SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12138-2020

BETWEEN:

ERROL RICHARD SHULMAN Appellant

and

SOLICITORS REGULATION AUTHORITY Respondent

Before:

Ms A Horne (in the chair)
Mr D Green
Mr R Slack

Date of Hearing: 11 & 23 February 2021

Appearances

The Appellant represented himself.

Alastair Willcox, solicitor, of the Solicitors Regulation Authority, The Cube, 199 Wharfside Street, Birmingham, B1 1RN, for the Respondent.

APPEAL JUDGMENT

Introduction

1. By a Notice of Appeal brought by the Appellant pursuant to section 44E of the Solicitors Act 1974 (as amended) ("the Act") dated 19 October 2020, the Appellant appealed against a decision of an Adjudication Panel ("the AP") of the Respondent dated 23 September 2020. The Appellant sought to quash that decision.

The Legal Framework

2. The procedure for the hearing of the Appeal was governed by the Solicitors Disciplinary Tribunal (Appeals and Amendment) Rules 2011 ("the Appeal Rules") which came into force on 1 October 2011.

3. The Tribunal had power under section 44E(4) of the Act to make such order as it thought fit, and such an order might in particular:

   (a) affirm the decision of the Society;

   (b) revoke the decision of the Society;

   (c) in the case of a penalty imposed under section 44D(2)(b), vary the amount of the penalty;

   (d) in the case of a solicitor, contain provision for any of the matters mentioned in paragraphs (a) to (d) of section 47(2);

   (e) …..

   (f) make such provision as the Tribunal thinks fit as to payment of costs.

4. Additionally, the Tribunal was led by the legal principles formulated in Solicitors Regulation Authority v Solicitors Disciplinary Tribunal and Arslan and the Law Society (Intervening Party) [2016] EWHC 2862 summarised below:

   - The role of the Tribunal was to review the Adjudicator's decision, rather than to conduct a rehearing.

   - That review function was analogous to that of a court dealing with an appeal from another court or tribunal pursuant to Rule 52.11 of the Civil Procedure Rules. The case law that had developed under Rule 52.11 in relation to (i) the difference between a review and rehearing and (ii) the nature of a review would inform the correct approach that the Tribunal should adopt when conducting a review.

   - The Tribunal should interfere with the Respondent's 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.

   - 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 was the findings made by the Adjudicator and the evidence before the Adjudicator. Whilst the Tribunal

could reach a different conclusion, the consideration was whether, on that evidence, the Adjudicator was justified in making the factual findings that he did.

- Where a challenge was made to conclusions of primary fact, the weight to be attached to the findings of the original decision-maker would depend upon the extent to which that decision-maker had an advantage over the reviewing body; the greater that advantage, the more reluctant the reviewing body should be to interfere.

- Where the original decision involved an evaluation of the facts on which there was room for reasonable disagreement, the reviewing body ought not generally to interfere unless it was satisfied that the conclusion reached lay outside the bounds within which reasonable disagreement was possible.

The Burden and Standard of Proof

5. The burden of proving that the AP decision was wrong or that the decision was unjust because of a serious procedural or other irregularity in the proceedings lay with the Appellant. The standard to which he was required to prove that the decision was unjust was the civil standard, namely that on a balance of probabilities it was more likely than not that the AP decision was unjust.

Relevant Background

6. On 4 June 2020 an Adjudicator of the Solicitors Regulation Authority ("SRA") determined that:

   - By failing to comply with a signed agreement dated 4 October 2018 in Ujah v Shulman within the timeframe stipulated, Mr Shulman breached Principles 2 and 6 of the SRA Principles 2011 and failed to achieve Outcomes 11.1 and 11.2 of the SRA Code of Conduct 2011) other than the alleged breach of Principle 2 and failure to achieve Outcome 11.1 of the SRA Code of Conduct 2011.

   - Mr Shulman be sanctioned to a financial penalty of £1,000.00.

   - Publication of the internal sanction was required.

   - Mr Shulman do pay the SRA costs, with regards to the investigation of the matter, in the sum of £600.00.

7. The Adjudicator decision shall be referred to as the First Instance Decision for the purpose of this judgment.

8. The Appellant applied for a review of the First Instance Decision in respect of the financial penalty imposed and publication of the same. The review was heard by an AP of the SRA on 15 September 2020. The AP decision was dated 23 September 2020. The AP dismissed the appeal in respect of the financial penalty and upheld the First Instance Decision. As the Appellant made no application for the AP to revoke publication of the First Instance Decision, no direction was made in that regard.

Relevant Facts

9. On 4 September 2017, the SRA received a report from Singletons Solicitors, who were instructed by Mrs U, about the Appellant's conduct on a probate matter relating to the estate of Mr U ("the deceased"), who died intestate on 19 December 1999. The Appellant had been appointed in his professional capacity as the Personal Representative of the deceased's estate. Chesham & Co ("the Firm") was instructed to represent the Appellant (in his capacity as Personal Representative of the estate) in relation to the litigation with Mrs U arising from the probate matter. The Appellant was the sole Principal of the Firm. The report alleged that the Appellant was in breach of a Court Order dated 3 May 2017, which required the Appellant, in his capacity as Personal Representative of the estate to:

    (i) Pay Mrs U's costs as agreed.

    (ii) Distribute any of the cash assets of the estate.

    (iii) Provide to Mrs U an executed transfer of a property owned by the deceased ("the Property").

    (iv) Deliver to Singletons a bill of costs, breakdown of costs and details of disbursements charged to the estate.

10. An Investigation Officer ("IO") at the SRA investigated the report ("the First Investigation") which resulted in an "Explanation of Conduct" letter being sent to the Appellant on 20 June 2018. The broad allegations to which the Appellant was required to respond were that, in failing to comply with a Court Order, the Appellant had breached Principle 2 (integrity), Principle 6 (undermined public trust in him and in the provision of legal services) and failed to achieve Outcome 5.3 of the SRA Code of Conduct (compliance with court orders which place obligations on you).

11. The Appellant responded on 2 July 2018, and broadly asserted that he had not breached the Court Order as Mrs U had "failed to fulfil her side of the bargain" in that the duty was on her to apply to Her Majesty's Land Registry to register the transfer of the Property. The Appellant further asserted that he would pay Mrs U's costs upon registration of the transfer or upon receipt of an undertaking to register the transfer.

12. The IO concluded that the Appellant's failure to comply with the terms of the order dated 3 May 2017 had arisen due to a misunderstanding as to its terms, that his conduct had a low-level public impact and that it was unlikely to be repeated. The IO therefore issued a Letter of Advice ("LoA") to the Appellant on 20 November 2018 which stated:

    "…

    Based upon the information I have, it is my view that you have:

    - Failed to comply with Principle 6 …
    - Failed to achieve Outcome 5.3 …

> I note that an agreement was recently reached between all parties and that you have now made payment to Singletons, 18 months after the Order was made…
>
> Although no further action is being taken this letter does constitute a formal record of the position and we will retain a copy. We have the power to review the position if we receive further information. We can also take this letter into account when deciding appropriate action if we receive any future allegations or concerns…"

13. Singletons made a further report ("the second report)" to the SRA about the Appellant on 20 December 2018, which complained that he had failed to comply with an agreement dated 4 October 2018 ("the Agreement") in the probate litigation. The Agreement provided that:

> "…
>
> THE PARTIES HEREBY AGREE:
>
> 1. …
> 2. [Mrs U] will execute the transfer [of the Property] and deliver it to [the Appellant] within 14 days…
> 3. [The Appellant] will sign the transfer and submit it to the Land Registry for registration within 14 days of receipt from [Mrs U] …
> 4. …"

14. Singletons stated that the Appellant had failed to register the transfer as agreed.

15. The IO re-opened the First Investigation and embarked on a Second Investigation in respect of the second report. The Appellant was notified of the same by way of a letter dated 11 February 2019. Both investigations culminated in an "Explanation of Conduct" letter being sent to the Appellant on 15 May 2019, which resurrected the allegations arising out of the First Investigation. The Appellant responded by letters dated 6 June 2019 and 12 July 2019. He broadly asserted that (a) there was no justification for re-opening the First Investigation and (b) he was justified in not registering the transfer, despite having agreed to do so, because (i) no assurance had been given to him that Mrs U would sign the transfer, (ii) the Order dated 3 May 2017 required Mrs U (not him) to register the transfer, (iii) the terms of the letter dated 4 October 2018 did not amount to an undertaking and (iv) he had now registered the transfer.

16. The matter was considered by a single SRA Adjudicator ("the Adjudicator") on 4 June 2020. The Adjudicator:

(i) Made no findings in relation to the allegations arising from the first report; that by failing to comply with the Court Order dated 3 May 2017 within a reasonable time, [the Appellant] breached Principles 2 and 6 of the SRA Principles 2011 and failed to achieve Outcome 5.3 of the SRA Code of Conduct 2011);

(ii) Found allegation two proven (By failing to comply with a signed agreement dated 4 October 2018 in Ujah v Shulman within the timeframe stipulated, Mr Shulman

breached Principles 2 and 6 of the SRA Principles 2011 and failed to achieve Outcomes 11.1 and 11.2 of the SRA Code of Conduct 2011) other than the alleged breach of Principle 2 and failure to achieve Outcome 11.1 of the SRA Code of Conduct 2011

17. As set out above, the Adjudicator directed the Appellant to pay a financial penalty in the sum of £1,000.00, costs of £600.00 and ordered that the decision be published.

18. The Appellant subsequently applied for an AP review of the Adjudicator's decision. The AP considered the appeal on 15 September 2020 and gave its determination on 23 September 2020. The AP dismissed the review and upheld the Adjudicator's decision as neither wrong nor unjust.

The Appellant's Appeal

19. Ground 1: "Commercial Common Sense" and context

19.1 The Appellant submitted that the AP failed to construe the agreement set out in the letter of the 4 October 2018 against the factual background and matrix of circumstances in which that letter was written. The relevant circumstances included the following:-

(i) The terms of Clause 3 of the Schedule to the Tomlin Order ("the Order") dated 3 May 2017, which placed the responsibility for registering the transfer on Mrs U.

(ii) Mrs U was unwilling to register the transfer.

(iii) The imminence of the hearing on 6 October 2018, which was the return date for the Appellant's application for an Order requiring Mrs U to sign the transfer.

(iv) The Appellant had fully prepared for the hearing having filed and served a witness statement, a skeleton argument and an application bundle. Singletons were totally unprepared, as Mrs U had failed to file and serve a witness statement or give them instructions.

19.2 Construing the language of the letter in the above context with commercial common sense, the only reasonable conclusion that the AP could have arrived at is that the parties intended that the Appellant should have permission to register the transfer (not that he was so obliged) as he could not rely upon Mrs U giving instructions to Singletons to do so.

20. Ground 2: The Purported Undertaking/Agreement

20.1 The Appellant submitted that there was no evidence upon which the AP could have found that Mrs U trusted the Appellant as a solicitor to register the transfer. Mrs U was not the Appellant's client, or former client, but his litigation opponent who had appointed Singletons to protect her interests.

20.2 There was no evidence that Singletons required the Appellant, or were in any position to require the Appellant, to provide a professional undertaking in his capacity as a solicitor to register the transfer. Mrs U (for reasons that are unclear) was resolutely

opposed to the registration of the transfer, and it was therefore contrary to the evidence to find that she relied upon any professional undertaking by the Appellant to do so ,and no such allegation had been made by her.

20.3 Mrs U was free to register the transfer, if not obligated to do so, pursuant to the Schedule to the Tomlin Order. Singletons had not provided any evidence that they intended the letter of 4 October 2018, to impose a professional undertaking on the Appellant to register the transfer.

20.4 The Appellant contended that the central issue, which was overlooked by the Adjudicator and the AP, was whether Singletons intended to obtain a professional undertaking from the Firm and if so, whether that bound the Appellant. The Appellant maintained that at the material time he was acting on behalf of Mr U's estate as a "personal representative" and not in his capacity as a solicitor. He stated that in his personal representative capacity he instructed the Firm so as to ensure that his costs of dealing with the litigation were adequately met. The Appellant submitted that there was no intention on the part of Singletons to obtain and rely upon an undertaking from the Appellant in his capacity as a solicitor. The content of the letter dated 4 October 2018 did not amount to a professional undertaking; it was simply a contractual agreement.

20.5 The Appellant submitted that the Adjudicator wrongly assumed that, because the Appellant had agreed that he would apply to register the transfer, it necessarily followed that such agreement constituted a professional undertaking on the part of the Firm/Appellant in his capacity as a solicitor. That erroneous assumption was, the Appellant submitted, adopted by the AP and rendered its decision wrong.

21. Ground 3: The Appellant's role in the underlying litigation

21.1 The Appellant submitted that the AP was wrong to treat the distinction between the Appellant's role as a party to the proceedings and his position as principal of the Firm as academic or technical, and one which could not be applied in practice. He further submitted that the AP ignored the authorities cited by him in his Grounds of Review, which made clear that the distinction had long been recognised by the Courts, was based on public policy, was not difficult to apply in practice and certainly not in the circumstances of this case.

22. Ground 4: Bias

22.1 The Appellant submitted that the AP failed to apply properly or at all the test set out in Porter v Magill [2002] 2 AC 357, HL to the issue of whether the Respondent's decision to allege the Appellant was in breach of a professional undertaking was flawed by apparent bias. Viewed from the perspective of a reasonable and well informed observer with knowledge of the facts there was, he submitted, a real risk that such observer would regard the Respondent's decision as biased having regard to:

- The terms of Ms Ward's email to Singletons dated 9 January 2019, which pre-judged the outcome of the second investigation before it had taken place.

- The striking contrast between the terms of the Respondent's LoA dated 20 November 2018 and their investigation report, without any further investigation of the facts.

- Their admission (in their response to the Grounds of Review) that they believed the Appellant's delay in registering the transfer was a deliberate disregard of their letter of 20 November 2018 (which was a misconception).

22.2 The Appellant therefore submitted that there was ample material upon which the AP should have found the Porter v Magill test to have been satisfied, and that it should have directed that the Respondent's file relating to the investigation be disclosed so that the issue of bias could be properly investigated on all available factual material.

22.3 The Appellant further submitted that there was evidence before the AP which the Adjudicator was not privy to, namely the Investigating Officer ["IO"]'s response to the Appellant's application for an AP review. The IO stated in that response that the First Investigation was re-opened because the Appellant had failed to comply with the LoA. The AP should, the Appellant submitted, have regarded this incorrect view as "compromising the fairness of the SRA's investigation and integrity" of the proposed sanction.

22.4 The Appellant submitted that if there was an "instruction" in the LoA in respect of the transfer of the Property, with which he had failed to comply that alleged failure should have been raised with him, and his comment sought, prior to re-opening the investigation in that regard. The failure to do so lent weight, he submitted, to the contention that the whole process was unfair, as the SRA should have:

(i) Notified him of the second Singletons complaint dated 20 November 2018;

(ii) Invited his representations in respect of the new complaint which alleged a lack of integrity on his part; and

(iii) Then proceeded to investigate the second complaint.

22.5 The failure to do so was, in the Appellant's submission, a continuation of the bias demonstrated in Ms Ward's email to Singletons, which tainted the IO's investigation, which in turn was adopted in the First Instance Decision of the Adjudicator. The Appellant contended that the AP continued that stream of bias, as evidenced by its finding that:

> "…The additional allegation was raised by the SRA following Mr Shulman's failure to sign the transfer as instructed within the letter of advice dated 20 November 2018…"

22.6 The Appellant submitted that the AP did not determine or consider his representations on that point, and that if it had done so in line with the test promulgated in Porter v Magill it "might have found in [his] favour".

23. Ground 5: The LoA dated 20 November 2018 and sanction

23.1 The Appellant submitted that the AP was wrong and "Wednesbury unreasonable" to uphold the sanction determined by the Adjudicator, as it took into account incorrectly and irrelevantly that the alleged breach of the undertaking was not the first occasion that this had happened.

23.2 He submitted that the LoA made no finding against him, he had 47 years of practice with no previous record of any breach of any SRA principles. The Appellant stated that he was unfairly deprived of the opportunity to comment on that incorrect analysis, and to remedy what he considered to be an erroneous conclusion reached that he "misunderstood the terms of the Court Order".

23.3 The Appellant contended that the AP erroneously relied upon the LoA to determine that he had embarked on a pattern of misconduct, when it should have found that the Adjudicator's finding was an isolated incident. He submitted that the LoA concluded that he had misunderstood the terms of the 3 May 2017 Court Order in unusual circumstances, and that his intention had been to conclude the administration of Mr U's estate. Those conclusions did not, he contended, amount to a previous finding of professional misconduct that could have properly been relied upon when determining sanction.

23.4 The Appellant further submitted that it was "Wednesbury unreasonable" for the AP not to have taken into account the SRA's Enforcement Strategy when determining sanction.

The Respondent's Response

24. Ground 1: "Commercial Common Sense" and context

24.1 Mr Willcox submitted that there could be no suggestion that the AP failed to construe the October 2018 agreement against the factual background in which it was written. He further submitted that the AP had fully appreciated all of the relevant facts when it was interpreting the 4 October 2018 agreement as part of its review. It was therefore well aware of the circumstances of the case. Mr Willcox invited the Tribunal to take note of the fact that the Appellant had not challenged the factual background set out by the AP in its decision.

24.2 Mr Willcox stated that the AP read and considered all of the documents filed in respect of the review namely:

- The Notice dated 19 December 2019 prepared by the IO and all of the appendices to it.
- The Appellant's Grounds of Review dated 2 July 2020 and 7 July 2020.
- The IO's review report further to the Appellant's review grounds.
- The Appellant's further submissions, one of which was undated and the other dated 2 September 2020.

- Statement of KB dated 8 September 2020.

24.3 Mr Willcox contended that the AP conducted a full review of the First Instance Decision and determined that it was neither wrong nor materially flawed. It was entitled to so find on the evidence before it.

24.4 Mr Willcox submitted that it was not for the AP to interpret the October 2018 agreement "with commercial common sense," as the Appellant suggested, but rather to interpret it on the facts of the case, which it duly did.

25. Ground 2: The purported Undertaking/Agreement

25.1 Mr Willcox reminded the Tribunal that the Adjudicator found that the wording of the October 2018 agreement did constitute an undertaking by the Appellant. The AP agreed with that finding and, having noted that the explanation the Appellant advanced for the review differed from that which he had proffered ahead of the First Instance Decision, "found no merit in [the Appellant's] argument that he entered into the October 2018 agreement in his capacity as a defendant, and not as a solicitor."

25.2 Mr Willcox referred the Tribunal to the "Definition of undertaking taken from the SRA Glossary 2012" which provided that:

> "**undertaking**
>
> means a statement given orally or in writing, whether or not it includes the word "undertake" or "undertaking", made by or on behalf of you or your firm, in the course of practice, or by you outside the course of practice but as a solicitor or REL to someone who reasonably places reliance on it, that you or your firm will do something or cause something to be done, or refrain from doing something."

25.3 The AP found that the Appellant had entered into the 4 October 2018 agreement as a solicitor, Mrs U was entitled to rely on his trusted status as a solicitor, and to believe that he would honour a signed bilateral agreement.

25.4 Mr Willcox submitted that that the Tribunal had no reason to interfere with the AP decision on that point, as it was neither wrong nor unjust due to serious procedural or other irregularity.

26. Ground 3: The Appellant's role in the underlying litigation

26.1 Mr Willcox made plain that he was unable to respond to the Appellant's assertions that the AP failed to take into account the authorities (relating to distinction between being a party to litigation and a firm instructed in litigation) as no authorities had been specified.

26.2 In any event, the AP was quite clear on the point it was making. It did not accept the Appellant's explanation that he did not comply with the October 2018 agreement because it was not an undertaking made in his capacity as a solicitor. It noted that he had previously advanced a different explanation. It found that he had given the

undertaking in his capacity as a solicitor and that Mrs U had been entitled to rely on that.

26.3 Mr Willcox submitted that in those circumstances, the AP found that it would be an academic/technical exercise to draw a distinction as to whether the Appellant had entered into the October 2018 agreement as a defendant or as solicitor and that such a distinction would be entirely artificial in practice.

26.4 Mr Willcox contended that was a finding which the AP was quite entitled to make, having considered all of the evidence, and the Tribunal could be satisfied that it need not be disturbed.

27. Ground 4: Bias

27.1 Mr Willcox submitted that the AP gave due consideration to the Appellant's arguments, based on the test for bias set out in the case of Porter v Magill, that the Adjudicator of first instance should have ordered a fresh investigation because the SRA's e-mail to Singletons Solicitors dated 9 January 2019 created "a real risk, that a fair minded and informed observer would regard this letter as compromising the neutrality and impartiality of the further investigation." That email stated:

> "…Having looked at the decision [to issue a LoA] and the additional information that you have sent in [the second report], I have decided that we should re-open the investigation and make some further enquiries with a view to imposing a regulatory sanction.
>
> I will be passing the matter back to [the original IO] to take those steps…"

27.2 The AP, having carefully considered the matter, found "...nothing whatsoever in the email to suggest that the neutrality and impartiality of the reopened investigate (sic) had been or would be jeopardised by it." The AP determined that the email "was merely a courtesy communication from the SRA to Singletons notifying them that their email of complaint and the new information they provided had resulted in the reopening of the investigation." It also made the point in its decision that it is for the SRA to formulate the allegations that are put before the Adjudicator, and not for the complainant to do so.

27.3 Mr Willcox therefore submitted that the AP's finding in respect of that email and potential bias was neither wrong nor unjust because of a serious procedural or other irregularity. Therefore, the Tribunal should not interfere with its assessment on that point.

28. Ground 5: The LoA dated 20 November 2018 and sanction

28.1 Mr Willcox submitted that the Appellant had not filed or served a copy of the case of Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223. Neither had the Appellant explained how it, a standard of unreasonableness used in assessing an application for judicial review of a public authority's decision, applied to the s44E application. In any event, Mr Willcox did not accept that the AP acted unreasonably in upholding the sanction determined by the Adjudicator.

28.2 The SRA issued the Appellant with a LoA dated 20 November 2018 arising out of his failure to comply with a 2017 Court Order. In that letter, the IO made it clear that:

(i) in his view, the Appellant had breached Principle 6 of the SRA Principles 2011 and failed to achieve Outcome 5.3 of the SRA Code of Conduct 2011;

(ii) his letter constituted a formal record of the position, and that the SRA would have the power to review the position if it received further information; and

(iii) that the SRA could take the letter into account "when deciding appropriate action if we receive any future allegations or concerns."

28.3 When taking account of the LoA, the Adjudicator made it clear that he was considering previous "non-compliance" and did not specify a breach of an undertaking. Indeed, the previous non-compliance had not been in respect of a breach of an undertaking.

28.4 The Appellant had been on notice since November 2018 that the LoA would be considered if any further concerns were brought to the SRA's attention in the future.

28.5 Mr Willcox submitted that the Adjudicator was right to take the LoA into account when applying the SRA's Enforcement Strategy ("the Enforcement Strategy") and deciding upon a financial penalty of £1,000.00. The Enforcement Strategy states, under the heading of "Regulatory history and patterns of behaviour":

> "…Once we have identified a breach of our standards or requirements, a key factor when deciding what to do next will be whether the behaviour forms part of a pattern of repeated misconduct or regulatory breaches…for this reason we will review our records for previous complaints and findings against the individual or firm…"

28.6 Mr Willcox submitted that it therefore followed that the AP was right not to disturb the financial penalty imposed by the Adjudicator. He further submitted that the Tribunal should do likewise.

28.7 In conclusion Mr Willcox submitted that the AP was justified in reaching the decision it did, having conducted a review of the matter. There were no serious procedural or other irregularities in the proceedings of this case which would entitle the Tribunal to interfere with the decision of the Adjudication Panel.

28.8 Further, the Adjudication Panel which sat on 15 September 2020 considered the matter in full. Therefore, the reviewing Tribunal should not disturb the decision unless it concludes that it lies outside the bounds within which reasonable disagreement is possible.

28.9 For the reasons set out above, and in light of the Applicant's conduct, it was proportionate and proper both for the protection of the public and to maintain the reputation of the solicitors' profession for the decision of the Adjudication Panel to remain.

The Tribunal's Findings

29. The Tribunal noted that the Adjudicator and the Adjudication Panel had made their respective decision based on the civil standard of proof. The parties agreed that when considering the appeal, in accordance with the findings in Arslan, the Tribunal should also adopt the civil standard.

30. The parties also agreed that the role of the Tribunal was to review the decision and not to rehear the case. It was also accepted by the parties that the Tribunal should only interfere with the decision where it was wrong or unjust due to a serious procedural error or other irregularity. When assessing the AP's decision, the Tribunal was required to consider whether the decision was outside the bounds within which reasonable disagreement was possible.

31. The Tribunal considered all the documents submitted, together with the oral and written submissions of both parties.

32. Ground 1: "Commercial common sense" and context

32.1 The Tribunal found that the Appellant was incorrect in his assertion that the Order of 30 May 2017 imposed an obligation on Mrs U which she failed to fulfil. The Order of 30 May 2017 did not place any obligations on Mrs U once she had received the signed transfer from the Appellant. The Tribunal found that the Appellant was retrospectively seeking to introduce new terms into the Order by arguing both at the time and subsequently that it imposed obligations on Mrs U, in order to justify his own non-compliance with its terms. The Appellant's interpretation of the Order was erroneous. In any event the findings of the AP, which the Tribunal was required to review, were predicated on the Appellant's non-compliance with the terms of the 4 October 2018 letter, by which time matters had moved on from the parties' actions (or inactions) in relation to the May 2017 Order.

32.2 The Tribunal determined that the letter of 4 October 2018 ("the Letter") made plain that responsibility for registering the Property fell squarely on the Appellant namely:

> "[1] ….
>
> [2] [Mrs U] will execute a transfer in the form as attached and deliver it to [the Appellant] within 14 days of the date of this letter;
>
> [3] [The Appellant] will sign the transfer and submit it to the Land Registry for registration within 14 days of receipt from the [Mrs U]; and
>
> [4] The parties do bear their own cost of the application…"

32.3 The Tribunal proceeded on the basis that, irrespective of any earlier obligations, the Letter transferred any obligation in relation to registration of the Property onto the Appellant.

32.4 The Tribunal rejected the Appellant's assertions that the AP failed to construe the Letter against the context of the matter or with "commercial common sense".

32.5 The Tribunal was satisfied that the AP considered all of the documents filed by the parties for its review of the First Instance Decision. There was no evidence before the Tribunal to suggest that the AP did not fully consider all of the documents before it when reviewing the First Instance Decision.

32.6 The Tribunal considered the argument that the AP should have applied "commercial common sense" to be unmeritorious. The Letter was essentially a sensible agreement reached between the parties, of which the Appellant sought the Court's endorsement by way of a letter dated 5 October 2018, which stated:

> "…We refer to this afternoon's application hearing. The parties have agreed that the application be withdrawn on the terms set out in the letter attached [the Letter]. Can you please place this before the District Judge…"

32.7 The nature and extent of the obligations placed on both parties by the Letter were plain from its face, and there were no additional considerations, commercial or otherwise, which needed to be brought to bear in order to interpret the terms of the agreement. In any event, none of the factors relied on by the Appellant, as set out in paragraphs 19.1-19.2 above, supported an interpretation that the Appellant was to have permission to register the transfer (because Mrs U had proved herself unwilling to do so). Had that been the parties' intention, the agreement would have been drafted accordingly. The Letter clearly placed an obligation on the Appellant to register the transfer, and to do so within 14 days of receiving it from Mrs U.

32.8 The Tribunal therefore found that the AP's interpretation of the agreement was correct, and concluded that the Appellant had not discharged the burden of proving on the balance of probabilities that the AP decision was wrong or unjust because of a serious procedural or other irregularity in the proceedings.

32.9 The Tribunal therefore dismissed the Appellant's first ground of appeal.

33. <u>Ground 2: The purported Undertaking/Agreement</u>

33.1 The Tribunal carefully considered the Appellant's submissions which appeared to be:

(a) In entering into the agreement contained in the Letter he was acting as a Personal Representative to Mr U's estate and not in his capacity as a solicitor.

(b) The Letter did not represent a formal undertaking on the part of his Firm.

(c) Singletons never sought a professional undertaking from the Firm.

(d) The AP was wrong to conclude that Mrs U "trusted" the content of the Letter.

33.2 The AP concluded that:

> "…The [AP] finds no merit in Mr Shulman's argument that he entered into the October 2018 agreement in his capacity as a defendant, and not as a solicitor. It may be possible to distinguish the two in an academic or technical sense, but it is an entirely artificial distinction to draw in practice. Mrs Ujah was entitled to rely on Mr Shulman's trusted status as a solicitor and to believe that he would honour a signed bilateral agreement…"

33.3 The Tribunal enquired of the Appellant, in the course of his submissions, whether he was appointed as a Personal Representative of Mr U's estate because of his solicitor status. The Appellant confirmed that was correct, and that he had instructed his Firm to act for him in his capacity as Personal Representative. In those circumstances the Appellant was acting in his capacity as a solicitor whether he was entering into an agreement as a professional Personal Representative or as a solicitor/Firm instructed by himself in that capacity. On those facts the Tribunal found no reason to interfere with the AP's conclusion that the distinction between the Appellant's roles as a professional Personal Representative and as solicitor on the record for himself as Personal Representative was artificial and bore no practical difference. The Tribunal agreed that the Appellant acted at all times and in each of his varying roles in the underlying proceedings in his capacity as a solicitor.

33.4 The AP described the Letter as a "signed bilateral agreement" as opposed to a professional undertaking. The Appellant submitted the Letter to the court on 5 October 2018, for endorsement of its terms in disposal of the application due to be heard the following day. The Tribunal noted that the "bilateral agreement" contained all of the constituent elements of an undertaking as described in the SRA glossary referred to by Mr Willcox. The Tribunal determined that ultimately it mattered not whether the Letter was a professional undertaking or an agreement entered into by a solicitor, as the failure found by the AP was that the Appellant did not do what he said he would do (namely sign and then submit the transfer to the Land Registry within 14 days of receiving it from Mrs U). That failure was serious whether the obligation was treated as one entered into by a solicitor and incorporated in terms filed with the Court, or as an undertaking. The Tribunal determined that the AP's finding in that regard was proper in all of the circumstances.

33.5 The Tribunal did not consider that the Appellant's submissions regarding Singletons not seeking a professional undertaking from him were of relevance. The terms of the obligation entered into by the Appellant (in whichever of his professional capacities he entered into it) contained all the constituent parts of an undertaking. It was not necessary for his opponent's solicitors to have directly required him to give an undertaking for the agreement to amount to one. In any event, the AP had not approached the failure to comply with the obligation as a breach of an undertaking. Moreover, the Tribunal found that the Appellant had misrepresented the AP's findings in respect of Mrs U's reliance on the Letter. He submitted that the AP found that she "trusted" the content, when in fact it found that she was "entitled to trust" the Appellant to comply with its content. The Tribunal concurred with the AP's finding on that point, in that a member of the public was entitled to trust that a solicitor would comply with the terms of an agreement set out on the Firm' headed paper and filed at court for endorsement.

33.6 The Tribunal concluded that the Appellant had not discharged the burden of proving on the balance of probabilities that the AP's decision was wrong or unjust because of a serious procedural or other irregularity in the proceedings.

33.7 The Tribunal therefore dismissed the Appellant's second ground of appeal.

34. Ground 3: The Appellant's role in the underlying litigation

34.1 The Tribunal noted that there was some overlap between Ground 2 and Ground 3 in respect of the Appellant's role in the underlying litigation. The Tribunal determined that the Appellant was appointed Personal Representative to Mr U's estate because of his solicitor status, and that he proceeded (on the Appellant's own case) to instruct his own Firm to engage in inter party communications and communications with the Court. On that basis the Tribunal determined that the AP was entitled to find that, on the given facts, any distinction between the Appellant's roles as a solicitor or Personal Representative was artificial and/or academic.

34.2 The Appellant referred to authorities that he prayed in aid before the AP to support his contention that the Courts recognised that the two roles were distinct and capable of being recognised as such. Other than the bald assertion to that effect before the Tribunal, the Appellant did not direct the AP or the Tribunal to the authorities upon which he sought to rely. The Tribunal therefore found no reason to interfere with the AP's decision on that issue.

34.3 The Tribunal concluded that the Appellant had not discharged the burden of proving on the balance of probabilities that the AP decision on this issue was wrong or unjust because of a serious procedural or other irregularity in the proceedings.

34.4 The Tribunal therefore dismissed the Appellant's third ground of appeal.

35. Ground 4: Bias

Ms Ward's email

35.1 The Tribunal considered whether Ms Ward's email to Singletons dated 9 January 2019 demonstrated bias. That email stated:

> "…Having looked at the decision and the additional information that you have sent in, I have decided that we should reopen the investigation and make some further enquiries with a view to imposing a regulatory sanction…"

35.2 The Tribunal acknowledged that the email was clumsily worded. It could be read as suggesting that Ms Ward had pre-determined the outcome of the SRA's investigation, but the Tribunal considered that she was in fact intending to explain to the complainant the SRA's processes and that the imposition of a regulatory sanction could be the conclusion of the investigation. It should have been written in more careful terms. Nevertheless, the Tribunal was told by Mr Willcox that Ms Ward played no part in the investigation which followed, the recommendation arising therefrom, or the ultimate outcome. The Applicant had submitted that Ms Ward was a Team Leader and as such was bound to have discussed the Singletons complaints with the IO. The Tribunal did

not consider that there was any indication that this had happened, or that the IO's investigation had been tainted. This was particularly so given that the Tribunal concluded that Ms Ward's email did not demonstrate bias, but was the result of poor drafting.

35.3 The Tribunal therefore rejected the Appellant's assertion that Ms Ward pre-judged the outcome of the re-opened investigation (in that she stated "with a view to imposing a regulatory sanction") and tainted the tenor of the re-opened investigation by having discussed the same with the IO. The Tribunal did not consider that demonstrated bias and concluded that investigations are normally commenced with a view to the imposition of a regulatory sanction (where appropriate). That is the point of the process. Whilst Ms Ward should have taken more care in the language deployed in her email, her poor drafting did not demonstrate bias. There was no suggestion that either the IO or the Adjudicator saw and were unduly influenced by the email. Weighing all of those factors in the balance the Tribunal concluded that the AP was entitled to conclude that there was no evidence which would lead an informed observer to conclude that there was bias, notwithstanding the clumsy wording of the email.

The IO response to the Appellant's application to the AP for review

35.4 The Appellant correctly submitted that this evidence was before the AP but not the Adjudicator. That was because the IO was responding to the Appellant's grounds of appeal to the AP. The Appellant was criticising the decision of the Adjudicator and the IO analysed that critique. The IO, in his response, made reference to the Appellant not having complied with the LoA. The Appellant submitted that that incorrect assertion "compromised the fairness of the SRA investigation and the integrity" of the proposed sanction. The Tribunal rejected that submission. The LoA made it clear that the SRA expected the Appellant to comply with the terms of the May 2017 order. He continued to fail to do so even following receipt of the LoA. The Tribunal found that the IO response was properly considered by the AP, which was entitled to find that it did not demonstrate bias. The Tribunal further rejected the Appellant's submission that the IO response was infected by Ms Ward's bias. There was no evidence supporting that contention.

The LoA

35.5 The Appellant's primary submission was that the LoA did not confer an instruction on him to execute/sign the Property transfer. The Tribunal considered whether the lack of an express instruction in the LoA showed that the IO's suggestion that it did demonstrated that he was infected by bias and if so, whether that tainted the AP decision. The Tribunal acknowledged that the LoA did not expressly instruct the Appellant to execute/sign the Property transfer. However, the Order of 30 May 2017 required the Appellant to do just that, and the LoA made plain that he was required to meet Outcome 5.3 of the Solicitors Code of Conduct which required him to comply with court orders which placed obligations on him. It was therefore implicit that the SRA expected the Appellant to meet his obligations under the May 2017 Order. The letter was not written in more direct and compulsive terms presumably because the SRA had decided not to institute disciplinary proceedings, but to advise the Appellant that he was required to comply more closely with the Code of Conduct in future. The Appellant cannot have read the LoA as suggesting that the SRA was content for him to

continue to ignore the terms of the May 2017 Court Order. The Tribunal accordingly found that the IO's reference to the LoA requiring the Appellant to execute the transfer (in accordance with the 2017 Order), and that his continued failure to do so amounted to a failure to comply with the LoA, was not a mischaracterisation of the position and so was not evidence of bias on the part of the IO.

35.6 The Appellant's secondary submission was that the SRA's process was biased in that it did not seek his representations on his alleged failure to comply with the LoA prior to re-opening the investigation. The Tribunal noted that the SRA sent the Appellant an "Explanation of Conduct" letter on 15 May 2019, which invited his representations on the re-opened investigation and the allegations made against him. The Tribunal further noted that the Appellant responded in full on 6 June 2019 and 12 July 2019. The Tribunal therefore concluded that the Appellant was given an opportunity to make representations and as such there was no evidence of bias in the process.

35.7 The Tribunal concluded that the Appellant had not discharged the burden of proving on the balance of probabilities that the AP decision on this issue of bias was wrong or unjust because of a serious procedural or other irregularity in the proceedings.

35.8 The Tribunal therefore dismissed the Appellant's fourth ground of appeal.

36. Ground 5: The Letter of Advice ("LoA") dated 20 November 2018 and sanction

36.1 The Appellant broadly asserted that the AP was "Wednesbury unreasonable" to have upheld the Adjudicator's decision on sanction because this took into account the LoA, when that LoA had not made any finding against the Appellant and was of no relevance to the second investigation and finding. The Tribunal noted that the Appellant did not enunciate the basis upon which he considered that the AP's decision in this regard was "Wednesbury unreasonable". However, the Tribunal applied the legal principle promulgated in Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223 namely "a reasoning or decision is Wednesbury unreasonable (or irrational) if it is so unreasonable that no reasonable person acting reasonably could have made it". The Tribunal applied that test to the question of whether it was unreasonable/irrational for the AP to adopt the approach of the Adjudicator in determining sanction, when that approach took into account the terms of the LoA, treated it as an earlier finding of misconduct, and so evidenced a pattern of behaviour. The relevant sections of the LoA read:

> "…Based upon the information I have, it is my [the IO's] view that you have;
> - Failed to comply with Principle 6 of the SRA Principles 2011;
> - Failed to achieve Outcome 5.3 of the SRA Code of Conduct 2011;
>
> …
>
> Although no further action is being taken this letter does constitute a formal record of the position and we will retain a copy. We have the power to review the position if we receive further information. **We can also take this letter into account when deciding appropriate action if we receive any future allegations or concerns**…" [emphasis added]

36.2 On that basis, the Tribunal concluded that the LoA did constitute a finding that the Appellant had failed to comply with the Code of Conduct. No further action was taken at that stage, as the SRA characterised the Appellant's failure as a "misunderstanding" of the Order with which he had failed to comply. That was, in the Tribunal's view, a generous characterisation in the Appellant's favour. Nevertheless, the LoA made plain that, should a further complaint be received, the SRA might reconsider its position. A further complaint was received following the Appellant's failure to comply with the 4 October 2018 agreement, at which time he was still in default of the May 2017 Order. The Tribunal therefore concluded that the SRA was entitled to revisit the terms of the LoA and re-open the investigation into the matters giving rise to it. Equally the SRA was entitled to take the Appellant's continued failure to comply with the May 2017 Order, notwithstanding the terms of the LoA, into account when considering the seriousness of the findings arising from the second investigation. Consequently it was not "Wednesbury unreasonable" for (a) the IO to describe the alleged misconduct as a "course of conduct", (b) the Adjudicator to take the earlier finding of a breach of the Code into account when determining sanction or (c) the AP to affirm that reasoning and uphold the decision on sanction.

36.3 The Tribunal considered the Appellant's submission that neither the Adjudicator nor the AP had regard to the SRA's Enforcement Strategy when determining sanction, which was "Wednesbury unreasonable". The Tribunal noted that the Appellant made that submission without specifying what in the Enforcement Strategy the AP should have, but did not, take into account. It was not for the Tribunal to forensically examine the Enforcement Strategy and determine the basis upon which the Appellant advanced the position that he did. In any event, both the Adjudicator and the AP made plain in their respective Decisions that they had had regard to and applied the Enforcement Strategy.

36.4 The Tribunal concluded that the Appellant had not discharged the burden of proving on the balance of probabilities that the AP decision was wrong or unjust because of a serious procedural or other irregularity in the proceedings.

36.5 The Tribunal therefore dismissed the Appellant's fifth ground of appeal.

37. In consequence the Tribunal determined to affirm the decision of the Adjudication Panel and dismiss the Appellant's appeal on all five grounds.

Costs

38. Mr Willcox applied for the Respondent's costs in the sum of £2,327.00 as set out in the Schedule of Costs dated 4 February 2021, and which was served on the Appellant on the same date. Mr Willcox drew the Tribunal's attention to the fact that costs had not been claimed for the second day of the part heard appeal, and stated that they were not being sought.

39. The Appellant did not challenge the quantum of costs sought, but asserted that he was unable to address the principle of costs being awarded to the Respondent as he was "unaware of the reasons for the appeal being dismissed". The Tribunal reminded the Appellant that he was aware that the appeal had been dismissed on all grounds and gave him a further opportunity to make submissions as to the application. The Appellant

declined to do so, save for to state that he had "no comment regarding [his] ability to pay".

Post Appeal Application

40. The Appellant indicated that he intended to appeal against the Tribunal's decision and asked for any Order to be stayed pending appeal. Mr Willcox made no representations on that point. The Tribunal did not accede to the Appellant's request, but pointed out that in relation to that element of the Tribunal's Order which required the Appellant to pay the Respondent's costs, the Appellant was at liberty to discuss with the Respondent the timing of such payment, pending any appeal he might choose to pursue.

Statement of Full Order

41. The Tribunal Ordered that the appeal under S.44E of Errol Richard Shulman, be DISMISSED and it further Ordered that he do pay the costs of the response of the Law Society to this appeal fixed in the sum of £2,327.00.

Dated this 11th day of March 2021
On behalf of the Tribunal

A Horne
Chair