SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12022-2019

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

MICHAEL USHER Respondent

Before:

Mr A. N. Spooner (in the chair)
Mr J. Evans
Mrs L. McMahon-Hathway

Date of Hearing: 25th and 26th February 2020

Appearances

Andrew Bullock, barrister of Solicitors Regulation Authority, The Cube, 199 Wharfside Street, Birmingham, B1 1RN, for the Applicant.

The Respondent represented himself.

JUDGMENT

Allegations

1. The Allegations against the Respondent were that while in practice as a member of Ushers Solicitors LLP ("the Firm"):

1.1 That he failed to notify the SRA that the Firm had entered into the Extended Indemnity Period (as defined by the Solicitors Indemnity Insurance Rules 2013) ("EIP") ("SIIR") on 1 April 2017 at any time on or after 5 April 2017. He thereby breached any or all of:

1.1.1 Principle 7 of the SRA Principles 2011; and

1.1.2 Rule 17.3 (a) SRA Indemnity Insurance Rules 2011

1.2 That he failed to notify the SRA that the Firm had entered into the Cessation Period (as defined by the SIIR) ("the CP") on 1 May 2017 at any time on or after 5 May 2017. He thereby breached any or all of:

1.2.1 Principle 7 of the SRA Principles 2011; and

1.2.2 Rule 17.3 (b) SRA Indemnity Insurance Rules 2011

1.3 That on 7 June 2017, whilst in the CP, the Firm accepted instructions from Clients One. He thereby breached Rule 5.2 SIIR.

1.4 Although the Firm had entered into the CP on 1 May 2017 and had not subsequently obtained Professional Indemnity Insurance ("PII") incepting on or before 31 March 2017, the Respondent failed to ensure that it ceased to practice on or before 30 June 2017 onwards. He thereby breached any or all of:

1.4.1 Principle 4 of the SRA Principles 2011;

1.4.2 Principle 5 of the SRA Principles 2011;

1.4.3 Principle 6 of the SRA Principles 2011;

1.4.4 Principle 8 of the SRA Principles 2011;

1.4.5 Outcome O 1.8 SRA Code of Conduct 2011;

1.4.6 Rule 4.2 (c) SRA Indemnity Insurance Rules 2011; and

1.4.7 Rule 5 (1) SRA Indemnity Insurance Rules 2011

1.5 On 28 July 2017 he made statements in correspondence with an employee of the SRA which he knew, or should have appreciated, were apt to mislead them into believing that the Firm maintained PII when he knew this was not the case. He thereby breached any or all of:

1.5.1 Principle 2 of the SRA Principles 2011;

1.5.2 Principle 6 of the SRA Principles 2011; and

1.5.3 Principle 7 of the SRA Principles 2011.

1.6 On 31 July 2017 he made statements in response to questions contained within a proposal for PII which he completed upon behalf of the Firm which were untrue and which he knew, or should have known, to be untrue. He thereby breached and/or failed to achieve any or all of:

1.6.1 Principle 2 of the SRA Principles 2011;

1.6.2 Principle 6 of SRA Principles 2011; and

1.6.3 Failed to achieve Outcome O (11.1) of the SRA Code of Conduct 2011.

2. In addition, Allegations 1.5 and 1.6 set out above, were advanced on the basis that the Respondent's conduct was dishonest and (if not dishonest) reckless.

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

Relevant Principles and Rules

SRA Principles 2011

Principle 2 You must act with integrity

Principle 4 You must act in the best interests of each client

Principle 5 You must provide a proper standard of service to your clients

Principle 6 You must behave in a way that maintains the trust the public places in you and in the provision of legal services

Principle 7 You must comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner

Principle 8 You must run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles.

SRA Code of Conduct 2011

Outcome O(1.8) clients have the benefit of your compulsory professional indemnity insurance and you do not exclude or attempt to exclude liability below the minimum level of cover required by the SRA Indemnity Insurance Rules.

Outcome O(11.1) you do not take unfair advantage of third parties in either your professional or personal capacity.

Solicitors Indemnity Insurance Rules 2013

Rule 4.2 (c) A firm must in respect of its obligation to effect and maintain qualifying insurance.

Rule 5 (1) Each firm carrying on a practice on or after 1 October 2013, and any person who is a principal of such a firm, must ensure that the firm takes out and maintains qualifying insurance at all times.

Rule 5 (2) Each firm that has been unable to obtain a policy of qualifying insurance prior to the expiration of the extended indemnity period, and any person who is a principal of such a firm, must ensure that the firm, and each principal or employee of such firm, undertakes no activities in connection with private legal practice and accepts no instructions in respect of any such activities during the cessation period save to the extent that the activity in connection with private legal practice is undertaken to discharge its obligations within the scope of the firm's existing instructions or is necessary in connection with the discharge of such obligations.

Rule 17.3 Each firm shall notify the Society (or such person as the Society may notify to the firm from time to time) and its participating insurer in writing as soon as reasonably practicable and in no event later than five (5) business days after the date on which:

(a) the firm enters the extended indemnity period under its policy;

(b) the firm enters the cessation period under its policy;

Documents

3. The Tribunal had regard to the all the documents presented to it, including the agreed hearing bundle.

Preliminary Matter

4. Mr Bullock applied for leave to adduce an email dated 27 August 2017 from the Respondent to the Applicant. This was a document that the Respondent had asked for and had only just been located. The Respondent did not object and the Tribunal granted leave for this email to be added to the hearing bundle.

Factual Background

5. The Respondent was admitted to the Roll on 1 March 2010. At the material time he was one of two members of the Firm and its Compliance Officer for Legal Practice (COLP) and its Compliance Officer for Finance and Administration (COFA).

6. The Firm was a Limited Liability Partnership and was authorised by the SRA as a recognised body since 10 December 2010.

7. On 26 June 2017 an employee of the SRA conducted a review of information provided to it by insurers and identified the Firm as being one which was open but apparently without PII.

SIIR Rules

8. Under SIIR 2013, if a firm's existing PI insurer is not going to renew insurance for the firm, and the firm has not secured cover from another Insurer, its last participating insurer is required to provide the firm with extended cover in accordance with the terms of its' last policy for a further 90 days beyond the end of the indemnity period; known as the Extended Policy Period (EPP). At the end of the EPP the firm no longer has the benefit of PII. The EPP comprises a 30-day Extended indemnity period ("EIP") and a 60-day Cessation Period ("CP"). During the CP the firm can only deal with existing instructions. After the EPP the firm must close if it has not obtained a new policy.

9. During the EIP the firm can continue to trade as normal, including taking on new clients and there is no obligation on firms to wind down the practice. However, Rule 17.3(a) of the SIIR 2013 requires firms to inform the SRA of this as soon as reasonably practicable, and no later than 5 business days after the date on which the firm entered the EIP.

10. During the CP, under 17.3(b) SIIR 2013, there are reporting conditions on the firm and insurers to notify the SRA of the firm moving into CP. Again, the firm is required to notify the SRA of this as soon as reasonably practicable and no later than 5 business days after the date on which the firm entered the CP. Firms can continue to look for insurance during the CP and if obtained, that would again be backdated by the new insurer to 1 October 2013. During the CP, firms are required to put in place plans for the orderly wind down of the practice and in accordance with Rule 5.2 SIIR 2013, firms cannot take on any new instructions and can only finish existing work.

Summary of the Applicant's Case

11. The Firm had a PII policy with Chancery Pii which expired on 31 March 2017. Prior to the expiration of that policy, the Firm made an application to JLT Speciality Ltd ("JLT"), an insurance broker, in relation to a policy to be underwritten by AmTrust Europe Ltd ("AmTrust"). That application was completed by the Respondent and all subsequent correspondence with the brokers passed through him.

12. The terms upon which AmTrust were prepared to offer PII cover to the Firm were set out in various documents comprised within a Terms Pack which was sent to the Firm by JLT under cover of a letter dated 31 March 2017. JLT was prepared to offer the Firm PII cover for a policy period of 12 months at a premium of £3,000 (plus IPT of £275) subject to a limit on indemnity of £3,000. The Accompanying Notes to those Terms stated that: -

> "…Cover is not in place until your instructions have been accepted by JLT, on behalf of insurers and we have received either clear funds or finance approval from Close Premium Finance"

13. The acceptance of those terms by the Firm was signified by the completion of an Instructions, Payment and Claims Declaration Form by the Respondent on 31 March 2017. This form stated, amongst other things that: -

> "I/we understand that insurer(s) will not accept these instructions unless accompanied by payment in full by a bank transfer, cheque or by premium financing. Documentation and confirmation of cover will not be provided until we have cleared and matched funds or confirmation of finance."

14. The Respondent made an application on behalf of the Firm to pay the premium by 16 monthly instalments to be funded by a Credit Agreement with Close Brothers Limited and the relevant loan agreement was submitted to that company on or around 12 April 2017. On 13 April 2017, that company declined to offer finance and the Firm did not subsequently receive either cleared funds or alternative confirmation of finance.

15. As a result, the effect of the provisions concerning payment within the Accompanying Notes to the Terms and Instructions, Payment and Claims Declaration Form was such that JLT never accepted the Firm's instructions to effect a PII policy with AmTrust and PII cover with AmTrust was never in place for the Firm.

16. The Applicant's case was that the Firm did not therefore maintain a PII policy upon the expiration of its policy with Chancery Pii on 31 March 2017. It remained without cover until 10 August 2017 when it effected a PII policy through Hera Insurance Ltd, also a broker, ("Hera") underwritten by China Re but this was not backdated to 31 March 2017. The Firm continued to practice throughout the intervening period.

17. The Respondent denied all the Allegations.

Live witnesses

18. There were no live witnesses and the Respondent elected not to give evidence.

Findings of Fact and Law

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

20. The Tribunal considered carefully all the documents, witness statements and oral evidence presented. In addition it had regard to the oral and written submissions of both parties, which are briefly summarised below.

21. **Allegation 1.1**

Applicant's Submissions

21.1 Mr Bullock submitted that because Chancery Pii did not renew its PII policy with the Firm for the indemnity year 2017 – 2018, and because the Firm had not secured cover with another insurer when that policy expired on 31 March 2017, the Firm entered into

the EIP on 1 April 2017. The Respondent knew that the Firm had entered into the EIP by 13 April 2017 at the latest. Mr Bullock referred the Tribunal to the email from Guy Lewis, the account handler with JLT who was dealing the renewal of the Firm's cover, emailed the Respondent on that day to advise him that Close Brothers had declined to offer finance. In the course of that email, Mr. Lewis said:

> "…in the meantime, I would be grateful if you could either try to arrange finance yourself (in the event of Close still refusing) or make arrangements to transfer the premium directly to JLT as a lump sum. As it currently stands, you are still covered until the end of April, via your previous providers "Extended Indemnity Period" this protects you against this very eventuality and ensures that there is no gap in cover when moving to a new provider…"

21.2 Despite this, the Respondent had not notified the SRA that the Firm had entered into the EIP either on 5 April 2017 or at any time after that date.

21.3 Mr Bullock submitted that by failing to notify the SRA that the Firm had entered into the EIP the Respondent had failed to comply with his regulatory obligations imposed upon him by SIIR 2013, which form part of the SRA Handbook. He was a member of the Firm, as well as being its COLP and COFA, and had sole responsibility for its negotiations with JLT regarding PII cover. A solicitor in that position should have notified the SRA within five days of entering the EIP in order to ensure that they had complied with their regulatory obligations, even if they considered that they might subsequently obtain PII cover backdated to the expiration of their previous policy. However, even if they did not do so, then they would be certain to notify the SRA of the position as soon as they had learned that they had not obtained such cover. Mr Bullock therefore submitted that the Respondent had breached Principle 7.

Respondent's Submissions

21.4 The Respondent had served an Answer to the Allegations and a Witness Statement. He also relied on his replies to the Explanation with Warning (EWW) letter. The Respondent relied on these documents in addition to his oral submissions at the hearing.

21.5 The key submission made by the Respondent was that he had a contract with AmTrust to provide PII from 1 April 2017. The Respondent submitted that if the Tribunal agreed with that analysis then all the remaining Allegations must fail.

21.6 The Respondent submitted that there was an offer by AmTrust on 31 March 2017. It was an offer and not an invitation to treat and it was made specifically to the Firm. By signing that offer the Respondent, as COLP, had accepted it and there was therefore a legally binding irrevocable agreement. The Respondent rejected the submission by Mr Bullock that payment had to be received and cleared funds obtained before cover was in place. This was a credit agreement and the contract was therefore formed by executory consideration. The payment was to be received at some time in the future and it did not delay the formation of the contract.

21.7 The Respondent submitted that it was the intention of the parties that the contract was formed on 31 March 2017. The references to cleared funds was due to boilerplate clauses in the agreement. The Respondent submitted that "contra proferentem rules" must apply.

21.8 The form signed on 19 May 2017 was not a new agreement, but a variation of the contract formed on 31 March 2017. If the Tribunal was not with the Respondent on this point, he submitted that acceptance and consideration moved with the posting of the cheque on 19 May 2017.

21.9 The Respondent submitted that upon signing the contract there is nothing further for the firm to do before coverage was in place. The application for finance was made at that point and it was JLT who have to prepare the papers for the application for finance. There is nothing further to be signed. If it is correct that the contract comes into place on signing of document then allegations must fail. The Respondent submitted that all subjectivities had been satisfied at this point by completion of an extensive proposal form.

21.10 The Respondent appeared to concede that Mr Bullock had made a "salient point" in that he had not pushed back on JLT by arguing a binding contract point at the time. However, the Respondent also took the Tribunal to emails between himself and Mr Lewis that referred to numerous telephone conversations having taken place between them.

Applicant's Additional Submissions

21.11 Mr Bullock responded to the Respondent's submissions on the basis that some points had not been previously raised. He submitted that the agreement signed on 31 March 2017 was not a credit agreement as it would be subject to separate requirements that did not arise in this case.

21.12 The rule of contra proferentem was a construction rule that applied in cases of ambiguity. It could not be used to give a different meaning to unambiguous terms.

21.13 Mr Bullock also took issue with the variation of contract point, submitting that the May 2017 document substituted a different term and a different premium and if the March 2017 agreement was irrevocable then it could not simply be substituted in that way.

The Tribunal's Findings

21.14 The Respondent's primary case was that he had a valid policy of PII in place from 1 April 2017. The starting point for the Tribunal was therefore to examine the documents relating to the Respondent's dealings with JLT and AmTrust.

21.15 It was not in dispute that the Chancery Pii policy had expired on 31 March 2017. In advance of that date the Respondent had entered into discussions with JLT with a view to putting in place new insurance.

21.16 There had been an offer of insurance made by AmTrust that was sent to the Respondent on 31 March 2017. The offer was accepted by the Respondent. In order for the contract to be valid it required consideration. In this case that was the payment of the premiums. The form completed by the Respondent included the following statement: -

> "I/We understand that insurer(s) will not accept these Instructions unless accompanied by payment in full by a bank transfer, cheque or by premium financing. Documentation and confirmation of cover will not be provided until we have cleared and matched funds or confirmation of finance."

21.17 The Tribunal was entirely satisfied that this was a clear, unambiguous statement that there would be no cover in place without confirmation of finance or payment of the premium. The Tribunal rejected the Respondent's submissions concerning contra proferentum. This was not a case of ambiguity and that rule therefore had no relevance to the facts of this case.

21.18 The Tribunal also rejected the submissions concerning "boilerplate" clauses and credit agreements. These were points that the Respondent had not raised in his Answer or Witness Statement and in any event were plainly without merit. The Tribunal accepted the submission of Mr Bullock on these points.

21.19 The Respondent had not paid the premium or secured finance and so the Tribunal was satisfied beyond reasonable doubt that he did not have a contract of insurance with AmTrust. Therefore upon the expiry of the Chancery Pii policy, the Respondent did not have PII, save for the extended provisions of the expired policy. The Tribunal therefore found beyond reasonable doubt that the Firm had entered the EIP on 1 April 2017.

21.20 In addition to the clear wording contained in the acceptance form, the emails from Mr Lewis were equally unequivocal. The email of 13 April 2017, referred to above in Mr Bullock's submissions, made explicit reference to the EIP. This message was reinforced on 21 April 2017 in a further email from Mr Lewis to the Respondent.

21.21 On 12 May 2017 Mr Lewis was continuing to chase the Respondent for payment. In that email he stated the following: -

> "Having not received any payment, we are not currently "on risk" although you are still covered to varying extents under your previous policy's Extended Indemnity Period and/or Cessation Period".

21.22 Again, it could not have been clearer to the Respondent that he was not covered by AmTrust and that he was in the EIP.

21.23 On 9 June 2017 a further email from Mr Lewis to the Respondent stated the following:-

> "Further both to our emails below and to our telephone correspondence, having received no payment from yourselves or responses to the below, I must advise that the insurers are no longer in a position to accept any form of payment even should it arrive at this belated stage. I would suggest that you contact your current broker, and/or the SRA, to seek advice as to how to proceed, I would

note that you are currently still insured under your current insured's extended indemnity period/cessation period to varying degrees."

21.24 This was another clear notification to the Respondent that AmTrust were not on risk (and never would be) due to the lack of payment. It was also clear that the Respondent therefore remained in the EIP or CP.

21.25 This email had followed the Respondent's completion of a form on 19 May 2017. He had described this as a variation of the contract of March 2017. The Tribunal rejected this submission as it had found that no such contract existed with AmTrust on 31 March 2017, or at all.

21.26 The Respondent had not contacted the SRA notwithstanding the obligation on him to do so, the multiple red flags drawn to his attention and the advice of Mr Lewis that he should contact the SRA. The Respondent had not contacted the SRA at any stage and the matter only came to its attention through its own review of information provided by insurers in June 2017.

21.27 The Tribunal found the factual basis of Allegation 1.1 and the breach of Rule 17.3(a) of the SIIR and Principle 7 proved in full beyond reasonable doubt.

22. **Allegation 1.2**

Applicant's Submissions

22.1 Mr Bullock submitted that since the Firm was still without PII cover on 1 May 2017, 30 days after it had entered the EIP, it therefore entered into the CP on that date. The Respondent's state of knowledge concerning its insurance arrangements did not change in the intervening period. Despite this, the Respondent had not notified the SRA that the Firm had entered the CP at any time. Mr Bullock submitted this constituted a breach of Principle 7.

Respondent's Submissions

22.2 The Respondent denied this Allegation on the same basis as he had denied Allegation 1.1 his submissions in relation to both Allegations are therefore set out above.

The Tribunal's Findings

22.3 The Tribunal had already made findings regarding the Respondent's entry into the EIP in relation to Allegation 1.1.

22.4 There was still no policy of insurance in place at the time the Firm entered the CP as no new policy took effect until 10 August 2017. As the Tribunal had found above, the Respondent did not notify the SRA of the position at any time.

22.5 The Tribunal found Allegation 1.2 proved in full for the same reasons set out in full in relation to Allegation 1.1.

23. **Allegation 1.3**

Applicant's Submissions

23.1 Mr Bullock referred the Tribunal to the client matter listing generated on 16 November 2017 ("the Client Matter Listing"), which set out details of the clients for whom the Firm acted between 30 July 2017 and 11 August 2017. On 7 June 2017, the Firm had accepted instructions from Clients One notwithstanding that it was then in the CP and therefore prohibited from accepting new instructions, in breach of Rule 5.2 of SIIR.

Respondent's Submissions

23.2 The Respondent did not deny taking on Clients One. However, he denied this was a breach of the SIIR as he submitted that he was not in the CP at the time, for the reasons he had set out in relation to Allegation 1.1.

The Tribunal's Findings

23.3 The Tribunal found that it was clear from the Client Matter Listing and from the Respondent's admission that he had taken on Clients One. The Tribunal had already found that the Firm was in the CP at this time for the reasons set out above in relation to Allegation 1.1. The Tribunal therefore found Allegation 1.3 proved beyond reasonable doubt.

24. **Allegation 1.4**

Applicant's Submissions

24.1 Mr Bullock told the Tribunal that the Firm was required to cease to practice promptly on the expiry of the EIP and should have closed by 30 June 2017, 60 days after it had entered the CP. However, it had continued to have conduct of ongoing client matters throughout the period between that date and 11 August 2017, when it secured cover through Hera, a period of 42 days. Mr Bullock submitted that the Firm had done so without having a PII policy in place. The Client Matter Listing showed that the Firm held a total of 15 live client matters as at 16 November 2017, the inception date for all but one of which predated 10 August 2017.

24.2 Mr Bullock submitted that if a solicitor found that they were unable to obtain PII, then it was be in the best interests of their clients for the solicitor to cease to act and for them to obtain alternative representation from a solicitor who does have such cover. In allowing the Firm to continue to act for clients at a time when it did not have PII cover, the Respondent had not acted in the best interests of his clients and had thereby breached Principle 4.

24.3 Mr Bullock further submitted that in allowing the Firm to continue to act for clients at a time when it did not have PII cover, the Respondent had failed to provide a proper standard of service to clients and thereby breached Principle 5 of the SRA Principles 2011

24.4 In relation to the Allegation that the Respondent had breached Principle 6, Mr Bullock submitted that public confidence in the Respondent, in solicitors and in the provision of legal services was likely to be undermined by a solicitor putting the interests of clients at risk by acting for them without the benefit of PII.

24.5 Mr Bullock told the Tribunal that the Respondent was the member of the Firm who had assumed sole responsibility within the business for its PII arrangements for the indemnity period 2017 / 2018. This role required him to either ensure that he arranged a PII policy taking effect from 31 March 2017 or that he took steps to ensure its orderly closure if such a policy had not been arranged by the end of the EPP. In the event, he did neither and had therefore breached Principle 8.

Respondent's Submissions

24.6 The Respondent's defence to this Allegation, as it had been in relation to Allegations 1.1-1.3, was that he had a valid policy of PII in place and had done so since 31 March 2017.

The Tribunal's Findings

24.7 The Tribunal found the factual basis of this Allegation proved beyond reasonable doubt, having rejected the Respondent's case in relation to the existence of PII. The Firm did not have PII and had not closed after 30 June 2017. The breaches of Outcome O1.8 and Rules

24.8 Rules 4.2(c) and 5(1) were also proved on the same basis.

24.9 Principles 4 and 5

24.9.1 It was clearly not in the best interests of clients to be in situation where the firm that was advising and acting for them was uninsured. It was a basic element of the service offered to clients that they had the benefit of a firm's PII policy. The Tribunal found the breaches of Principles 4 and 5 proved beyond reasonable doubt.

24.10 Principle 6

24.10.1 It followed a matter of logic that the trust the public placed in the provision of legal services would be undermined if the provider of those services was operating without insurance. The Tribunal found the breach of Principle 6 proved beyond reasonable doubt.

24.11 Principle 8

24.11.1 It again followed as a matter of logic that practising without insurance was inconsistent with running the business in accordance with sound financial and risk management principles. The Tribunal found the breach of Principle 8 proved beyond reasonable doubt.

25. **Allegation 1.5**

Applicant's Submissions

25.1 Mr Bullock told the Tribunal that on 26 July 2017, a Regulatory Supervisor at the SRA emailed the Respondent to seek clarification of the Firm's PII position as follows:-

> "The SRA and qualifying insurers undertake regular exercises to ensure that the data we hold reflects the true position in terms of who they provide insurance cover for. Our records demonstrate that your previous insurance policy, with Chancery, expired on 31 March 2017. Your firm was not included in the most recent report received by the SRA.
>
> I would be grateful if you could provide me with a copy of the firms most recent insurance certificate, so that our records can be updated accordingly.
>
> I would be grateful if this could be provided to me by Friday 28 July 2017"

25.2 The Respondent had responded to the Regulatory Supervisor by an email timed at 13.03 on 28 July 2017 as follows:

> "I am in the process of obtaining a copy of the most recent insurance certificate from the insurers and will forward the same to you asap."

25.3 Mr Bullock submitted that the purpose of the Regulatory Supervisor's email had been to seek confirmation that the Firm had PII cover in place from 31 March 2017. The Respondent's reference to "…the most recent insurance certificate…" carried the necessary implication that, on 28 July 2017, the Firm held an insurance certificate which post-dated 31 March 2017. Mr Bullock submitted that the Respondent must have appreciated that implication at the time that he composed that email. In a letter to the SRA dated 9 January 2018, the Respondent confirmed that this was indeed how his reference was intended to be understood as follows;

> "…On 28 July 2017, Usher Solicitors LLP communicated to the SRA that they were in the process of obtaining the most recent insurance certificate from the insurers. At that time it was understood that the certificate from our current insurers would be backdated to include cover for the period 1 April 2017 to 10 August 2017…"

25.4 However, as at 28 July 2017, the Respondent knew that the Firm was not, in fact, insured with Hera as at that date because he had not submitted a proposal form to Hera and JLT did not consider that it was on risk. Mr Bullock referred the Tribunal to the email from Mr. Lewis to the Respondent on 12 May 2017 which stated;

> "…Having not received any payment, we are not currently "on risk" although you are still covered to varying extents under your previous policy's Extended Indemnity Period and / or Cessation Period. … I would stress the urgency here, as this is a highly unusual situation and we would not wish for this to drag on any further…"

25.5 On 12 June 2017 Mr Lewis had emailed the Respondent stating;

> "…having received no payment from yourselves or responses to the below, I must advise that the insurers are no longer in a position to accept any form of payment, even should it arrive at this belated stage. … I would note that you are currently still insured under your current insurer's extended indemnity period / cessation period to varying degrees…"

25.6 Mr Bullock submitted that this demonstrated that when the Respondent sent his email to the Regulatory Supervisor on 28 July 2017, he knew or should have known, that the Firm did not maintain PII.

25.7 Mr Bullock told the Tribunal that the word "apt" meant "appropriate to or tending to".

25.8 Mr Bullock submitted that by implying to the Regulatory Supervisor that the Firm had PII cover when it did not, the Respondent had failed to act with integrity. He referred the Tribunal to Wingate v Solicitors Regulation Authority v Malins [2018] EWCA Civ 366, in which it was said that integrity connoted adherence to the ethical standards of one's own profession. Mr Bullock submitted that a solicitor of integrity should always be frank when dealing with their regulator and careful not knowingly to say anything which might lead them to believe something which was not true. Mr Bullock therefore submitted that the Respondent had breached Principle 2.

25.9 Mr Bullock further submitted that the conduct also amounted to a breach by the Respondent of the requirement to behave in a way which maintained the trust placed by the public in them and in the provision of legal services, in breach of Principle 6.

Respondent's Submissions

25.10 The Respondent denied this Allegation in full and denied lacking integrity or acting dishonesty or recklessly. In his Answer he stated the following:

> "The information given by the Respondent to the SRA on 28 July 2017 was supplied accurately and honestly. At no point in time did the Respondent give misleading information to or seek to mislead the SRA. Contrary to the assertion made, Am Trust were not able to retract their offer of indemnity cover on 9 June 2017. At that point in time, their offer had been accepted by the Firm and the appropriate consideration furnished. Given the above, it is denied that the Firm did not maintain PII or that the Respondent knew this to be the case."

25.11 In his witness statement the Respondent had stated:-

> "Firstly, it should be noted that I was simply using the exact terminology of the email to which I was responding i.e. from the regulatory supervisor on 26 July 2017 which requested, "I would be grateful if you could provide me with a copy of the firms(sic) most recent insurance certificate, so that our records can be updated accordingly." Secondly, at that juncture - consequent to the SRA disclosure that the firm had not been included in the most recent report received by the SRA - I had been in contact with Hera Indemnity who indicated that they would be able to secure terms and that they were likely to be backdated

> if they were unable to procure a certificate from Am Trust, which I had requested they obtain on my behalf."

25.12 He further stated:-

> "It is categorically denied that any attempt was made to mislead an officer of the SRA, or at all."

The Tribunal's Findings

25.13 The Tribunal considered the meaning of the term "apt" and agreed with Mr Bullock's interpretation of that phrase.

25.14 The Tribunal examined the context in which the email of 28 July 2017 was sent. It was in response to a clear question from the SRA as to the status of his insurance. The email from the SRA had been triggered by the fact that it appeared to the SRA that the Respondent may not have PII. The purpose of the enquiry was perfectly clear.

25.15 The Tribunal noted the sequence of events during this exchange of emails. The enquiry from Ms Munn of the SRA was sent at 11.16 on 26 July 2017. At 12.48 that day the Respondent emailed a 2014 proposal form to Hera. At 13.15 the Respondent had emailed Mr Lewis attaching a copy of his letter of 19 May 2017. He then replied to the SRA on 28 July 2017.

25.16 The Tribunal was satisfied that the Respondent knew that he did not have a valid certificate of PII at this time. His email to the SRA was therefore apt to mislead as it gave an impression that was incorrect.

25.17 Even if the Respondent believed that he should have insurance from AmTrust (which the Tribunal did not find to be the case), at the very least he was aware that AmTrust did not consider itself to be on risk.

25.18 The Respondent knew there was no certificate in place at that point, as evidenced by the emails he sent to Hera and Mr Lewis at this time. The Respondent had also had repeated warnings in the form of emails from Mr Lewis from as far back as April 2017 that he was not covered. The Respondent knew that the email to the SRA was apt to mislead in that he knew he needed cover and did not happen.

25.19 The Respondent had not given evidence, which was his right. He had confirmed that he had had sight of Practice Direction 5, which permitted the Tribunal to draw the appropriate inferences from his failure to give evidence.

25.20 The Tribunal, having regard to the context in which the email was sent, was satisfied beyond reasonable doubt that the Respondent was aware that his email of 28 July 2017 was apt to mislead. The Tribunal found the factual basis of Allegation 1.5 and the breach of Principle 7 proved beyond reasonable doubt.

25.21 Principles 2 and 6

25.21.1 In considering whether the Respondent had lacked integrity it applied the test for integrity set out in Wingate [2018] EWCA Civ 366. At [100] Jackson LJ had stated:-

> "Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. To take one example, a solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead. Such a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse".

25.21.2 Wingate and Evans and Malins had continued a line of authorities that included SRA v Chan [2015] EWHC 2659, Scott v SRA [2016] EWHC 1256 (Admin), Newell-Austin v SRA [2017] EWHC 411 (Admin) and Williams v SRA [2017] EWHC 1478 (Admin).

25.21.3 The Tribunal found that it was an obvious lack if integrity to knowingly provide statements that were apt to mislead when responding to an enquiry from the regulator. The Tribunal noted that the Respondent had been advised to inform the SRA of the position by Mr Lewis – something that was his regulatory obligation in any case. He had then responded to the enquiry in the misleading way set out above. The Tribunal found the breach of Principle 2 proved beyond reasonable doubt.

25.21.4 It followed as a matter of logic that the trust the public placed in the provision of legal services was diminished if solicitors misled their regulator. The Tribunal found the breach of Principle 6 proved beyond reasonable doubt.

26. **Allegation 1.6**

Applicant's Submissions

26.1 Mr Bullock told the Tribunal that the proposal form which led to the Firm obtaining PII through Hera ("the Proposal Form") was not submitted to Hera until 31 July 2017. The Proposal Form contained was a section headed "21. Current Coverage" in which the proposer was asked "Please provide details of your current insurance". Below these words appear a series of boxes with the following headings (amongst others):-

- Current Insurer – The box was completed with the words "AmTrust Europe Limited".
- Current Broker – The box was completed with the word "JLT"
- Renewal Date - The box was completed "31/03/2018"

26.2 Mr Bullock submitted that the Firm was not insured with AmTrust and the statements made within that section of the proposal form were therefore untrue.

26.3 The Proposal Form contained a declaration in the following terms:-

> "We declare that to the best of our knowledge or belief that the particulars and statements given in this application are true and complete and this application, declaration and information shall be the basis of the contract between ourselves and the Insurer.
>
> We declare that we have informed the Insurer of all facts which are likely to influence the Insurer in the acceptance or assessment of the insurance. We accept that if we are in doubt whether any fact may influence the Insurer we should disclose it.
>
> We agree that we have a continuing obligation to notify Insurers of any material matters during the currency of any policy.
>
> We accept that any deliberate misrepresentation of facts declared on this proposal form may be referred to The Legal Complaints Service."

26.4 Mr Bullock submitted that when the Respondent confirmed these matters by signing the declaration, he knew that the statements in section 21 referred to above were untrue and incomplete. Even if the Respondent believed that a valid contract of insurance existed between the Firm and AmTrust, the statement in section 21 was still incomplete because it did not explain that it was based on the Respondent's own understanding of the position, which JLT and AmTrust did not accept.

26.5 Mr Bullock submitted that making statements made within the Proposal Form that were not true and completed demonstrated a lack of integrity and was a breach of Principle 6.

Respondent's Submissions

26.6 In his Witness Statement the Respondent stated the following:-

> "Contrary to the view expressed in paragraph 51.2 of the Rule 5 statement, section 21 of the application for PII is accurately completed, the declaration is signed and dated 31/07/2017 and the account handler at Hera Indemnity, Torquil Crawford, had been made completely aware of the circumstances surrounding the application. It is notable that terms were subsequently offered by the insurers through Hera Indemnity and that renewal terms have been offered and accepted for two years post-dating these events, notwithstanding the SRA investigation and ongoing disciplinary proceedings, of which both parties are of course, aware."

26.7 In his Answer he had stated:-

> "It is denied that any statement made by the Respondent within a proposal for PII completed on 31 July 2017 was untrue. The circumstances which led to the application being made were discussed in significant detail with the broker by telephone and is evidenced in the emails of 3 August 2017. The Firm's current insurers were absolutely clear as to the circumstances pertaining to the professional indemnity insurance application and the history related to the

Firm's dealings with JLT and Am Trust. For the reasons above, it is denied that the Respondent made any statements within a proposal form for PII completed on behalf of the Firm which were untrue and which he knew or should have known, to be untrue."

The Tribunal's Findings

26.8 The context in which the form was completed was set out above. It followed from those findings that the answers provided on the form were not true, despite the declaration contained on that document. The Respondent did not have any insurance with AmTrust and therefore it was wrong to say that he did or that it was valid until 30 March 2018. The Respondent knew this, evidenced by the very fact that he was trying to get PII from Hera, which he would not have needed to do if he had a valid and ongoing PII policy in place. The answers given on the form were simply not true and the Respondent could not have believed otherwise. The Tribunal found the factual basis of Allegation 1.6 and the breaches of outcome O11.1 proved beyond reasonable doubt.

26.9 Principles 2 and 6

26.9.1 The Tribunal had already found that knowingly making statements to the SRA that were apt to mislead was evidence that the Respondent had lacked integrity. There was no distinction, for these purposes, between misleading the SRA and making untrue statements to the prospective insurers. The Tribunal found the breach of Principles 2 and 6 proved beyond reasonable doubt.

27. **Dishonesty in relation to Allegations 1.5 and 1.6**

Applicant's Submissions

27.1 Mr Bullock told the Tribunal that his submissions on dishonesty were as set out in the Rule 5 Statement. The Applicant's case was that in relation to Allegation 1.5, the Respondent was aware of the following:-

- The Regulatory Supervisor was dealing with him in her capacity as an officer of the SRA, with whom he was under a professional obligation to co-operate;
- The Regulatory Supervisor was seeking confirmation that the Firm was complying with its regulatory obligations;
- The circumstances called for utmost frankness and candour;
- The statement contained in the email would create the impression that the firm currently maintained PII;
- The Respondent intended to create that impression;
- The Respondent had not yet submitted a proposal form to Hera and the Firm was not insured through AmTrust;

- The Firm did not therefore currently maintain PII (or, at a minimum, that there were good reasons to suspect that it might not maintain PII).

27.2 In relation to Allegation 1.6, the Applicant's submissions were that the Respondent was aware of the following:-

- The Proposal Form was a formal commercial document, which would form the basis of a contract of insurance;
- That the declaration was a formal affirmation of the truth of the information contained within the proposal form;
- That China Re would rely upon the contents of the Proposal Form when deciding whether to accept the risk/offer cover;
- That by signing the declaration on the Proposal Form, he would lead Hera and China Re to believe that its contents were true and complete;
- That the contents were untrue and incomplete.

27.3 Mr Bullock submitted that the Respondent's actions would be considered dishonest by the standards of ordinary decent people.

Respondent's Submissions

27.4 The Respondent denied acting dishonestly. In his witness statement he had stated:-

> "I vehemently refute the allegation of dishonesty at paragraph 55 & 56 of the Rule 5 statement. I have secured previous PII policies for the firm without incident where the payment arrangements were not fully completed until after the inception of the cover. I had no reason to believe that on this occasion the procedure would be any different or that the firm would encounter the dilemma we faced on this occasion. My belief that the firm had secured cover was genuinely held and proper. There can be no question that ordinary decent people would consider my actions to have been dishonest. Mistaken perhaps, nothing more."

27.5 The Respondent maintained his position on this in the course of his submissions. His dispute with the factual basis of the Applicant's case is set out above in relation to the substantive Allegations.

The Tribunal's Findings (Allegation 1.5)

27.6 The test for considering the question of dishonesty was that set out in Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67 at [74] as follows:-

> "the test of dishonesty is as set out by Lord Nicholls in Royal Brunei Airlines Sdn Bhd v Tan and by Lord Hoffmann in Barlow Clowes: ….. 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."

27.7 The Tribunal applied the test in Ivey and in doing so, when considering the issue of dishonesty adopted the following approach:

- Firstly, the Tribunal established the actual state of the Respondent's knowledge or belief as to the facts, noting that the belief did not have to be reasonable, merely that it had to be genuinely held.

- Secondly, once that was established, the Tribunal then considered whether that conduct was honest or dishonest by the standards of ordinary decent people.

27.8 The Tribunal had analysed the Respondent's state of knowledge when making its findings in relation to Allegation 1.5 above. It had concluded that the Respondent had sent the email to the SRA knowing that it was apt to mislead, for all the reasons already set out. The Respondent was replying to an enquiry of significant importance made by his regulator. It called for complete openness and transparency and not a deliberately misleading answer. The Tribunal was satisfied beyond reasonable doubt that the actions of the Respondent in sending that email would be considered dishonest by the standards of ordinary decent people. The allegation of dishonesty was proved beyond reasonable doubt in relation to Allegation 1.5.

The Tribunal's Findings (Allegation 1.6)

27.9 The Tribunal again applied the Ivey test in relation to this Allegation.

27.10 The Tribunal had made findings as to the Respondent's state of knowledge when considering Allegation 1.6 above. It had concluded that the Respondent had made statements on the PII form which he knew to be untrue, for the reasons set out above. The Tribunal noted the context of the completion of the form, which was that the Respondent had been without PII since the end of March 2017. The initial approach to Hera had come almost immediately after the email from the SRA of 26 July (to which he had subsequently sent a misleading reply) and the completion of the form was a continuation of that conduct. The Tribunal was satisfied beyond reasonable doubt that a solicitor knowingly completing a form for PII with untrue information would clearly be regarded as dishonest by the standards of ordinary decent people. The Tribunal found the allegation of dishonesty proved beyond reasonable doubt in relation to Allegation 1.6.

Previous Disciplinary Matters

28. There was no record of any previous disciplinary findings by the Tribunal.

Mitigation

29. The Respondent declined to offer any mitigation.

Sanction

30. The Tribunal had regard to the Guidance Note on Sanctions (November 2019). The Tribunal assessed the seriousness of the misconduct by considering the Respondent's culpability, the level of harm caused together with any aggravating or mitigating factors.

31. In assessing culpability, the Tribunal found the Respondent's motivation had been to try to secure a new policy of PII and when that had been unsuccessful, to conceal the matter from the SRA and Hera. The Respondent was solely responsible for the circumstances giving rise to the misconduct, which had continued over a period of several months. This included 42 days when there was no form of PII cover in place of any sort. On the Tribunal's findings, the Respondent had misled the regulator. He was an experienced solicitor, who was also the COLP. The actions the Respondent had taken were clearly calculated and deliberate. One example of that was the sequence of events upon receipt of the email from the SRA of 28 July 2017.

32. In terms of harm, the Tribunal had not heard any evidence of harm caused to any individual clients. However, there was significant potential for substantial harm to have been caused to those clients who did not have the benefit of protection which they were entitled to. The damage to the reputation of the profession was very substantial. It was a grave matter for a solicitor to mislead his regulator and make untrue statements on a proposal form for PII.

33. The misconduct was aggravated by the Respondent's dishonesty. Coulson J in Solicitors Regulation Authority v Sharma [2010] EWHC 2022 Admin observed:

> "34. there is harm to the public every time a solicitor behaves dishonestly. It is in the public interest to ensure that, as it was put in Bolton, a solicitor can be "trusted to the ends of the earth"."

34. The misconduct was not a one-off incident as it involved a continuing process over several months which included the SRA and Hera being misled.

35. There were no mitigating factors in this matter, save for the fact that the Respondent did not have any previous findings recorded against him at the Tribunal.

36. The misconduct was so serious that a Reprimand, Fine or Restriction Order would not be a sufficient sanction to protect the public or the reputation of the profession from future harm by the Respondent. The misconduct was at the highest level and the only appropriate sanction was a strike-off. The protection of the public and of the reputation of the profession demanded nothing less. There had been a clear breach of the SIIR, which exposed clients to significant risk and this had been compounded by dishonest attempts to conceal the fact.

37. The Tribunal considered whether there were any exceptional circumstances that would make a strike-off unjust in this case. The Respondent had been given the opportunity to review the Guidance Note on Sanctions and had declined to make any representations. The Tribunal found there to be no exceptional circumstances and therefore the only appropriate and proportionate sanction was that the Respondent be struck off the Roll.

Costs

38. Mr Bullock applied for costs in the sum of £8,000. The original figure had been £9,435 but he had reduced the sum claimed to take account of the fact that the hearing had concluded in two days rather than the estimated three.

39. The Respondent submitted that if three days had been £9,435 then two days might be less than £8,000 on a proportionate basis.

The Tribunal's Decision

40. The Applicant had succeeded in proving all the Allegations and was therefore entitled to costs. The Tribunal reviewed the cost schedule and noted that this had been a fully contested dishonesty case. The Respondent had indicated that he would give evidence and had then elected not to. That was entirely his right, but it had inevitably required Mr Bullock to be prepared to cross-examine the Respondent. The costs claimed were relatively modest and the Tribunal considered it to be reasonable and proportionate.

41. The Respondent had served a Personal Financial Statement. The Tribunal reviewed this carefully. The Respondent had an asset in the form of a mortgage-free property and so there were clearly enforcement options available to the Applicant. The Tribunal noted that the Applicant took a responsible approach to enforcement and so saw no basis to reduce the costs on account of the Respondent's means.

Statement of Full Order

42. The Tribunal Ordered that the Respondent, MICHAEL USHER, 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 £8,000.00.

Dated this 23rd day of March 2020
On behalf of the Tribunal

A. N. Spooner
Chair