still gave the misleading impression that he had not been aware of the misdating error until Byrne & Partners drew it to his attention.

[175] Quite apart from the misleading aspects of this letter, as Mr Gray was constrained to accept in cross-examination, whilst Byrne & Partners were asking two questions: (i) had Gibson Dunn been aware of the misdating error at the hearing of 10 and 11 September 2013 and (ii) had they been aware of the error before the hearing, he had deliberately only answered the first question and avoided the second. Of course answering the second, unless he positively lied, would mean having to admit that he had been fully aware of the misdating error from

> 23 August 2013 which would lead to the awkward question of whether he had deliberately misled the court at the hearing. Therefore the strategy he continued to pursue was one of equivocation and evasiveness, not answering the second question…
>
> [177] …I found the attempt by an English solicitor and partner in a City firm to justify a positively misleading letter to the other side's solicitors as "acceptably evasive" breathtaking. This letter was clearly dishonest and it was designed to deceive Byrne & Partners into thinking that Mr Gray had not been aware of the dating error at the September 2013 hearing, It had the desired effect, because Byrne & Partners wrote back on 9 November 2014 saying:
>
> > *"You have now told us that Mr Gray and leading counsel were not aware of the misdating and we accept that." …*"

46.3 Ms Hansen submitted that significant weight could and should be attributed to Flaux J's findings.

Principle Breaches

46.4 Ms Hansen averred that the public and the profession were entitled to expect solicitors to act truthfully and candidly in correspondence. The Respondent's failure to do so undermined public confidence in him and in the profession contrary to Principle 6.

46.5 Ms Hansen contended that sending the misleading and disingenuous correspondence to counterparties to litigation amounted to a clear failure to adhere to the ethical standards of the profession contrary to Principle 2.

Respondent's Evidence

46.6 The Respondent stated that when the first letter from Byrne was received by the Firm on 4 September 2014 he did not remember anything about the dating error at all. He could not recall re-reading the transcripts of the intercepted telephone calls at that time but it was "highly unlikely" that he did so; he re-read them around 7 November 2014. Having done so he remained of the view at the time that the court had not been misled as:

- He wrongly concluded that Flaux J had been reading from the excerpts in the Extradition Request, which contained the quotes but referred to the correct date. He now recognised - but did not then - that Flaux J had in fact been looking at the incorrectly-dated French transcripts, and so did rely on the incorrect date.

- The wrong date had only been only mentioned once (by Mr Butcher QC), and Flaux J did not appear to have picked up on the point. The Respondent believed that he simply did not notice on the references to the words "previous night" and so on, from which he should have concluded, but did not, that Flaux J was relying on the accuracy of that date.

- Instead, it appeared to him that Flaux J reached his view on the basis of the suspicious language of the calls.

46.7 The Respondent considered the references made by Byrne regarding Djibouti's reliance on the conviction were wrong, because it was clear that Flaux J relied only on the transcripts and reached no view on the conviction at all.

46.8 The Respondent stated that in October – November 2014 he was "hardly in Dubai at all" and was assisting with the response to Byrne from his various locations in other jurisdictions and time zones. He believed that the allegations made by Byrne, that the Firm had misled the court, were "background noise" that he discussed with Mr Qureshi QC whose initial view was that he had not known of the dating error. In a telephone call on 6 November 2014, Mr Qureshi QC accepted that the Respondent could have told him of the dating error. There was a further telephone call on 7 November 2014 along with an email from the Respondent to Mr Qureshi QC in which he stated:

> "…I think we're on thin ice if we say we didn't ever know about this from the beginning until their letter. Remember, they know we've been to see Interpol lots of times.
>
> I think its better we say we were not alive to the distinction at the hearing, which is true. I've re-read the transcript, and it's only Butcher who cites the wrong date…"

46.9 The Respondent explained that his reference to "thin ice" was an attempt by him to avoid accusing Mr Qureshi QC of lying with regards to his knowledge of the dating error in 2013. The words "alive to" were deployed by the Respondent to make the point that it was Mr Butcher QC who had relied upon the wrong date at the September Hearing which the Respondent and the Djibouti Team did not realise during the hearing.

46.10 The Respondent stated he did not want to tell Byrne that the dating error was noted in August 2013 because he thought that Flaux J had relied upon the suspicious language in the intercepted telephone calls as opposed to the incorrect date.

46.11 The "offending" letter dated 7 November 2014 was carefully drafted to avoid the suggestion that the Firm was never aware of the dating issue. When the response from Byrne was received on 9 November 2014 in which they accepted the explanation given, the Respondent did not give it any further thought. He believed that the "peripheral issue" had been resolved and was preparing for the November Hearing. The Respondent stated that he didn't "think [he] had to tell his opponent that they were wrong".

46.12 The Respondent was cross examined at length by Ms Hansen, during the course of which he asserted that:

- With regards to the second letter from Byrne dated 30 September 2014 which stated:

> "…Given your perplexing stance that the submissions made to the Court were not misleading despite this now admitted and plainly material error, we are left with the distinct impression that you were aware of the error prior to the licaring before Mr Justice Flaux, and that you nonetheless thought it acceptable for matters to proceed as they did…"

He did not correct their understanding as "Byrne wouldn't accept that" and that if he had done so the Firm would have been "subject to more of this" by Byrne.

- Whilst letters were drafted as a joint effort by the Djibouti Team, he bore the responsibility for the final content.

- When the letter from Byrne was received he "didn't have a clue what they were on about so [he] asked Ms Kahn to look into it which she did. The [August 2013] emails were revealed and [he] recollected [the dating error]."

- He made a conscious, tactical decision not to reveal to Byrne who knew of the dating error and when.

- He believed that he told Mr Qureshi QC of the dating error on 26 August 2013 but Mr Qureshi QC did not recall that and the Respondent "wasn't going to squabble" with him over that which was why the words "not alive to" were deployed in the response to Byrne.

- That careful drafting was not intended to mislead Byrne and he did not consider that he was obliged to correct their understanding unless and until the Court ordered an investigation as to who knew what and when within the Firm.

Respondent's Submissions

46.13 Mr MacDonald submitted that Byrne first raised the dating issue with the Firm almost exactly one year after the September Hearing at which stage the Respondent had no reason to focus his mind on the issue during that time. The issue must, Mr MacDonald contended be considered in the context of Byrne's general approach to the Djibouti Litigation. The issue raised immediately followed Byrne's attempt to suggest that the tapes were wholly fabricated, a theory which was totally debunked by the Djibouti Team. That, and the history of Mr Boreh's team aggressively taking every point available, wrongly accusing various people (including the Respondent) of misleading the court in the past, no doubt affected the lens through which the Respondent and the Djibouti Team viewed what Byrne were alleging.

46.14 Mr MacDonald averred that it was clear from the immediate email exchanges that neither Mr Qureshi QC nor the Respondent had any real recollection of addressing the issue. The Respondent then reacquainted himself with the history, going through many of the same thought processes he went through in 2013.

46.15 Notably in his exchange with Ms Kahn on 9 September 2014, the Respondent said: "Did we anywhere explain why we put the correct date in the extradition (Thank God!) but why the transcript one was wrong?".

46.16 Mr MacDonald submitted that again demonstrated the Respondent's honesty. He was relieved that the correct date had been submitted in the documentation to the court. It was also unlikely that, had he knowingly misled the Court in 2013, that he would have forgotten about such a serious matter.

46.17 The Firm's initial response was not criticised. After Byrne's second letter the following email exchange occurred:

> "Mr Qureshi QC: We were not aware of the dating issue ...
>
> The Respondent: We did know about the dating issue. I recall we took the view as set out in our first letter - it was an error, but not one relied upon. The extradition request uses the correct dates…"

46.18 Mr MacDonald contended that the above exchange was entirely in keeping with the Respondent's case that he had discussed the date issue with Mr Qureshi QC during 2013, and they had resolved how to deal with it, albeit that Mr Qureshi QC did not remember that by September 2014. That was unsurprising given the number of issues in the case and the overall lack of importance of the terrorism issue.

46.19 The Respondent was criticised for his email to Mr Qureshi QC of 6 November 2014. It was first said that Flaux J's misunderstanding was only "obvious" to someone who knew of the error in the dating of the transcripts. That was true, in that it required a close analysis of the transcripts to appreciate that the Court was proceeding on the basis of the incorrect date. That supported the Respondent's submissions made under Allegation 1.2. Because the Respondent was not aware that the wrong transcripts had been exhibited, Flaux J's misunderstanding would not have been obvious to him at the time of the hearing. Even in his internal email in 2014 to Mr Qureshi, the Respondent said that he did not notice it at the material time. Mr MacDonald submitted that would be a surprising thing for him to say to Mr Qureshi QC if they were both fully aware that the Respondent had noticed it at the time.

46.20 The Applicant further contended that the sentence "I guess we say that you were unaware of the error and we did not notice it at the time" was knowingly inconsistent with the true position. Mr MacDonald submitted that ignored the distinction between "you" and "we". Saying "you were unaware" was no doubt reflective of the fact that despite the Respondent having reminded Mr Qureshi QC of their conversations during 2013, Mr Qureshi QC continued to suggest he had not been aware of the issue. Conversely, by stating "We did not notice it at the time" reflected what the Respondent had already told Mr Qureshi QC a month earlier namely that he had been aware of the issue when it came up, but did not notice that anything was wrong during the September Hearing.

46.21 Mr MacDonald submitted that was one of two occasions where the Applicant suggested to the Respondent that he put forward a position to Mr Qureshi QC that they both knew to be untrue. Mr MacDonald reminded the Tribunal that Ms Hansen, in outlining the Applicant's case, did not seek to put forward a case either way on Mr Qureshi QC's knowledge, at times it was effectively being suggested to the Respondent in cross examination that Mr Qureshi QC was a co-conspirator, or at least

that the Respondent was treating him that way. Mr MacDonald submitted that was totally implausible. If the Respondent was seeking to hide something from the Court, or actively mislead it, it was surely the last thing he would do to openly suggest that to leading counsel of Mr Qureshi QC's standing and reputation.

46.22 Mr MacDonald surmised that the allegation ultimately focused, as did Flaux J, on the Respondent's drafting of the sentence "Neither Leading Counsel nor Mr Peter Gray were alive to the issue of the 4/5 March date discrepancy at the September 2013 hearing". Mr MacDonald submitted that that drafting was a response to Mr Qureshi QC's draft, which said that it was only after 4 September 2014 that the Respondent and Mr Qureshi QC "became aware of and understood the nature of the tape dating issue".

46.23 The Respondent was clearly not happy with that. He emailed back openly about his thinking: "I think we're on thin ice if we say we didn't ever know about this from the beginning until their letter. Remember, they know we've been to see Interpol lots of times. I think its better we say we were not alive to the distinction at the hearing, which is true. I've re-read the transcript, and it's only Butcher who cites the wrong date. Let me know what you think of my mark-up".

46.24 Mr MacDonald submitted that the Respondent was absolutely clear about his reasoning in that email, to ensure that counsel could consider it properly. Mr MacDonald further submitted that the Respondent could be forgiven for the understatement "we're on thin ice if ... "as he was hardly likely to accuse his leading counsel of drafting a clearly misleading letter. Rather, he was delicately responding to the fact that Mr Qureshi QC again seemed to be under a misapprehension, which he again corrected.

46.25 Mr MacDonald submitted that this was the second occasion where the Applicant advanced an interpretation that the Respondent was suggesting something thoroughly improper to counsel namely that they should not tell a lie simply because they might get caught out. Mr MacDonald averred that simply cannot have been the Respondent's meaning, because it was so implausible that he would openly suggest such a thing to Mr Qureshi QC. It was not apparent why having been to Interpol would mean that any lie would get 'caught out' in any case. The Respondent could not remember the meaning of that sentence, and it did not appear to have been focused on during the 2015 proceedings. Mr MacDonald submitted that the suggestion it could have meant anything sinister was so unlikely that it should be discounted.

46.26 Mr MacDonald reminded the Tribunal that the Respondent then chased Mr Qureshi QC by email to ensure he had been able to properly consider the proposed wording, and eventually managed to speak to him by phone. That was the second time that day the Respondent had spoken to Mr Qureshi QC about the response and demonstrated an obvious persistence to ensure Mr Qureshi QC had been able to properly consider the issue. Mr MacDonald submitted that was clear evidence of the Respondent's honesty.

46.27 Mr MacDonald contended that any doubt about whether Mr Qureshi QC at that point understood the nature of the Respondent's knowledge was settled by his email just the day before to Junior Counsel:

> "Am reviewing the terrorism file again - PG repeated this morning that he mentioned the date issue before the hearing - unfortunately I cannot recall so it is possible he did tell me - I would hope I would have appreciated its potential for problems immediately…"

46.28 Mr MacDonald submitted that the letter of 7 November 2014 to Byrne was not misleading. It was true that neither the Respondent nor Mr Qureshi QC had been alive to the issue of the discrepancy at the hearing. Lawyers choose words with precision. A lawyer reading the Respondent's letter would be overwhelmingly likely to identify that the statement "Mr Gray and Mr Qureshi were not alive to the issue at the hearing" was different to suggesting they were never aware of it at all, as otherwise that is what they would have said.

46.29 Mr MacDonald averred that the Rule 5 statement recognised the distinction set out above by the submission that it was not plausible that the Respondent did not notice the issue at the September Hearing. The Applicant therefore relied upon proving Allegation 1.2 in order to prove Allegation 1.3.

46.30 Mr MacDonald submitted that the Respondent was criticised in cross-examination for precise drafting on a number of occasions, which was said to have been done in order to create a misleading impression. Mr MacDonald submitted that the opposite was the case, the Respondent's precise drafting was in order to avoid misleading anyone. Mr MacDonald contended that it was permissible, and common litigation practice, for lawyers to pursue careful drafting to protect their client's interests by not opening up an area that will only allow the opponent to pursue a new avenue of argument, whilst making sure the drafting is not actively misleading in accordance with their obligations.

46.31 Mr MacDonald contended that the Applicant's approach in that regard was one of a number of occasions where the Rule 5 Statement adopted a dangerous circularity which was also apparent in Flaux J's judgment namely that the Respondent was dishonest in 2013, therefore his actions in 2014 were dishonest. The drafting of "alive to" was dishonest because the Respondent knew that he had appreciated the court had been misled during the hearing in 2013. But then his dishonest actions in 2014 supported the case that he was dishonest in 2013. Whilst Mr MacDonald accepted that the Tribunal could consider dishonesty found on one allegation supported dishonesty in respect of another (or indeed honesty found on one allegation to support honesty on another), he averred that the Tribunal could not use 1.1 and 1.2 to prop up 1.3-1.5, and 1.3-1.5 to prop up 1.1 and 1.2.

46.32 Mr MacDonald submitted that the fact that Byrne, whether deliberately having identified this distinction, and in an attempt to force out an answer, or genuinely misunderstanding, replied with the phrasing "aware of" rather than "alive to", which of course had a different meaning, did not render a non-misleading letter misleading. The matter was clearly not going to be left at that, because the Respondent knew by that point that he was to make a Fourth Affidavit. Mr MacDonald further submitted

that the Respondent was not under an obligation to correct Byrne, otherwise stating an incorrect position to flush out the opponent's answer would be a litigation strategy.

46.33 Mr MacDonald reminded the Tribunal of the Respondent's evidence that he viewed Byrne as using their correspondence to set traps, a contention that was supported by his contemporaneous email during the hearing on 10 September 2013 and the email to Mr Handley which was the focus of Allegation 1.4 ("all you are doing is falling into their trap"). The Applicant's position that the Respondent should have replied saying "you have misunderstood", missed the point that this would effectively be answering Byrne's question, which was the exact thing the Firm did not want to do for legitimate reasons of litigation strategy. Mr MacDonald submitted that whether or not it was in fact a trap, that was demonstrably what the Respondent believed.

46.34 Mr MacDonald contended that at the very least, the letter was clearly not knowingly misleading. The Respondent deliberately changed the phrasing to make sure it was true, as he expressed to Mr Qureshi QC in his contemporaneous email. He was at pains to ensure Mr Qureshi QC agreed with the phrasing adopted, which Mr Qureshi QC did. Mr MacDonald concluded that it was a considerable irony that the Respondent was accused of misleading the Court for changing a misleading letter into a letter which he clearly believed not to be misleading, in terms he contemporaneously expressed to Mr Qureshi QC.

<u>The Tribunal's Findings</u>

46.35 The Tribunal was required to determine whether the letter sent by the Firm dated 7 November 2014 to Byrne was known by the Respondent at the material time to have been misleading. Much evidence was received and lengthy submissions were made in respect of the preceding communications from Byrne and replies sent from 4 September 2014 ("the initial letter") which the Tribunal took into account but focused its findings on the 7 November 2014 letter.

46.36 The Respondent's evidence was that upon receipt of the initial letter raising the issue of the dating error on 4 September 2014, he could not recollect the significance of the dating error. The Tribunal gave him the benefit of the doubt in that regard. However, on his own admission, the Respondent proceeded to re-acquaint himself with the dating error by reviewing emails from 2013 and discussed the matter at length with Mr Qureshi QC upon receipt of the initial letter. It was plain from his evidence before the Tribunal that every response to Byrne was carefully drafted and drafted with precision.

46.37 The questions posed by Byrne in their letter of the 3 November 2014, which the Firm's letter of 7 November 2014 replied to, re-iterated the two questions which Byrne were seeking a response to namely:

> "…We note your denial that the Count was deliberately misled as to the date of the conversation, but you still have not answered our question as to whether you, your clients or your counsel were aware of that error and its significance (i) at the time when the extradition request was drafted, or (ii) at the time of the hearing before Mr Justice Flaux. Please now do so…"

46.38 The Firm responded in terms that deliberately only answered the first question and avoided the second namely:

> "…Neither Leading Counsel nor Mr Peter Gray were alive to the issue of the 4/5 March date discrepancy at the September 2013 hearing…"

46.39 The Tribunal found that both questions posed by Byrne were direct, clear and unambiguous. The Tribunal found that the Firm's response, which the Respondent was responsible for, was indirect, unclear and ambiguous. Byrne were asking whether the Respondent and/or Mr Qureshi QC were aware of the dating error and its significance at the September Hearing. The Respondent was well aware of both by virtue of the August 2013 emails, discussions with Mr Qureshi QC, the Kroll meeting, the Al Tamimi meeting, the change in strategy and the amendments made to the extradition request. Given the Tribunal's findings that ventilation of the terrorism conviction and underpinning evidence at the September Hearing which it found could not have gone unnoticed by the Respondent, the Tribunal determined that the language deployed in the response ("alive to") was designed to deceive Byrne and obfuscate the true position.

46.40 Having reached its own decision on the factual matrix of Allegation 1.3, the Tribunal considered and concurred with Flaux J's findings in that regard and in so doing determined that the Respondent:

- Failed to act with integrity contrary to Principle 2 as no solicitor acting with integrity would (a) use ambiguous language to avoid answering a direct question posed by an opponent in litigation and (b) avoid answering a legitimate question posed by an opponent in litigation.

- Undermined public trust in him and in the provision of legal services contrary to Principle 6. The public was entitled to expect solicitors to be clear and precise in responding to legitimate questions posed by an opponent in litigation. The use of semantics and language that was open to misapprehension undermined public trust in the Respondent and in the provision of legal services.

46.41 The Tribunal therefore found Allegation 1.3, breach of Principle 2 and 6 <u>proved beyond reasonable doubt</u>.

47. **Allegation 1.4 - Correspondence to more junior colleague within the Firm**

<u>Applicant's Submissions</u>

47.1 Ms Hansen submitted that the Respondent's email to Mr Handley on 10 November 2014 (in which he stated it was a waste of time for Ms Merchant and Ms Kahn to review their emails) amounted to an attempt on his part to induce Mr Handley to cooperate with him in maintaining a misleading account of the state of knowledge of individuals within the Firm – and specifically him – as to the dating error as at the September Hearing.

47.2 Ms Hansen contended that his conduct was particularly serious given that he was seeking to protect his own position, in the knowledge that he was the only English qualified solicitor with knowledge of the dating error who was present at the September Hearing. Mr Handley was not, she submitted, aware of the dating error at the material time.

47.3 Ms Hansen averred that the Respondent sought, by way of that email, to secure that he was not identified as having knowledge of the dating error at the September Hearing. Ms Hansen further averred that the Respondent did so from a position of seniority, authority and influence over Mr Handley as he was a partner and Mr Handley a Senior Associate. If Mr Handley had acquiesced then, Ms Hansen submitted, the Respondent's misleading conduct may not have been identified either within the Firm or in the course of the Djibouti Litigation.

47.4 Ms Hansen relied upon Flaux J's findings at the March Hearing in that regard which included:

> "…
>
> [185] … on the afternoon of 10 November 2014 after the conference call and once business had opened in the United States where Mr Gray was, Mr Handley had an email exchange with Mr Gray in relation to the Fourth Affidavit. It begins with Mr Handley saying: *"Sana and Aurelie have been asked to complete what they can with the affidavit and asked to go back through their emails and see if there is an explanation for how we got all the right dates in the extradition request but mischaracterised the dates for the freezer."* This accorded with what it had been agreed should be investigated during the conference call that morning.
>
> [186] Mr Gray's response, minutes later was as follows:
>
> > *"This is a waste of time. Please do not do that.*
> >
> > *All you are likely to find is that on date X we realised the error, addressed it and moved on. Is that something you think is appropriate to admit to the court? Would you like me to publicly apportion blame on other lawyers? All you are doing is falling into their trap. And it would not end there.*
> >
> > *The fact is we were not alive to it at the hearing, we did not mean to mislead the court and we are addressing it that way."*
>
> [187] Mr Gray really had no proper explanation for this disgraceful email in cross- examination. He was forced to accept that Mr Handley was obviously right when he said later that the court should be informed. However, the attempt to suggest that other lawyers were to blame, when he knew that he was the only English solicitor who had sat through the September 2013 hearing knowing the full implications of the misdating issue, was wholly wrong. This email, as Mr Kendrick

> QC put to Mr Gray, albeit he would not accept the point, was deceiving Mr Handley into thinking that he, Mr Gray, had not known: "we were not alive to it at the hearing" again the words of equivocation, whereas others in the firm had…"

47.5 Ms Hansen submitted that significant weight could and should be attributed to Flaux J's findings.

Principle Breaches

47.6 Ms Hansen submitted that in seeking to cause Mr Handley to participate, unwittingly, in the continuation of a course of conduct which caused the Court and others to be misled, he undermined public trust in him and in the profession contrary to Principle 6.

47.7 Ms Hansen further submitted that the Respondent had a clear responsibility to refrain from seeking to co-opt more junior solicitors, acting under his supervision and authority, unwittingly into a scheme designed to protect the solicitor and perpetuate the Court and others being misled contrary to Principle 2.

Respondent's Evidence

47.8 The Respondent "sketched out" what he proposed to include in the Fourth Affidavit and sent it to Mr Qureshi QC, Mr Handley and some of the Djibouti Team at 3.49am (US) on 10 November 2014. The Respondent stated that he was working late and was very tired. Mr Handley replied at 4.13am (US) in the following terms:

> "…As I understand it [Ms Holmes] never worked on this aspect of the Freezer. Given that they have broadened out their requests to all GDC fee earners it would be better for those with the best and deepest knowledge of the preparation of this aspect of the Freezer to work and comment on this affidavit. I'm just not sure who that was…"

47.9 The Respondent replied to that email at 11.16am (US):

> "…That's not the point I was making. I'm not asking anyone to carry out a post-mortem. I'm just asking for the admin of turning my text into a draft doc so I can review this am…"

47.10 The Respondent stated that his intention with the Fourth Affidavit was to "set out the story of who knew what and when which he would forward to Ms Holmes to refine in affidavit form but Mr Handley wanted something different". The Respondent tried to speak to Mr Qureshi QC following the telephone conference that had taken place that morning with the London barristers, the Djibouti Team and Mr Handley. He was annoyed that the call had taken place without him that led to Mr Handley instigating how to proceed and instructing members of the Djibouti Team to embark on matters that he did not agree with.

47.11 The Respondent believed that it was a waste of time to direct Ms Kahn and Ms Ngo Yogo II to review their historic emails as they "weren't going to tell Byrne who knew what and when" in 2013. The Respondent stated that as at November 2014 he "thought that Mr Handley knew [he] knew of the dating error" in 2013 but that he wanted to "cast the net wide" to include the knowledge of all of the Djibouti Team. The Respondent believed that it would have been a disproportionate task to investigate fully before the November Hearing. The Respondent denied that his email to Mr Handley (stating that any review of emails was a waste of time and should not be undertaken) was an attempt by him to induce Mr Handley into making or causing to be made misleading statements. The Respondent averred that Mr Handley was not making any statements nor representations to the court at the November Hearing, Mr Qureshi QC was making representations and he was swearing the Fourth Affidavit in that regard.

47.12 The Respondent was cross examined at length by Ms Hansen, during the course of which he asserted that:

- He believed that as at November 2014, Mr Handley was aware of the dating error.
- Mr Handley was aware of the dating error following the telephone conference with the Djibouti Team and Mr Qureshi QC which he was not party to and when it was openly discussed.
- His instruction to Mr Handley to reverse the decision made for Ms Merchant and Ms Kahn to review all communications in order to ascertain who knew what and when was not an attempt on his part to prevent Mr Handley from discovering that he knew of the dating error in August 2013.

Respondent's Submissions

47.13 Mr MacDonald submitted that Allegation 1.4 was fundamentally misconceived. It focused on Mr Gray's email of 10 November 2014 in which he stated to Mr Handley:

> "…This is a waste of time. Please do not do that. All you are likely to find is that on date X we realised the error, addressed it and moved on. Is that something you think is appropriate to admit to the court? Would you like me to publicly apportion blame on other lawyers? All you are doing is falling into their trap. And it would not end there. The fact is we were not alive to it at the hearing, we did not mean to mislead the court and we are addressing it that way…"

47.14 Mr MacDonald averred that nothing in that email sought to induce Mr Handley to make, or cause to be made, any statement to any third party. It addressed a debate about whether to conduct an investigation for the purposes of the Respondent's Fourth Affidavit.

47.15 Mr MacDonald submitted that Ms Hansen made a valiant attempt in outlining the Applicant's case to make its case theory fit the drafting of the allegation, by suggesting that the Respondent was seeking to prevent Mr Handley from investigating, so that he would go along with the approach in the Respondent's Fourth

Affidavit. Mr MacDonald stated that did not align with the particulars of Allegation 1.4 namely that the Respondent sought to induce Mr Handley to make or cause to be made statements to third parties. As drafted, Allegation 1.4 would make the person who Mr Handley was causing to make statements to be the Respondent himself. The Respondent was the only person who was going to make a statement to a third party or the Court at that stage, which was why the Allegation as pleaded simply did not stack up.

The Tribunal's Findings

47.16 Allegation 1.4 centred on the Respondent's email to Mr Handley on 10 November 2014 in which he relayed that an investigation as to who knew what and when would be a disproportionate waste of time, would serve only to attribute blame and could potentially breach legal professional privilege.

47.17 In his evidence before the Tribunal, Mr Handley confirmed that he instigated the Firm's internal investigation in an attempt to "get ahead" of a Court ordered investigation. It was plain from his email of 10 November 2014 that the Respondent disagreed with his approach and effectively "shut down" any internal investigation unless and until the Firm was ordered by the Court to undertake the same. Mr Handley's evidence did not touch upon and he did not speak to whether the Respondent's email sought to induce him to make or cause to be made statements to third parties which would have been misleading as alleged. There was no other evidence advanced by the Applicant to support or substantiate that Mr Handley had been so induced.

47.18 The Tribunal therefore found Allegation 1.4 not proved in its entirety.

48. **Allegation 1.5 -Misleading Fourth Affidavit**

Applicant's Submissions

48.1 Ms Hansen summarised the misleading aspects of the "offending" paragraphs in the Respondent's Fourth Affidavit as:

- [38] was misleading in that it was reciting Byrne & Partners' position with regard to the Respondent's conduct in the knowledge that they had been misled by the correspondence of 7 November 2014.

- [39] carried the meaning that it would be a disproportionate task, and would potentially breach legal professional privilege, to identify who in the Firm knew of the error in the date and when. This was misleading and disingenuous; at the time of swearing the affidavit, the Respondent knew that he, and the parties to the chain of the August 2013 emails, had been aware of the error from 23 August 2013.

- [40] sought artificially to confine the response to the issue of the Respondent's affidavit, and not the submissions made at the September Hearing.

48.2 Ms Hansen relied upon Flaux J's findings at the March Hearing in that regard which included:

> "…
>
> [194] On 11 November 2014, Mr Gray's fourth affidavit was sworn. In a number of respects, despite Mr Gray's protestations to the contrary, it was a highly misleading document. It was no answer for Mr Simpson QC to point out that six other lawyers (including Mr Qureshi QC) had a hand in drafting the affidavit. The only lawyer who knew that Mr Gray had been aware of the dating error before and at the time of the September 2013 hearing and who had sat through the entire hearing with that knowledge, knowing also that the court was proceeding on a misapprehension, was Mr Gray himself. It follows that whilst he knew it was misleading, the other lawyers involved in the drafting would not have known that.
>
> [195] The extent to which the affidavit was misleading emerges at an early stage. At paragraph 6 the affidavit said: *"without prejudice to the position that the application (for affidavits] is both unnecessary and diversionary, in order to ensure that the Court is fully appraised of all facts and matters underpinning the serious allegations levelled in the application, I have set out matters below."* That was clearly designed to give the court the impression that Mr Gray was setting out the position in full as regards the misdating issue and knowledge of it. However, as Mr Kendrick QC pointed out, that statement was deliberately evasive because Mr Gray had a strategy, which was still in place, of evading the question Byrne & Partners were asking about who had known when about the misdating issue.
>
> [196] Of particular concern in this context are paragraphs 38 to 41 of the affidavit in the section headed "Knowledge of the Date Error"…
>
> [197] … Starting with paragraph 38, Mr Kendrick QC put to Mr Gray that this was a cocktail of literal truth and deceit. Whilst it was quite right that Byrne & Partners had accepted that neither he nor Mr Qureshi QC intended to mislead the court, in his case that was because he had misled Byrne & Partners in the letters I have referred to into believing that he was not personally implicated. As Mr Kendrick QC rightly put it, what Mr Gray was now doing in paragraph 38 was banking that earlier misleading.
>
> [198] In my judgment, paragraph 39 is also misleading. Quite apart from the fact that it fails to disclose his own involvement, it suggests that it would be an enormous task to find out who knew what and when within the firm whereas he knew already that he had personally known of the dating error before the September 2013 hearing. The statement at the end of the paragraph that no lawyer on the team intended to misled either this court or the Dubai court was simply untrue in the light of the findings I have made that Mr Gray deliberately misled this

court and the fact that a deliberate strategy had been adopted not to inform this court or the Dubai court that the conviction and the evidence upon the basis of which it had been obtained were unsafe.

[199] The statement in paragraph 40 that the error was inadvertent is simply untrue, since he had been party to that deliberate strategy and had known at the time of the September 2013 hearing that the court and counsel was being misled. Paragraph 41 was misleading because, despite Mr Gray's protestations to the contrary, it gave the impression to anyone reading it, including the court that the clients, Djibouti, had only recently discovered about the dating error when it was raised with them by Gibson Dunn. This was not true since the clients had known about the misdating issue since August 2013, before the hearing of the freezing order application. So far as the suggestion that it was "widely known" that there had been an explosion on 3 March 2009, Mr Gray had no honest basis for saying that. All he was able to come up with when challenged in cross-examination was an unreported attack referred to in statements obtained from three anonymous police officers who contradicted each other as to whether there was any physical damage, of which attack there was no contemporaneous record. By no stretch of anybody's imagination was this "widely known"…"

48.3 Ms Hansen contended that significant weight could and should be attributed to Flaux J's findings.

Principle Breaches and Outcomes not met

48.4 Ms Hansen therefore submitted that, in swearing the misleading Fourth Affidavit, the Respondent (a) failed to uphold the proper administration of justice contrary to Principle 1, (b) undermined public confidence in him and in the legal profession contrary to Principle 2, Outcome O(5.1) and O(5.2) and (c) lacked integrity contrary to Principle 2.

Respondent's Evidence

48.5 The Respondent stated that it was not his intention to mislead Byrne in the Firm's communications with them and he did not believe that they had in fact been misled. His view in relation to the disproportionate amount of time an internal investigation would take and the extent of the privileged documents concerned was predicated on the fact that he did not know who within the Firm was aware of the dating error and if so when. The Respondent reminded the Tribunal that when Flaux J ordered that investigation it took the Firm one month to carry out.

48.6 The Respondent stated that whilst his position in his Fourth Affidavit limited the "misleading statements" to that which was contained in his Third Affidavit and did not include the submissions made by Mr Qureshi QC at the September Hearing, it was not his intention to do so. He was simply making the point that any "misleading" was inadvertent and he did not think that Mr Qureshi QC's submissions were misleading in any event. The Respondent averred that the issue as to whether the submissions

were misleading was addressed in Mr Qureshi QC's letter to Flaux J which set out his position in that regard.

48.7 The Respondent was cross examined at length by Ms Hansen, during the course of which he asserted that:

- He did not intend to mislead in his Fourth Affidavit.
- [38] of the affidavit was carefully drafted so as to avoid breaching legal professional privilege.
- [39] of the affidavit was designed to set out his position regarding privilege as well as the disproportionate task that Byrne was asking of the Firm by investigating who knew what and when.
- [40] the words "I take responsibility" were not intended to give the impression that he was unaware of the dating error at the material time, he was "commenting on the subject more generally".
- He had no intention to conceal or limit disclosure as to his knowledge as "[they] were going to court over [the issue]" two days after the Fourth Affidavit was sworn.

<u>Respondent's Submissions</u>

48.8 Mr MacDonald submitted that the Respondent's Fourth Affidavit was not misleading in that:

- [38] recited Byrne's position with regard to the Respondent's conduct in the knowledge that they had been misled by the correspondence which was the subject of Allegation 1.3. If Allegation 1.3 failed for the reasons set out above, then this particular must also fail. In any case, the Fourth Affidavit recited Byrne's concession that neither Mr Qureshi QC or the Respondent intended to mislead the court.
- [39] carried the meaning that it would be a disproportionate task and would breach legal professional privilege to identify who knew of the error and when. That was admitted by the Respondent. The Applicant suggested that was misleading because the Respondent was aware that he, Ms Kahn, Ms Merchant, Ms Ngo Yogo II, and Mr Fitzgibbon had been aware of the dating error. Mr MacDonald submitted that the latter did not make the former misleading. It would have been an impossible task to conduct the investigation that later took the Firm a month in 24 hours. Any answer that involved the knowledge of the Respondent and the other associates he was immediately aware was involved would only have been a partial answer. It would have also created a difficult situation with Mr Qureshi QC, who the Respondent thought had known about the issue, whereas Mr Qureshi QC was saying he did not remember it. It would certainly have been a waiver of privilege, as also pointed out by email and in the conference call by Junior Counsel.

- [40] sought, the Applicant suggested, to artificially confine the response to the issue of the Respondent's Third Affidavit, rather than submissions made at the September Hearing. Mr MacDonald submitted that that suggestion was barely arguable. Emphasising one aspect of an issue rather than another was not misleading, it was part of a lawyer's stock in trade. The suggestion was contingent upon Allegation 1.2 being found proved but more importantly, Byrne had repeatedly referred to those submissions in their correspondence Mr MacDonald contended that there was no prospect at all of misleading anyone into confining the issue to the Third Affidavit, and doing so would not assist the Respondent or the Djibouti Client.

48.9 Mr MacDonald averred that at the very least, the Affidavit was not knowingly misleading. There was nothing to be gained, and everything to be lost, by adopting a knowingly misleading approach at a stage where Byrne were clearly not going to let the issue go, and the court's adjudication was required. The Respondent was again involving the entire Djibouti Team, including counsel, in the approval of the response before it went out, and there was no record of anyone expressing the view that the Affidavit was misleading.

48.10 Mr MacDonald contended that Allegations 1.3-1.5 revolved around the Firm's refusal to answer Byrne's questions about who had known of the dating error. It was clear that someone had, because the extradition request had the correct dates in them. Mr MacDonald submitted that it must be observed that parties do routinely refuse to answer each other's questions in correspondence during the course of litigation. Sometimes they do so expressly, and sometimes they simply ignore the question. The other party's remedy is to apply for a court order requiring answers – and that was already in train [namely the November Hearing].

48.11 Mr MacDonald submitted that whether or not it was tactically wise in hindsight, the Respondent was entitled not to answer the question, if the Court had not been misled. That position was set out in Firm's letters and Mr Qureshi QC's letter to Flaux J.

48.12 Mr MacDonald concluded that whilst the strategy adopted by the Respondent was unsuccessful in the Djibouti Litigation, in fact it was catastrophic because it built the momentum which led to the findings against him and the discharge of the freezing order, that did not make it unusual or dishonest.

<u>The Tribunal's Findings</u>

48.13 The Respondent's Fourth Affidavit was intended to assist the Court in relation to the dating error and the Respondent's knowledge of it; in the Respondent's words:

> "[4] I make this affidavit to clarify certain matters raised by Byrne & Partners in an exchange of correspondence dating from 4 September 2014 …"

48.14 As set out fully under Allegation 1.3, Byrne sought answers from the Respondent as to who knew of the dating error at the time of drafting the extradition request and as at the September Hearing.

48.15 The Tribunal considered the "offending" paragraphs with that in mind when determining whether or not it was misleading as alleged.

48.16 In [38] the Respondent stated:

> "…Although [Byrne] no longer suggest that [Mr Qureshi QC] or I intended to mislead the court [at the September Hearing]…"

48.17 The Tribunal accepted that statement was, at face value, true as Byrne's letter of 9 November 2014 stated:

> "…We, of course, accept your word that neither [Mr Qureshi QC] nor [the Respondent] was aware that they were relying, at the hearing in September 2013, on false and misleading documents…".

48.18 However, Byrne's understanding was predicated on the misleading assertion made in the Firm's letter of 7 November 2014 that neither the Respondent nor Mr Qureshi QC were "alive to" the misdated transcripts relied upon by Flaux J during the September Hearing. Given the Tribunal's findings in respect of Allegation 1.3 (namely that the words "alive to" were misleading) the Tribunal found that [38] was misleading as it reiterated the inaccurate, ambiguous and misleading basis upon which Byrne abandoned the suggestion that the dating error was known and noted at the September Hearing.

48.19 In [39] the Respondent sought to persuade the Court that it would be a disproportionate task which impinged on legal professional privilege to ascertain who knew what and when of the dating error. He sought to maintain that position in his evidence before the Tribunal. His evidence in that regard was rejected. It was plain to the Tribunal, by virtue of the emails on 23-26 August 2013, that knowledge within the Team was easily identifiable at first instance. Ms Merchant, Ms Ngo Yogo II and the Respondent exchanged emails in that regard which the Respondent was well aware of at the material time. He chose not to disclose that fact in his Fourth Affidavit and attempted to obfuscate the same by reference to disproportionality and legal professional privilege. In so doing the Tribunal determined that [39] was misleading.

48.20 [40] was the only part of the Fourth Affidavit that addressed Byrne's questions as to who knew of the dating error and when. The Tribunal noted that Byrne specifically asked what the state of knowledge was at the time of the extradition request (exhibited to the Respondent's Third Affidavit) and as at the September Hearing. [40] stated:

> ".. In short, the error was in my affidavit and I take responsibility for its contents. I repeat that the error was inadvertent and I sincerely apologise to the Court if that error caused it to be misled…"

48.21 Mr MacDonald sought to persuade the Tribunal that "emphasising one aspect of an issue rather than another was not misleading, it was part of a lawyer's stock in trade". The Tribunal rejected that submission. The purpose of the Fourth Affidavit was to clarify the position regarding knowledge of the dating error. The Fourth Affidavit was required as a consequence of the Respondent failure to answer the direct questions posed by Byrne in that regard in open correspondence from September–November

2014. Given those factors, the content of [40] was found by the Tribunal to have been misleading. The Tribunal further found that the Respondent's suggestion that the "error" within the Third Affidavit was inadvertent. On the evidence before the Tribunal, notification of the dating error and the change in strategy at the Kroll and Al Tamimi meetings, made plain that it was not.

48.22 Having reached its own decision on the factual matrix of Allegation 1.5, the Tribunal considered and concurred with Flaux J's findings in that regard and in so doing the Tribunal therefore found Allegation 1.5, breach of Principle 1, 2, 6 and failure to achieve Outcome 5.1 proved beyond reasonable doubt.

48.23 Outcome 5.2 provides that solicitors should not be complicit in another person deceiving or misleading the court. Having found that the content of the fourth affidavit was ultimately the Respondent's responsibility and did not impinge on the conduct of others, the Tribunal determined that the alleged breach of Outcome 5.2 was not proved beyond reasonable doubt.

49. **Allegation 2.1 - Dishonesty in respect of Allegations 1.1 – 1.5**

Applicant's Submissions

49.1 Ms Hansen submitted that as an experienced solicitor, the Respondent must have known, or at least suspected, that:

- The Court would rely on and be misled by the content of his Third Affidavit insofar as it contained or exhibited material relating to the date of the transcripts of the intercepted telephone calls his client would rely on the false information contained in the letter for the purpose of misleading a third party.

- The Court would be misled by the submissions made on behalf of the Djibouti Clients at the hearing on 10-11 November 2013, insofar as those submissions advanced or relied on the premise that the dating of the telephone call transcripts was accurate, particularly in circumstances in which the incorrect premise was adopted by the counterparty to the application and by the Judge in asking questions of Counsel, and in circumstances in which the Judge plainly, from the questions asked of Counsel, considered the date of the transcript to be relevant to the determination of a substantial application with serious consequences for the parties.

- Byrne would be misled by his letter of 7 November 2014 as to his state of knowledge as to the error in the dating of the telephone call transcripts.

- Mr Handley may be misled by the content of his email of 10 November 2014 and/or his email of 10 November 2014 might cause Mr Handley or others inadvertently to mislead others or cause them to be misled as to the date of knowledge of the Respondent or others as to the error in the date of the telephone call transcripts.

- The Court may be misled by the Further Affidavit as to the Respondent's date of knowledge or that of others as to the error in the date of the telephone call transcripts, or as to the feasibility of ascertaining individuals' dates of knowledge.

49.2 Ms Hansen submitted that ordinary, decent people would consider that behaviour to be dishonest.

Respondent's Submissions

49.3 Mr MacDonald submitted that whilst the Respondent accepted that he made significant mistakes throughout the Djibouti Litigation, he denied having done so dishonestly and the allegation that he did so was extremely unlikely. Mr MacDonald reminded the Tribunal that it required cogent evidence to find that the Respondent acted as alleged, especially given how out of character that would be according to those who know him well.

49.4 Mr MacDonald referred the Tribunal to the internal emails at the time which, he submitted, demonstrated that the Respondent was a solicitor who was open about his thinking with his team, and sought to involve them in decision making. He was openly relieved that the dating error was spotted, and when it resurfaced that the extradition request bore the correct dates. That was, Mr MacDonald submitted, all suggestive of a solicitor who was acting honestly.

49.5 Mr MacDonald submitted that there was a total lack of any evidence that the Respondent attempted to stop the lawyers in his team, many of whom were fully aware of the dating error, from talking to each other. He was managing most of them from a different continent. It was simply inconceivable that he could have attempted a strategy to withhold the dating error from the Court, without also ensuring it was withheld except amongst a small number in the team who already knew about it, and were willing to go along with the strategy.

49.6 With regards to the nine factors that Flaux J relied upon to find that the Respondent's conduct was dishonest, which were expressly adopted by the Applicant, Mr MacDonald submitted that:

49.6.1 When the dating error was discovered it was a "massive issue"

49.6.1a The emails where the Respondent treated the dating issue seriously were, as previously submitted, evidence of his honesty. However the Tribunal had the development of his views set out contemporaneously in the emails and meeting notes. Whilst the re-dating of the transcripts made the references to the night before less persuasive, they made the references to "tonight" more persuasive, as the calls were followed within hours by the Nougaprix attack. What remained are the conclusions which Flaux J himself expressed during the hearing on 10 September 2013:

> "…Mr Butcher, I can't decide these things, but the fact of the matter is that I am not the slightest surprised that police in Djibouti were sceptical of this explanation. When you look at the telephone – if you were looking at it from the point of view of an English criminal trial,

> which obviously is a very different creature from civil law systems, wherever they are, but the fact of the matter is if there were the evidence of that telephone tap the relevant defendant, be it Mr Boreh or anybody else, would be cross-examined up hill and down dale about the fact that what was really being talked about was grenades. It had nothing to do with scrap metal, it's complete nonsense. You don't have resonating acts with scrap metal unless you are hurling it around the square or something. No doubt that point might have been taken. It's nothing to do with distribution of political tracts. That sort of evidence would be challenged over and over again. The defendant could say, as they often do, as you know, maintain the story till the bitter end, but at the end of the day it would be a matter for the jury as to whether they believed it or not. I suspect they wouldn't believe it…"

49.6.1b Given there was still a case to answer, that the extradition request was based on the existence of an *investigation* not a conviction, and that Mr Boreh was entitled to a full re-trial as of right, it was not hugely surprising that no one thought particularly hard about whether the original conviction was 'safe' in the English law sense, still less given that the concept had no similar application in Djibouti or UAE Law. As made clear in the Respondent's email at the time, it was a judgment which he had never held in particularly high regard.

49.6.2 <u>The Respondent adopted a strategy of "getting away with the date error", or "fudging the date"</u>

49.6.2a Mr MacDonald submitted that nothing much can turn upon a particular phrase used internally in a meeting or one-off email. Those phrases did not turn an otherwise honest strategy into a dishonest one. Had they been a communication of a thoroughly dishonest strategy, then it was astounding that no one on the relevant email chain or at the meetings on 27 August 2013 expressed any concern whatsoever, or indeed felt any from those who were interviewed by the Firm.

49.6.3 <u>There was no credible evidence to support an argument that the meaning and effect of the transcripts was unchanged by the error</u>

49.6.3a Mr MacDonald submitted that Djibouti's analysis of the transcripts on the basis of the correct dates was set out in detail in the Firm's correspondence. The initial suggestion of an attack on 3 March 2009 made the case against Mr Boreh even stronger than it had been previously. That meant that both the references to the night before, and "tonight" could directly be linked to a grenade attack, whereas previously "tonight" had to be delayed for an unknown reason to 8 March.

49.6.3b The evidence of an attack on 3 March 2009 was properly examined and challenged by the Respondent and the Djibouti Team, again evidenced the honest way they were going about things. The fact that there was no clear evidence of an attack was far from fatal to the case, just as the lack of an attack on 5 March had not been. It was entirely possible that the Abdillahis'

were giving Mr Boreh false reassurance, and he was challenging that ("was the act heard by the people or have you done nothing concrete?"). As the Respondent pointed out it was rather surprising Mr Boreh was saying that when the attack at Nougaprix was so well known in Djibouti. It was also possible that the attack had simply not been reported. A case to answer, based fundamentally on the transcripts, confessions, false explanations, Nougaprix plans found at the Abdillahis' home, and total lack of an explanation for why Mr Boreh was talking to two such men at all, let alone about scrap metal and acts of resonance, remained. The case continued to be investigated including into the possibility of a 3 March attack in late 2014, and in the event of Mr Boreh being extradited, the Respondent had taken steps to ensure a re-trial with additional safeguards to ensure fairness.

49.6.3c The Respondent's reasoning on that issue was subjected to a forensic deconstruction by Flaux J. The problem with that was the lawyers at the time were not sitting down, with all of the evidence and the full picture, subjecting the issue to a careful analysis with the benefit of oral and written submissions from both sides. They were dealing with a developing picture, which each time it resurfaced needed to be dealt with before moving on to a plethora of other issues. When the dating issue was first brought to the Respondent's attention, there was a very firm suggestion of a 3 March attack. The initial evidence of that attack was then discounted, but the suggestion of other possibilities remained, and those continued to be investigated. Because a re-trial was inevitable, the safety of the judgment of the Djibouti Court of Appeal, which in any case was a matter for the courts of Djibouti, was never an issue which was subject to detailed examination.

49.6.4 <u>The proper course would have been to ensure the Dubai and English courts were aware that the original conviction was unsafe.</u>

49.6.4a Mr MacDonald submitted that was a more vexed question of ethics than the Applicant suggested. It was potentially an issue of disclosure, rather than misleading the court, and the basis of the Allegations was not a disclosure failing. Whatever the merits of the question, the simplest answer was that none of the senior Al-Tamimi lawyers, who the Respondent fully explained the dating issue to, and were ultimately responsible for the extradition request and matters of Dubai law, had any issue with what the Respondent proposed. Neither did Mr Qureshi QC, who was specifically instructed because of his knowledge of extradition.

49.6.4b The Respondent was repeatedly referred in cross-examination back to the conclusion that the Djiboutian conviction was unsafe. But it was absolutely clear that no one was particularly concerned with that issue in 2013, because it had no real practical consequences given the automatic right to a re-trial. The conviction was merely part of the factual background for the extradition, which required only an investigation. It did not even require the submission of evidence, but evidence was nonetheless submitted in order to pre-empt suggestions of political motive. Mr Boreh would have a full re-trial, where he could make whatever arguments he liked based on the correct understanding of the telephone transcripts. Debate about the 'safety'

of the Djiboutian conviction, which was expressed in Flaux J's judgment to be 'by default' and 'open to argument' was the application of an English, common law, concept, to a civil law system where it had little application.

49.6.4c As far as the English High Court proceedings were concerned, it was even less surprising that no one was thinking particularly hard about the safety of the Djibouti conviction. The terrorism extradition was a sub-issue of 'political motivation', itself a sub-issue described as "background music" or "white noise". As Ms Haywood was later to say in her email to Mr Qureshi QC: "I didn't see how it was relevant to a freezing injunction application".

49.6.5 The Respondent did not explain the full implications of the dating error to Mr Qureshi QC at any time

49.6.5a Mr MacDonald submitted that it was "telling" that the Applicant had not pursued that finding, because the evidence suggested that Mr Qureshi QC was aware of the full implications of the dating error in both 2013 and 2014, because he was told that by the Respondent.

49.6.5b Mr MacDonald contended that in 2013, the Respondent probably did tell Mr Qureshi QC about the dating error, with its full implications, on 26 August 2013, for three reasons:

(i) The Respondent consistently said that he did, and clearly said so internally in 2014. He did not know during 2014 and 2015, but as at the time of the Tribunal proceedings did know, that Mr Qureshi also acknowledged that as possible in 2014.

(ii) The contemporaneous records support that contention. Mr Qureshi QC had by that point billed 31.5 hours reviewing the evidence and drafting the extradition request. He had queried the date of the telephone calls and received updated transcripts with the correct date. There was evidence of a 28-minute telephone call "re extradition", just days after the dating issue had been discovered, when that was the only thing to discuss. The Respondent then sent an email saying he had discussed the issue with counsel, and emailed Mr Qureshi QC confirming the changes made to the date in the extradition request, and Mr Qureshi QC replied indicating he thought the issue would highly likely "stir things up". He billed three further hours that day on "Review of correspondence/further draft extradition request/telecon PG". Ms Haywood sent an email on 6 September indicating that Mr Qureshi QC was on top of the terrorism and extradition proceedings so that was an area of low priority for the solicitors to prepare a 'crib sheet'.

(iii) Although Mr Qureshi QC wrote a letter to the court suggesting he did not remember being told about the issue, and said the same during 2014, he was not sure about that in 2014. It was not overly surprising that leading counsel did not remember a phone call that until September 2014 was relatively insignificant, and virtually irrelevant for the purposes of the English High Court case.

49.6.5c At the very least, the Tribunal could not be sure that Mr Qureshi QC was not told, or that the Respondent actively concealed the matter from him, as would be needed for this to go towards any allegation being found proved.

49.6.5d Mr Qureshi QC's knowledge in 2014 was even more straightforward. Mr Qureshi QC was expressly told by the Respondent on at least two occasions that the Respondent had known about the dating issue, and indeed had discussed it with him.

49.6.5e Perversely given their position on that issue, the Applicant also relied on the Respondent's text to Mr Qureshi QC saying "It turns out I was told about the error in august. I completely forgot about it, in the midst of so much. However I can see that I will be accused of all kinds of things".

49.6.5f Mr MacDonald submitted that one could frankly see why looking back, together with the fact that Mr Qureshi QC made submissions at the November Hearing expressly suggesting that the Respondent was not aware of the dating error, Flaux J concluded that Mr Qureshi QC had been kept in the dark about the true position by the Respondent, even in 2014, despite other evidence to the contrary. However, on the evidence before the Tribunal that was plainly not correct, because by that point the Respondent had told Mr Qureshi QC that he had known about the dating error before the hearing in September 2013, and had discussed it with Mr Qureshi at that point, at least twice his words "It turns out" were evidently simply a typo or poorly chosen phraseology, as is not uncommon in a text message. Mr Qureshi QC's submissions at the November Hearing simply must have been an error. Mr MacDonald submitted that in light of the email between Mr Qureshi QC and Ms Haywood, the allegation was unarguable.

49.6.6 <u>The third affidavit contained equivocation, falling short of the standard of integrity and candour which the court expects of an English solicitor</u>

49.6.6a Mr MacDonald submitted that the Third Affidavit was drafted in an extremely tight turnaround, and extradition formed a very small part of it. It was rendered misleading by the exhibiting of the wrong transcripts, but the wording of it was largely unobjectionable, or only objectionable on such close a reading that it is plausible the Respondent did not spot it.

49.6.7 <u>It "beggars belief" that Mr Gray did not realise the court and Counsel were proceeding on a false basis at the hearing on 10-11 September 2013</u>

49.6.7a Mr MacDonald submitted that once one appreciated that the Respondent was not aware that the wrongly dated telephone transcript had been used, and that the meetings on 27 August were not as sinister at all, contrary to Flaux J's finding, it was at the very least possible that he did not notice that the court was being misled during the hearing, along with the other lawyers with the same knowledge as him who sat in that hearing, or went over the transcripts during 2013 and 2014.

49.6.8 Even if Mr Gray was not aware during the hearing, he must have become aware when reviewing the transcripts with Deborah Ngo Yogo II

49.6.8a Mr MacDonald reminded the Tribunal that the transcripts were not being reviewed in order to check whether the Court had been misled. Neither the Respondent or Ms Ngo Yogo II would have been focused on that issue – and the Respondent's evidence on that point (as set out in his Sixth Affidavit) was not challenged by the Applicant in cross-examination. The extract particularly cited by Flaux J did not indicate that the Court had been misled. Even when Ms Merchant did review the transcripts with Byrne's allegations in mind, she did not come to the conclusion that Flaux J found was inescapable. Mr MacDonald submitted that the misleading was far subtler than Flaux J found, and that explains the failure of anyone, including the Respondent, to recognise it even in 2014.

49.6.9 When Byrne & Partners raised the error, Mr Gray engaged in a course of "thoroughly evasive and positively misleading conduct"

49.6.9a Mr MacDonald submitted that the Respondent's honest conclusion was that the court had not been misled and that was yet another point which Byrne were aggressively and unreasonably pursuing. He was therefore entitled not to answer their questions. That conclusion appeared to have been shared by the rest of the team and counsel, and the Respondent consulted widely on the communications criticised in Allegations 1.3 and 1.5. Mr MacDonald averred that if the Tribunal agreed that Allegations 1.1-1.2 are not proved, then it was implausible verging on the impossible that an honest solicitor would act dishonestly, simply to cover up an honest error which made little difference.

49.7 Mr MacDonald submitted that there were at least 22 reasons why the Respondent's actions were neither deliberate, nor dishonest:

- The considerable character evidence before the Tribunal, which demonstrated how out of character, and how unlikely, the conduct alleged would be.

- The inherent unlikelihood that a solicitor of the Respondent's standing would mislead the court and others in the way alleged.

- The total lack of a plausible motive for the alleged behaviour.

- The overall importance of the extradition request to the application in question. If it had not been exhibited at all, the hearing would likely have gone the same way. The Respondent clearly did not anticipate a finding that terrorism went to dissipation.

- The overwhelming weight of the evidence that the Respondent did consult counsel at each stage. His position appeared to have been entirely consistent with counsels.

- The fact that other lawyers made the same mistakes, in as far as the Tribunal may determine that they were mistakes: in drafting the extradition request; in drafting the Third Affidavit; in failing to notice any misleading during the September Hearing; in failing to recognise that the court had been misled when it was raised in 2014. Junior lawyers were perfectly capable of raising ethical concerns, and were often closer to the facts on the ground than a partner. The fact that no one – either junior or senior to the Respondent – raised concerns during the material time suggested that it was entirely plausible that the Respondent was not acting deliberately. It was inconceivable that he could have brought so many people along with him in pursuing a dishonest course of conduct.

- The Respondent's reaction to the dating error ("well done"), and to rediscovering the correction in the extradition request ("thank god!").

- By correcting the date in the extradition request, the Respondent ensured that the issue was always going to be raised at some point.

- The Respondent's application of scrutiny to the evidence of an attack on 3 March 2009.

- That Mr Boreh was entitled to a full re-trial which made everyone less focused on the issue of his conviction and its 'safety'.

- The Respondent's openness with Al-Tamimi and Kroll about the dating error on 27 August 2013.

- The Respondent's focus on ensuring a fair and transparent re-trial for Mr Boreh.

- The indisputable fact that the wrong transcripts were exhibited in error.

- That the Respondent's email activity on 10 September 2013 coincided with the timing of Mr Butcher's submissions on terrorism, the only passage containing select quotes where it was clearer the court was proceeding on an incorrect basis.

- The Respondent's correcting of a draft letter to Byrne which would have been misleading. Ironically the correction he is criticised for.

- The Respondent's transparent reasoning during 2014, which he consistently sets out in writing to Mr Qureshi QC.

- The total futility of any purported attempt to mislead Mr Handley.

- The Respondent's workload and travel schedule. It was no coincidence that those problems peaked during the dates covering the allegations.

- The fact that the Djibouti Team was spread over many different jurisdictions, and there was no London partner, in litigation in the High Court in London.

- The temperament of the litigation, which meant the Respondent viewed Byrne's correspondence with guarded suspicion.

- The Respondent's evidence before the Tribunal. Whilst he undoubtedly found it frustrating at times as many witnesses do, especially when he appeared to be asked the same question repeatedly, he did not attempt to present his memory as better than it was, he maintained a wholly consistent account, and was able to explain his actions in detail to the Tribunal, with reference to the contemporaneous records.

- The Respondent's account has remained consistent since 2014, and new evidence that subsequently come to light has only proved him right. Conversely, none of the new evidence contradicted him. That was remarkable if he is lying. It was the Respondent who adduced nearly all of the evidence used against him in the 2015 hearing as well as all of the new evidence in these proceedings – because it showed his honesty.

The Tribunal's Findings

49.8 In determining whether the misconduct found proved in relation to Allegations 1.1, 1.2, 1.3 and 1.5 was dishonest, the Tribunal applied the test promulgated in Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67 at [74] namely:

> "… 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…"

49.9 In applying the Ivey test, the Tribunal gave due consideration to the numerous character references filed on the Respondent's behalf all of which spoke to his honesty and integrity. The Tribunal also gave due consideration to the oral evidence of Mr Beer, Mr Rochez and Rev Heaney. The character evidence advanced was considered in conjunction with the contemporaneous documentary evidence filed by both the parties as well as the oral evidence of the Respondent.

49.10 The Tribunal carefully considered the 22 reasons advanced by Mr MacDonald to support the contention that the Respondent did not act dishonestly in the Djibouti Litigation and determined that:

- It would be perverse to disregard the contemporaneous documentary evidence in favour of the character evidence adduced on the Respondent's behalf.

- Whilst it was ordinarily unlikely for a solicitor of the Respondent's standing to mislead the Court, given the tenor and nature of the Djibouti Litigation it could not be ruled out.

- Lack of plausible motive was not a determinative factor in considering whether the Respondent was dishonest on the facts of the case. On the Respondent's own case, the Djibouti Litigation was ill-tempered and hard fought throughout. The strategy deployed by the Firm was to "get ahead" of any issues and to win at all costs.

- The overall importance of the extradition request to the freezing injunction application was immaterial. The fact remained that the Respondent made a strategic decision to rely upon it and did so in a misleading manner.

- The extensive consultations with and reliance on Mr Qureshi QC and Ms Hayward of counsel did not abdicate the Respondent's responsibility to Byrne and the Court so as not to mislead.

- The fact that other lawyers made the same mistakes did not abdicate the Respondent's responsibility to Byrne and the Court so as not to mislead.

- The Respondent's reaction to the dating error did not abdicate his responsibility to Byrne and the Court so as not to mislead.

- Correcting the date in the extradition request did not abdicate the Respondent's responsibility to Byrne and the Court so as not to mislead.

- The Respondent's application of scrutiny to the evidence of an attack on 3 March 2009 was not relevant to the Tribunal's consideration of whether his conduct in respect of Allegations 1.1, 1.2, 1.3 and 1.4 was dishonest.

- That Mr Boreh was entitled to a full re-trial was not relevant to the Tribunal's consideration of whether his conduct in respect of Allegations 1.1, 1.2, 1.3 and 1.4 was dishonest.

- The Respondent's openness with Al Tamimi and Kroll about the dating error on 27 August 2013 was of limited relevance as he was not open with Byrne or the Court in relation to the same.

- There was no evidence before the Tribunal that the Respondent's focus was on ensuring a fair and transparent re-trial for Mr Boreh.

- Whilst it was an indisputable fact that the wrong transcripts were exhibited to the third affidavit in error, that was not relevant. Allegation 1.1 related to the misleading content within the body of the third affidavit which failed to mention or make plain the dating error on the transcripts.

- That the Respondent's email activity and other distractions at the September Hearing did not prevent a handwritten note of the judgment being prepared and given to Flaux J.

- The Tribunal did not accept that it would have been misleading for the Respondent to have corrected the draft letter to Byrne.

- The Respondent's transparent reasoning during 2014, which he consistently set out in writing to Mr Qureshi QC was of limited if any relevance to the Tribunal's consideration of whether his conduct in respect of Allegations 1.1, 1.2, 1.3 and 1.4 was dishonest.

- The Respondent's workload and travel schedule did not abdicate his responsibility to Byrne and the Court so as not to mislead.

- The fact that the Djibouti Team was spread over many different jurisdictions, and there was no London partner, in litigation in the High Court in London did not abdicate the Respondent's responsibility to Byrne and the Court so as not to mislead.

- The temperament of the litigation, which meant the Respondent viewed Byrne's correspondence with guarded suspicion did not abdicate his responsibility to Byrne and the Court so as not to mislead.

- The Tribunal found it difficult to follow the Respondent's oral evidence and found that he could not provide a direct answer to a direct question.

- The Tribunal accepted that the Respondent's position in respect of the allegations was consistent throughout the Tribunal proceedings. However, that did not detract from the significant weight the Tribunal attributed to the contemporaneous documentary evidence and the findings of Flaux J.

49.11 Against that backdrop the Tribunal made the following findings in respect of the allegations of dishonesty:

49.11.1 *Allegation 1.1*

49.11.1a The Respondent knew as at 23 August 2013 of the dating error on the intercepted telephone transcripts. That error was discussed in email communications with Ms Kahn and Ms Ngo Yogo II. It was also discussed at length via email and telephone communications with Mr Qureshi QC. It led to a change in strategy advanced by the Respondent at the Kroll and Al Tamimi meetings on 27 August 2013.

49.11.1b The Respondent was therefore well aware that the Djibouti conviction was founded on an erroneous interpretation by the Djibouti Court of the telephone transcript and the Abdillahi confession yet his Third Affidavit failed to mention the same.

49.11.1c The Tribunal found that given those facts the ordinary decent man would find the Respondent's conduct was dishonest.

49.11.2 *Allegation 1.2*

49.11.2a Having determined that the Respondent was aware of the dating error shortly before the September Hearing and having rejected the Respondent's evidence that he did not notice that the Court was proceeding on the erroneously dated transcripts the same, the Tribunal concurred with the findings of Flaux J that:

- The Respondent knew the Djibouti conviction was predicated on unreliable evidence but made a decision not to disclose that fact to the Court or any other outside agency.

- That decision of non-disclosure perpetuated into his Third Affidavit and the misleading language deployed in the "offending" paragraphs.

- The Respondent reviewed the transcripts of the September Hearing and discussed the same with Ms Ngo Yogo II as well as Ms Kahn. Having done so it was patently clear that the Court had been misled yet he did nothing to correct the Court's error in relying upon the conviction as a ground for granting the freezing injunction against Mr Boreh.

49.11.2b The Tribunal found that given those facts the ordinary decent man would find the Respondent's conduct was dishonest.

49.11.3 *Allegation 1.3*

49.11.3a The allegation of dishonesty in respect of the Firm's letter dated 7 November 2014 centred on the words "…Neither Leading Counsel nor Mr Peter Gray were alive to the issue of the 4/5 March date discrepancy at the September 2013 hearing…" The Respondent, prior to finalising the letter, had re-visited the August 2013 emails, had the benefit of the transcript of the September Hearing and had extensive discussions with Mr Qureshi QC as well as the Djibouti Team regarding who knew what and when. Given the Tribunal's findings in respect of the Respondent's knowledge at the material time, the Tribunal determined that (a) the Respondent was aware of the dating error at the September Hearing and (b) was aware during the September Hearing that Mr Butcher QC and Flaux J were proceeding on an erroneous basis which was not corrected. The words "alive to" perpetuated the misleading impression that the Respondent was not aware of the dating error until Byrne brought it to his attention in September 2014.

49.11.3b The Tribunal found that given those facts the ordinary decent man would find the Respondent's conduct was dishonest.

49.11.4 *Allegation 1.5*

49.11.4a Given the Tribunal's findings in respect of the "offending" paragraphs of the Respondent's Fourth Affidavit, the Tribunal determined that (a) Byrne were misled into concluded that neither the Respondent nor Mr Qureshi QC were aware of the dating error, (b) contrary to the assertion that it would have been a disproportionate task to ascertain who knew what and when, the Respondent was well aware that he, Ms Ngo Yogo II and Ms Kahn were aware of the dating error from 23 August 2013 and (c) the Respondent intentionally omitted to address knowledge of the dating within the Djibouti Team as at the September Hearing in his Fourth Affidavit despite repeated requests from Byrne in open correspondence and the purpose for which the Fourth Affidavit was required by the Court.

49.11.4b The Tribunal found that given those facts the ordinary decent man would find the Respondent's conduct was dishonest.

50. **Allegation 2.2 - Recklessness in respect of Allegations 1.1 – 1.5**

50.1 Having found that the Respondent's conduct in respect of the proven Allegations 1.1, 1.2, 1.3 and 1.5 was deliberate and dishonest, the Tribunal was not required to determine whether it was reckless.

Previous Disciplinary Matters

51. There were no previous Tribunal findings recorded against the Respondent.

Mitigation

52. Mr MacDonald reminded the Tribunal that the purpose of any sanction was not to punish the Respondent, it was to deter, prevent re-offending and to uphold public confidence in the legal profession. The Respondent professional standing had been entirely decimated by the findings of Flaux J in 2015. That in and of itself served to deter other solicitors and resulted in no risk of re-occurrence by the Respondent.

53. With regards to upholding public confidence in the legal profession, Mr MacDonald reminded the Tribunal that the Respondent self-reported the conduct complained of on 25 February 2015. The misconduct found arose in the context of an otherwise unblemished career spanning more than two decades, against the backdrop of his significant consultations with Leading Counsel and arose at a time when he was under significant stress, overwork and extensive travelling.

54. Mr MacDonald advanced personal mitigation which he submitted was profound in that (a) the Respondent's reputation had been destroyed, (b) he lost his employment at the Firm where he was on track to become an Equity Partner, (c) he lost his entire practice, (d) it was six and a half years since the misconduct, (e) it was six years on from Flaux J's findings and (f) it had taken six years for the proceedings to be heard by the Tribunal.

55. Mr MacDonald referred the Tribunal to the plethora of character references submitted on the Respondent's behalf from eminent lawyers and members of the community who all praised the Respondent's integrity and commitment to justice.

56. Mr MacDonald reminded the Tribunal that there would be a renewed detrimental effect on the Respondent's reputation as his failures were in the public domain again some six years after Flaux J's judgment.

Sanction

57. The Tribunal had regard to the Guidance Note on Sanctions (8th Edition, December 2020). 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.

58. The Tribunal considered the seriousness of the Respondent's misconduct. The Respondent deliberately deployed a misleading strategy in the Djibouti Litigation which resulted in the High Court and Byrne being misled as to evidence relied upon to obtain a global freezing injunction. The Tribunal determined that the misconduct found was of the utmost seriousness in that it breached the fundamental duty incumbent on him as a solicitor of the Supreme Court to conduct litigation fairly and not to mislead. Culpability for that conduct rested solely with the Respondent. The Tribunal did not accept that the knowledge and/or conduct of Mr Qureshi or other lawyers within the Djibouti Team vitiated that fact.

59. Given the seriousness of the misconduct found, the Tribunal determined that the only appropriate sanction was to strike the Respondent from the Roll of Solicitors. The Tribunal did not find, and indeed it was not submitted, that there were any exceptional circumstances such that striking the Respondent from the Roll would not be an appropriate sanction.

Costs

60. Ms Hansen applied for costs in the sum of £42,525.00. She submitted that those costs were reasonable and proportionate particularly as they were based on a five day substantive hearing (which is fact had taken six days) and that it did not include the costs of defending the Respondent's application in February 2020 for proceedings to be stayed as an abuse of process.

61. Mr MacDonald acknowledged that costs should be awarded in principle to the Applicant, the quantum should be reduced to reflect the fact that (a) Allegation 1.4 had been found not proved, (b) only one witness was called by the Applicant (Mr Handley) and that evidence was only relevant to Allegation 1.4.

62. Mr MacDonald stated that a Statement of Means had not been filed or served on behalf of the Respondent, that was intentional and there were no submissions to be made in relation to the Respondent's ability to meet an Order for costs.

The Tribunal's Decision

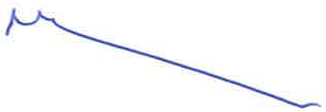
63. The Tribunal assessed the costs for the hearing. The Tribunal had heard the case and considered all of the evidence. The Tribunal noted that no claim had been made by the Applicant for day six of the hearing or for the time spent defending the Respondent's unsuccessful application for a stay of proceedings. The Tribunal rejected Mr MacDonald's submissions that costs should be reduced to reflect the fact that Allegation 1.4 was found not proved. Costs did not follow the event in regulatory proceedings and it was not advanced on the Respondent's behalf that Allegation 1.4 had been improperly brought.

64. Weighing all of the attendant circumstances in the balance, the Tribunal determined that the costs claimed were reasonable and proportionate thus awarded the same in full.

Statement of Full Order

65. The Tribunal Ordered that the Respondent, PETER MATTHEW JAMES GRAY, solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £42,525.00

Dated this 5th day of May 2021
On behalf of the Tribunal



R Nicholas
Chair