SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12134-2020

BETWEEN:

ROGER PATRICK DIAVEWA Applicant

and

SOLICITORS REGULATION AUTHORITY Respondent

Before:

Mr P Booth (in the chair)
Ms B Patel
Mr S Marquez

Date of Hearing: 15 January 2021

Appearances

Joe Sykes for the Applicant.

Rory Mulchrone, barrister of Capsticks LLP, 1 St George's Road, Wimbledon, London SW19 4DR for the Respondent.

JUDGMENT ON A REVIEW OF AN ORDER MADE UNDER SECTION 43 OF THE SOLICITORS ACT 1974

The Section 43 Order ("s43 Order")

1. On 10 September 2020 the Respondent had made the following order in respect of the Applicant:

> "To make an order pursuant to section 43 that with effect from the date of the letter or email notifying Mr Diavewa of Wellingborough of this decision:
> (i) no solicitor shall employ or remunerate him in connection with his/her practice as a solicitor;
> (ii) no employee of a solicitor shall employ or remunerate him in connection with the solicitor's practice;
> (iii) no recognised body shall employ or remunerate him;
> (iv) no manager or employee of a recognised body shall employ or remunerate him in connection with the business of that body;
> (v) no recognised body or manager or employee of such a body shall permit him to be a manager of the body; and
> (vi) no recognised body or manager or employee of such a body shall permit him to have an interest in the body
>
> except in accordance with the SRA's permission."

2. The Adjudicator had made the following findings in respect of the Applicant:

> "2.1 Between 16 January and May 2018 Mr Diavewa falsely held out, both to his client Mr [M] and to the Family Court, that the firm Calices solicitors continued to act on behalf of Mr [M] in relation to family court proceedings.
> 2.2 On 8 June 2017 Mr Diavewa created a letter bearing the date of 7 May 2017 and a statement of facts, in an attempt to mislead the Upper Tribunal in relation to an application for judicial review made on behalf of a client, [AU].
> 2.3 On 10 February 2017, 6 March 2017, 15 March 2017, and 11 May 2017 Mr Diavewa received into his own personal account, payments from a client of the firm, [AU], for fees due to the firm.
> 2.4 In respect of the findings at 2.2 and 2.3, above Mr Diavewa acted dishonestly.
> 2.5 Mr Diavewa who is or was involved in a legal practice but is not a solicitor, has occasioned or been a party to an act or default in relation to a legal practice which involved conduct on his part of such a nature that in the opinion of the SRA it would be undesirable for him to be involved in legal practice in all of the ways mentioned SRA."

3. On 5 October 2020 the Applicant filed an application for a review and revocation of that order.

Preliminary Matters

Representation by Mr Sykes

4. The Applicant informed the Tribunal that he wished to be represented by Mr Sykes at the hearing. Mr Sykes was not a barrister or solicitor and he was not authorised person for the purposes of the Legal Services Act 2007. Mr Sykes therefore did not meet the

definition of a legal representative under Rule 48 of the Solicitors (Disciplinary Proceedings) Rules 2019 ("SDPR 2019"). The Applicant therefore applied for permission to be represented by Mr Sykes.

Applicant's Submissions

5. The Applicant told the Tribunal that Mr Sykes had assisted him from the beginning of this matter and had assisted him in preparing the application and the grounds argued in support of it.

6. The Applicant explained that he had no experience before the Tribunal and submitted that it was in the interests of justice to allow him to be represented at the hearing. The Applicant told the Tribunal that he was unable to afford solicitor or counsel. This was partly because the s43 Order was preventing him from working.

7. The Applicant told the Tribunal that he was concerned that his case may not be properly put forward by him and that he would not be able to answer the Respondent's submissions. He submitted that this was an extremely serious matter and he urged the Tribunal to grant his application to be represented by Sykes.

Respondent's Submissions

8. Mr Mulchrone referred the Tribunal to the Respondent's written response dated 14 January 2021 which set out the basis for the Respondent's opposition to the application.

9. Mr Mulchrone noted that Mr Sykes was a disbarred barrister and so while he had clearly been properly trained, the requirements of professional discipline were not met.

10. The written submissions referred the Tribunal to its guidance on this issue, set out in 'Guidance: Person Assisting a Party' dated 6 November 2019 ("the Guidance"). It noted that the onus was on the Applicant to demonstrate that it was in the interests of justice to allow permission and submitted that the Applicant had not demonstrated that there were exceptional circumstances such as to allow this application.

The Tribunal's Decision

11. The Tribunal took careful note of the written and oral submissions of both parties.

12. Rule 48(7) of the SDPR 2019 stated as follows:

> "(7) In this rule "legal representative" means—
>
> (a) a solicitor;
>
> (b) a barrister;

(c) a person who, for the purposes of the 2007 Act, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation within the meanings given by Schedule 2 to that Act."

13. Mr Sykes did not fall within any of these categories and therefore the Applicant had quite properly made an application for permission to be represented by Mr Sykes, as opposed to merely being assisted by him.

14. The Tribunal had regard to the Guidance and noted that such applications were considered on a case-by-case basis. The following sections of the Guidance were of particular relevance:

> "20. The Tribunal should be slow to grant any application from a party for a right of audience or a right to conduct litigation to any lay person, including a person providing assistance. This is because a person exercising such rights must ordinarily be properly trained, be under professional discipline (including an obligation to insure against liability for negligence) and be subject to an overriding duty to the Tribunal. These requirements are necessary for the protection of all parties to the proceedings and are essential to the proper administration of justice.
>
> 21. Any application for permission to assist the party in presenting the party's case at the hearing should be considered very carefully. The Tribunal should only be prepared to grant such rights where there is good reason to do so taking into account all the circumstances of the case, which are likely to vary greatly. Such grants should not be extended to lay persons automatically or without due consideration. They should not be granted for mere convenience.
>
> 22. Examples of the type of special circumstances which might justify the grant of permission to a person providing assistance including:
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> - that person is a close relative of the party;
> - health problems preclude the party from addressing the Tribunal, or conducting the proceedings, and the party cannot afford to pay for a qualified legal representative;
> - the party is relatively inexperienced in appearing in a court setting and prompting by a person providing assistance may avoid unnecessarily prolonging the proceedings.
>
> 23. It is for the party to persuade the Tribunal that the circumstances of the case are such that it is in the interests of justice for the Tribunal to grant permission for a person to assist the party in presenting their case at the hearing."

15. The Tribunal had concerns about the fact that Mr Sykes was not bound by the same duties to the Tribunal as a legal representative as defined by Rule 48(7) of the SDPR 2019.

16. However, the nature of the hearing was a review not a re-hearing and as such no evidence was being called. The case would proceed entirely by way of submissions. The Tribunal had been struck by the limitations of the Applicant's skills in presenting his submissions on this discrete point. The effect of this was that the Tribunal had concerns about the Applicant's ability to present his substantive application effectively. The substantive application would be dealing with technical arguments which Mr Sykes had worked on in the lead-up to the hearing.

17. In all the circumstances the Tribunal was satisfied that it was in the interests of justice to permit the Applicant to be represented by Mr Sykes at this hearing.

18. The Tribunal proceeded to hear the substantive application. The submissions of the parties are summarised below.

Applicant's Submissions

19. Mr Sykes told the Tribunal that there were three grounds pursued as part of this application. The Applicant sought to have the s43 Order revoked or in the alternative, he sought to have the matter remitted to the Respondent for a fresh hearing before a different Adjudicator.

20. The first ground related to what were described as essential matters that needed to be taken into account that had not been at the original hearing. The second ground was that there were matters giving rise to an anxiety that there had been bias on the part of the Adjudicator. The third ground was that the Respondent's decision to publish the decision prior to the time limit allowed for review or appeal was inconsistent with provisions of the Solicitors Act 1974. Alternatively, the decision to publish before that time limit was ultra vires. In the further alternative, it was disproportionate.

Background

21. Mr Sykes told the Tribunal that the Applicant had been employed by a sole practitioner, MS, trading as CS, as a self-employed paralegal between 2014 and 22 November 2018. MS supervised the Applicant's work. Mr Sykes told the Tribunal that MS would usually have sight of the Applicant's draft documents and correspondence, and could amend the same. Alternatively, counsel would be instructed by the Applicant and counsel would then approve the documents.

22. Mr Sykes told the Tribunal that MS, by his own admission, neglected the practice much of the time and might not see the firm's outgoing documents at all. Mr Sykes submitted that this was systematic negligence to the extent of being intentional rather than inadvertent. It therefore followed that his conduct, as a factor materially affecting the Applicant's conduct, was relevant. The result was that the Applicant at those times was not supervised effectively or at all. He could not rely on supervisory guidance and had to use his initiative.

23. Mr Sykes told the Tribunal that the Respondent had raised allegations against the Applicant in relation to two cases, Mr M and Mr U.

24. In respect of Mr M, this was a case in the Family Court where the Judge had sent the Respondent a report about the Applicant's conduct of the case. The principal allegation was that the Applicant had purported to represent Mr M in court by four letters written on the firm's letterhead dated between 24 January 2017 and 17 May 2018. That was allegedly contrary to MS's instruction on 16 January 2017 to the Applicant to cease representation for lack of funds, and to the client's decision to instruct counsel directly from or about 30 May 2017.

25. In respect of Mr U, this case was brought to the Respondent's attention by the Legal Ombudsman by way of a report in or about April 2019. The issues were that the Applicant had failed to send the Upper Tribunal a form T485 within the time limit, leading to an automatic strike-out and that the Applicant had failed to inform the client or MS of the default. It was also alleged that the Applicant had applied to the Upper Tribunal to reinstate the application, without instructions. The Upper Tribunal had found the application out of time by 5 months. It had further been alleged that the Applicant had told the Upper Tribunal he had submitted the T485 on 7 May 2017, which the Upper Tribunal had noted was filed on 12 June 2017, with metadata showing the letter and accompanying statement of facts both created on 8 June 2017. Finally, it was alleged that Mr U had made four payments between 10 February-11 May 2017 to the Applicant's personal account and not to the firm's client account.

Ground 1

26. Mr Sykes submitted that the Adjudicator failed to take account of and/or give due weight to the role and defaults of MS. Mr Sykes invited the Tribunal to analyse the structure of s43 (1)(b). He noted that S43 (1)(b) provided that the non-solicitor "has ... occasioned or been a party to, with or without the connivance of a solicitor, an act or default in relation to a legal practice which involved conduct on his part of such a nature that in the opinion of the Society it would be undesirable for him to be involved in a legal practice in one or more of the ways mentioned in subsection (1A)"

27. Mr Sykes submitted that the thrust of the subsection was narrowly drawn and required a prejudicial finding as it made the non-solicitor liable for causing or participating in serious misconduct in legal practice whether or not that involves the "connivance" of a solicitor. This required the non-solicitor to have a "guilty mind". Mr Sykes submitted that the standard of proof in relation to such a finding was the criminal standard. Mr Sykes submitted that the starting point was to ask whether the Adjudicator had properly considered the role of MS.

28. Mr Sykes referred to the Skeleton Argument and invited the Tribunal to interpret s43(1)(b) as follows:

> "The subsection, therefore, does not apply to the following circumstances:
> (a) the non-solicitor is not primarily responsible for the relevant act or omission;
> (b) the non-solicitor is not a controlling party in the misconduct;
> (c) the solicitor is causative of the misconduct, by setting up the situation in which the non-solicitor misconducts himself, or by allowing a state of affairs

to occur in which the non-solicitor does so through lack of supervision and training."

29. Mr Sykes argued that the s43(1)(b) imported a requirement into the Respondent's decision-making process to take into account and/or give due weight to the role of a solicitor under whom the non-solicitor had allegedly misconducted himself before making s s43 Order against the non-solicitor. The Adjudicator should have carried out a balancing exercise between the Applicant and MS as to who was responsible for the relevant act or default. Mr Sykes told the Tribunal that this was not to permit the Applicant to escape blame for serious misconduct by finding MS connived in that misconduct, as s43 (1)(b) precluded that approach, but was to determine what actually happened in respect of the issues raised in the Mr M and Mr U cases before moving on to determine who should be considered as responsible for the conduct matters arising in the cases.

30. Mr Sykes referred to the Skeleton Argument where it was submitted that that the Adjudicator should have considered and balanced the following issues;

(1) "Whether the Applicant caused (occasioned) or was a party to the act or omission;
(2) Whether [MS] caused the act or omission;
(3) Whether [MS], without conniving in any misconduct, allowed the state of affairs to occur in which the Applicant was not supervised or trained, and in which the latter made errors without realising what he was doing
(4) Whether the conduct at issue that made it undesirable in the Respondent's opinion for the Applicant to be involved in legal practice was his or [MS's] fault, or the fault of both;
(5) Whether a s43 order against the Applicant was appropriate if he was not wholly or significantly responsible for the acts and omissions identified by the Respondent as serious misconduct."

31. Mr Sykes submitted that the Adjudicator had focussed "relentlessly" on the Applicant, and had looked away from MS's relevant acts and omissions. Mr Sykes described four failures of supervision in the Mr M case, and 14 in the Mr U case, which he submitted had not been taken into account.

Ground 2

32. Mr Sykes submitted that the Adjudicator had been biased against the Applicant.

33. Mr Sykes submitted that the test for bias was whether all the relevant circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger that the Adjudicator was biased. He referred the Tribunal to Re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700, 711, CA, approved in Porter v Magill [2001] UKHL 67, [2002] 2 WLR 37, [2002] 2 AC 357, [2002] 1 All ER 465. Mr Sykes submitted that it was clear from the Adjudicator's decision that the Respondent expected the Adjudicator to find dishonesty on the part of the Applicant.

34. The Adjudicator had noted there was a requirement to assess the Applicant's knowledge or belief as to the facts but had not taken into account the matters set out in relation to Ground 1, namely that the Applicant was only one of the actors involved. The Adjudicator had not addressed evidence pointing away from guilt on the part of the Applicant.

35. Mr Sykes referred to the Skeleton Argument where it was submitted that the following demonstrated evidence of bias:

> "Further, the Applicant notes the following evidence of bias:
>
> (1) Failure to assess fault on the part of [MS], unlike the Legal Ombudsman, as part of the balancing exercise impliedly required in the particular circumstances of the case given the serious misconduct required by s43 and the lack of evidence of connivance.
> (2) Failure to investigate whether the Applicant had access to client account ledgers and accounts, before deciding the Applicant misappropriated client funds.
> (3) Characterisation of paying money into the personal account as 'misappropriation of client funds', which accuses the Applicant of theft, instead of investigating whether the Applicant had access to the client account on the material dates.
> (4) Alleging misconduct against the Applicant as if he was not a paralegal but a solicitor trained in Solicitors Account Rules.
> (5) Alleging failure to pay the firm the sum the Legal Ombudsman ordered the firm to pay Mr [U], without acknowledging the Legal Ombudsman's praise of the Applicant by email dated 23 May 2019 to [MS] for offering to pay the entire sum the firm was ordered to pay, which included a penalty of £500.
> (6) Applying to the Applicant legal tests applicable only to solicitors, when he was an unqualified non-solicitor."

36. Mr Sykes submitted that the Adjudicator had held the Applicant to the same standards as a qualified solicitor and that this was "unjust".

Ground 3

37. Mr Sykes submitted that that the Adjudicator's decision to publish the s43 Order as at the date of notice of the Order and therefore prior to review or appeal was "wholly inconsistent with and/or ultra vires the provisions of s43 (3)(3A), 44 and 44D (3) of the 1974 Act and/or disproportionate in the circumstances"

38. The s43 Order took effect on 11 September 2020 and stated "A copy of the decision is enclosed. We will publish the control order on our website after the review or appeal period has expired." That period was 28 days, however the Respondent had decided to publish on 24 September 2020 instead. Mr Sykes submitted that the effect of s43 (3)(3A) of the 1974 Act made no provision for publication of a s43 Order at that time.

39. Mr Sykes noted that the Respondent had relied on Rule 9.2 of the SRA Regulatory and Disciplinary Procedure Rules, which provided that "The SRA shall publish any decision under rule 3.1 or 3.2, when the decision takes effect or at such later date as it may consider appropriate, unless it considers the particular circumstances outweigh the public interest in publication." Mr Sykes submitted that Rule 9.2 did not provide for timing and did not expressly overrule the relevant provisions as to publication and timing at s43, 44 and 44D of the 1974 Act or regulation 19 (2) of the 2019 Regulations.

40. Mr Sykes further submitted that publication within the review period was in breach of the Applicant's article 8.1 rights protected by Schedule 1, Article 8.1 of the Human Rights Act 1998. Mr Sykes submitted that the Respondent's order for publication should be quashed immediately. He told the Tribunal that the Applicant's livelihood had been destroyed as potential employers were on notice of alleged serious misconduct.

Submissions in 'mitigation'

41. Mr Sykes put forward what he described as mitigating circumstances which he submitted showed that the Applicant's conduct had been, at most, sloppy and negligent. He submitted that the sanction was disproportionate. Mr Sykes referred to the fact that the s43 Order was based on a review of two files and was not representative of the Applicant's overall work. The decision to impose the s43 Order could not be justified in the circumstances of this matter. Mr Sykes referred the Tribunal to SRA v Horwood Case No: 11439-2015 in which the Tribunal had revoked a s43 Order despite there being indications of intention dishonesty.

Respondent's Submissions

42. Mr Mulchrone reminded the Tribunal that a s43 Order was not penal, but supervisory. It was to ensure that the Applicant was only working in a law firm on terms approved by the Respondent.

43. Mr Mulchrone submitted that there was a fundamental contradiction at heart of the Applicant's case in that on the one hand he had invited the Tribunal to find that this was a firm in which there was a wholesale failure of supervision on the part of MS but on the other hand he invited the Tribunal to find that there was no need for him to be supervised such that the s43 Order could be revoked. Mr Mulchrone submitted that the weight of the evidence indicated that the Applicant was a paralegal who very much needed formal supervisory control. Mr Mulchrone told the Tribunal that client money had gone into the Applicant's personal bank account and ignorance of the rules could not excuse that. There was no evidence that the Applicant had undertaken training or developed insight such the s43 Order was no longer necessary.

Ground 1

44. Mr Mulchrone submitted that s43 was perfectly clear and that the whole course of conduct was "redolent of dishonesty" and that the Adjudicator was entitled to find that. He reminded the Tribunal that the standard of proof was not the criminal standard.

45. Mr Mulchrone submitted that on the representations and evidence, which included a contemporaneous attendance note by MS, it was perfectly reasonable for the Adjudicator to find that MS had instructed the Applicant that the firm must cease acting for Mr M but that, the Applicant had purported to continue doing so. The Applicant's attempts to deflect blame onto MS for inadequate supervision demonstrated his lack of insight and would justify a s43 order on its own.

46. In respect of Mr U's matter, Mr Mulchrone submitted that the Adjudicator was entitled to find that the Applicant had attempted to mislead the Upper Tribunal by deliberately backdating a letter and statement of facts to 7 May 2017. This finding was supported by the metadata showing the creation of the documents a month later and by the contents of the documents, which were responsive to the striking-out decision of 30 May 2017. The Adjudicator considered the Applicant's claim that he "copied and pasted" a previous letter "without modifying the date" but was entitled to reject it. Mr Mulchrone submitted that this was not a decision which no reasonable adjudicator could have made.

47. Mr Mulchrone noted that there did not appear to be any dispute that the Applicant caused or allowed Mr U to pay funds exceeding £2,800.00 into his personal bank account or that doing so was improper. The issue appeared to be whether the Applicant realised at the time that his treatment of these monies was improper and/or whether his conduct was dishonest. Mr Mulchrone submitted that the Adjudicator was entitled to find that the Applicant knew that it was. He submitted that, given the Applicant's experience in the legal profession, that he was ignorant of the most elementary principles of the Solicitors Accounts Rules.

48. Mr Mulchrone further noted that the representations submitted by the Applicant to the Adjudicator did not criticise the supervision, conduct or actions of MS and they did not suggest that MS's conduct was such that a s43 Order should not be made.

Ground 2

49. Mr Mulchrone submitted that the Applicant's written submissions on the question of bias were "muddled and wrong". He submitted that procedural fairness required that the case against the Applicant be pleaded clearly in advance, especially where dishonesty was alleged so as to enable the Applicant to meet the case. The purpose of setting the allegations out in the notice was not to exert improper influence over the decision maker. Mr Mulchrone reminded the Tribunal that the Adjudicator was independent of the investigation officer.

Ground 3

50. Mr Mulchrone submitted that the precise timing of publication was not a matter capable of vitiating s s43 Order that was otherwise properly made. However, the statutory provisions as to timing did not apply to s43 orders but to different functions of SRA under s44D of the 1974 Act. Mr Mulchrone submitted that the Applicant was entitled and obliged to publish the s43 Order when it took effect in the same way that the Tribunal published its judgment when it imposed s43 Orders. There was also a common law duty to publish in the interests of open justice.

51. Mr Mulchrone told the Tribunal that the decision to publish was not designed to embarrass the Applicant. It was done so that prospective employers could carry out checks on the Applicant before employing him. Mr Mulchrone reminded the Tribunal that there was a criminal liability for employing someone in respect of whom a s43 Order had been made without permission and it was unrealistic to rely on the honesty of someone who had been found to be dishonest to tell them about it. Mr Mulchrone submitted that there had therefore been no breach of Article 8.

52. Mr Mulchrone invited the Tribunal to dismiss the application.

The Tribunal's Decision

General

53. Section 43 of the 1974 Act provided as follows:

> "Control of solicitors' employees and consultants
>
> (1) Where a person who is or was involved in a legal practice but is not a solicitor—
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> …
>
> (b) has, in the opinion of the Society, occasioned or been a party to, with or without the connivance of a solicitor, an act or default in relation to a legal practice which involved conduct on his part of such a nature that in the opinion of the Society it would be undesirable for him to be involved in a legal practice in one or more of the ways mentioned in subsection (1A), the Society may either make, or make an application to the Tribunal for it to make, an order under subsection (2) with respect to that person.
>
> (1A) A person is involved in a legal practice for the purposes of this section if the person—
>
> (a) is employed or remunerated by a solicitor in connection with the solicitor's practice;
> (b) is undertaking work in the name of, or under the direction or supervision of, a solicitor;
>
> …
>
> (3) Where an order has been made under subsection (2) with respect to a person by the Society or the Tribunal—
>
> (a) that person or the Society may make an application to the Tribunal for it to be reviewed, and
> (b) whichever of the Society and the Tribunal made it may at any time revoke it.

(3A) On the review of an order under subsection (3) the Tribunal may order—

(a) the quashing of the order;
(b) the variation of the order; or
(c) the confirmation of the order;

and where in the opinion of the Tribunal no prima facie case for quashing or varying the order is shown, the Tribunal may order its confirmation without hearing the applicant.

…"

54. The Tribunal therefore had no jurisdiction to remit the matter for a re-hearing, as urged upon it by Mr Sykes.

55. The correct approach to a review of a s43 Order was set out in at [38]-[39] of Solicitors Regulation Authority (SRA) v Solicitors Disciplinary Tribunal (Arslan) [2016] EWHC 2862 (Admin):

> "38. I turn to the nature of the Tribunal's task in conducting a review under section 43(3) and an appeal under section 44E. It is not in dispute that the Tribunal was correct to hold that, in both cases, the proper approach was to proceed by way of a review and not a re-hearing. As for what such a review involves, the Tribunal accepted submissions made to it by Ms Emmerson that its function was analogous to that of a court dealing with an appeal from another court or from a tribunal and that it should apply by analogy the standard of review applicable to such appeals which is set out in rule 52.11 of the Civil Procedure Rules. Rule 52.11 makes it clear that a court or tribunal conducting a review should not generally receive new evidence that was not before the original decision-maker, although it may do so if justice requires it; and it should interfere with a decision under review only if satisfied that the decision was wrong or that the decision was unjust because of a serious procedural or other irregularity in the proceedings.
>
> 39. It follows that the Tribunal should not embark on an exercise of finding the relevant facts afresh. On matters of fact the proper starting point for the Tribunal in this case was the findings made by the adjudicator and the evidence before the adjudicator. The Tribunal had to consider whether, on that evidence, the adjudicator was justified in making the factual findings that he did."

56. The Tribunal also had regard to the Guidance Note on Other Powers of the Tribunal (4th Edition – December 2020).

57. The Tribunal noted that the nature of the hearing was a review and not a re-hearing. It also noted that, contrary to Mr Sykes submissions, the appropriate standard of proof before the Adjudicator was the civil standard and not the criminal standard. The Tribunal was therefore satisfied that the Adjudicator had applied the correct standard in this case.

58. The Tribunal also noted, as a preliminary point, that a solicitor's employees were subject to the same duties under the Code of Conduct as solicitors and it rejected Mr Sykes submissions insofar as they suggested otherwise.

59. The Tribunal recognised that a s43 Order was not a sanction but was a regulatory tool to ensure the protection of the public and the reputation of the profession.

60. The test that the Adjudicator was required to apply, and did apply, when considering the allegation 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."

Ground 1

61. This was advanced principally on the basis that the Adjudicator failed to give weight to defaults of the firm that employed the Applicant, specifically MS.

62. The Tribunal noted that the Applicant was an experienced legal executive who had also worked at other firms. There naturally had to be some supervision, but the Tribunal rejected the argument that he needed to be told what to do at all times in order to comply with his obligations. The Tribunal found that the Applicant had not come close to establishing a failure on part of adjudicator to give proper weight to the circumstances. The Adjudicator had not disregarded MS's role as it was clear that MS provided evidence which was before the Adjudicator. The Adjudicator had preferred MS's evidence over the Applicant's, having considered it carefully. The Tribunal was satisfied that there was ample evidence to show that the relevant matters were considered and weighed by the Adjudicator. The Adjudicator was therefore entitled to reach conclusions she did.

63. The Tribunal further noted that in any event, misconduct on the part of a solicitor could not negate misconduct on the part of an employee or shield that employee from being made subject to a s43 Order where misconduct had been established on the part of him/her. The Tribunal therefore rejected the submission by Mr Sykes that the provisions of s43 were in some way unclear or required further interpretation.

64. The Tribunal rejected Ground 1.

Ground 2

65. The Applicant's oral submissions on bias appeared to be based on potential not actual bias. In either case the Tribunal found no basis for this complaint at all. The fact that the Adjudicator found against the Applicant and rejected his evidence could not, in itself, amount to evidence of bias or the perception of bias. The logistical extension of such an argument would mean that any unsuccessful party in litigation would have been the victim of bias.

66. The Applicant had suggested that the Adjudicator had only looked for points that went against him. However the Tribunal was satisfied that the Adjudicator had considered all the evidence before him/her, had weighed it carefully and had found against him. There was no evidence of bias or pre-determination. The Adjudicator's role was not to investigate but to assess the evidence gathered in the course of that investigation and decide whether to make a s43 Order or not depending on the conclusions drawn from that evidence.

67. The Tribunal rejected Ground 2.

Ground 3

68. The Tribunal did not consider that the publication provisions to which the Applicant referred were applicable to decisions made pursuant to s43 of the 1974 Act. However, in any event the decision as to publication only arose after the decision to make a s43 Order had been taken. The Tribunal considered that insofar as there had been a misunderstanding about the timescales for publication, this could not vitiate the s43 Order and did not undermine the basis on which it had been made.

69. The Tribunal rejected Ground 3.

70. The points made in "mitigation" by Mr Sykes were misplaced as they appeared to have been made on the premise that the s43 Order was a punitive measure, which it was not. The Tribunal had been referred to Horwood, but this did not assist the Tribunal as it was not a binding authority and the circumstances of the two cases were not the same.

71. The Tribunal determined that it was appropriate to confirm the s43 Order and to refuse the application to revoke it. There had been no application to vary the s43 Order, but had there been such an application, that too would have been refused.

Costs

72. Mr Mulchrone sought the Respondent's costs in the sum of £2,500 plus VAT. This was a fixed fee case on which around 77.2 hours had been spent on preparation and advocacy. This worked out at an equivalent hourly rate of £32.

73. Mr Sykes submitted that the figure of 77 hours was not understood. He noted that 36 hours had been spent reviewing the documents. He submitted that the Respondent's Answer had been brief and had not dealt with the many issues arising in this case. He described the hours claimed as "wildly exaggerated" and told the Tribunal that he

would have expected to see around 15 hours for this. Mr Sykes submitted that the fixed fee was confusing and that a total of 25 hours instead of 77 would be reasonable. He submitted that the Respondent's costs should be no higher than £1,500.

74. Mr Sykes invited the Tribunal to further reduce those costs to £200 take account of the Applicant's means. He told the Tribunal that the Applicant had not worked for 15 months.

75. The Tribunal reviewed the cost schedule and noted that the Respondent's claim for costs of £2,500 plus VAT compared to the figure of £2,250 that the Applicant would presumably have sought had he been successful.

76. The Tribunal noted that the equivalent hourly of £32 was very modest. The costs claimed were clearly consistent with the work undertaken and Mr Sykes had produced no evidence to substantiate his suggestion that the Respondent's hours or costs had been "exaggerated".

77. The Tribunal further noted that the Applicant had provided no statement of means. He had brought the proceedings and could have submitted evidence of his means in advance of the hearing. The Tribunal noted that the Respondent took a reasonable and proportionate approach to enforcement and there was no basis to limit the Respondent's ability to seek to recover its costs in full. The Tribunal therefore ordered the Applicant to pay the Respondent's costs in the sum claimed.

Statement of Full Order

78. The Tribunal Ordered that the application of Roger Patrick Diavewa, for revocation of a S.43 Order be **REFUSED** and it further Ordered that he do pay the costs of the response of the Law Society to this application fixed in the sum of £3,000.00

Dated this 19th day of February 2021
On behalf of the Tribunal

P Booth
Chair