SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12193-2021

BETWEEN:

SOLICITORS REGULATION AUTHORITY LTD. Applicant

and

DAVID ELLIS Respondent

Before:

Mr P S L Housego (in the chair)
Mr P Lewis
Mrs N Chavda

Date of Hearing:
20 September 2021

Appearances

David Collins, barrister, of Capsticks LLP, 1 St George's Road, Wimbledon. London, SW19 4DR, for the Applicant.

The Respondent did not attend and was not represented.

JUDGMENT

Allegations

1. The allegations made by the Applicant against the Respondent, are that the Respondent:

1.1. Between 13 October 2017 and 25 October 2017, following the termination of his consultancy agreement with SC Law Solicitors Ltd ("the Firm"), failed to return client files and/or client files which were complete to the Firm for any or all of the client matters listed in Schedule A, despite having previously provided an undertaking to do so, and by reason of such failure breached one or more of Principles 4 and 10 of the SRA Principles 2011 and failed to achieve Outcomes 1.2 and 11.2 of the SRA Code of Conduct 2011;

1.2. Between 25 October 2017 and July 2018 failed to comply with the Order of Master Yoxall, dated 25 October 2017, requiring him to deliver up to the Firm any and all files, papers and documents belonging to the Firm or pertaining to the Respondent's work as a solicitor and to permit inspection of all electronic devices used by the Respondent in the course of his work as a solicitor and to allow copies of documents or media to be taken and by reason of such failure breached one or more of Principles 1 and 6 of the SRA Principles 2011 and failed to achieve Outcome 5.3 of the SRA Code of Conduct 2011;

1.3. Between November 2016 and October 2017 failed to comply with Court Orders issued in relation to the matters set out in Schedule A resulting in any or all of the claims listed in Schedule A being struck out and in doing so breached one or more of Principles 4 and 5 of the SRA Principles 2011 and failed to achieve one or more of Outcomes 1.2 and 5.3 of the SRA Code of Conduct 2011;

1.4. It is further alleged that the Respondent's conduct as set out at Allegation 1.3 above demonstrates manifest incompetence. In so acting, the Respondent breached Principle 6 of the SRA Principles 2011, but manifest incompetence is not an essential element to prove the allegation.

Documents

2. The Tribunal considered all of the documents in the case which included:

- The Rule 12 Statement dated 9 April 2021 with Exhibit HWP1.
- The Applicant's Statement of Costs at Issue dated 9 April 2021.
- The Applicant's Statement of Costs at Hearing dated 14 September 2021.
- The Applicant's Certificate of Readiness and Hearing Timetable dated 16 August 2021.

Application to Proceed in the Respondent's Absence

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

3. Mr Collins invited the Tribunal to proceed with the substantive hearing in the Respondent's absence. He submitted that effective service of the proceedings papers on the Respondent had been confirmed by a previous Division of the Tribunal on 15 June 2021 and that remained the case. Mr Collins reminded the Tribunal that it was

incumbent on the Respondent to engage in the proceedings as a member of the legal profession. Mr Collins submitted that no "good reason" or indeed any reason had been advanced by or on behalf of the Respondent to explain his lack of engagement in the proceedings and lack of attendance at the substantive hearing.

4. In those circumstances Mr Collins contended that the Respondent had disengaged entirely, last communicated (with the Firm and the Applicant) in 2018, had not made an application to adjourn the substantive hearing and even if the matter did not proceed he was unlikely to attend a substantive hearing at a later date.

The Tribunal's Decision

5. The Tribunal considered the representations made by the Applicant in conjunction with its powers pursuant to Rule 36 of the Solicitors (Disciplinary Proceedings) Rules 2019 which provides:

> "…If a party fails to attend and is not represented at the hearing and the Tribunal is satisfied that notice of the hearing was served on the party in accordance with these Rules, the Tribunal may hear and determine any application and make findings, hand down sanctions, order the payment of costs and make orders as it considers appropriate notwithstanding that the party failed to attend and is not represented at the hearing…"

6. The Tribunal applied the principles set out in the seminal authority of GMC v Adeogba and GMC v Visvardis [2016] EWCA Civ 162, in which Leveson P made plain that, with regards to regulatory proceedings, there was a need for fairness to the regulator as well as a Respondent. At §19 he stated:

> "…It would run entirely counter to the protection, promotion and maintenance of the health and safety of the public if a practitioner could effectively frustrate the process and challenge a refusal to adjourn when the practitioner had deliberately failed to engage with the process. The consequential cost and delay to other cases is real. Where there is good reason not to proceed, the case should be adjourned; where there is not, however, it is only right that it should proceed…"

7. Leveson P went on to state at §23 that discretion must be exercised:

> "…having regard to all the circumstances of which the Panel is aware with fairness to the practitioner being a prime consideration but fairness to the GMC and the interest of the public also taken into account…"

8. The Tribunal noted that (a) service had been properly effected in accordance with Rule 36, (b) the Respondent failed to file an Answer to the Rule 12 Statement, (c) the Respondent failed to attend a non-compliance hearing listed on 25 May 2021, (d) the Respondent failed to attend a case management hearing listed on 15 June 2021, (e) there was no application made to adjourn the substantive hearing and (f) no reason at all, for example ill-health supported by medical evidence, had been advanced by or on the Respondent's behalf.

9. Weighing all of the circumstances, including the obligation of a professional to engage with the profession's regulator the Tribunal determined that the Respondent had deliberately chosen not to exercise his right to be present or to give adequate instructions to enable lawyers to represent him. The overarching public interest in the expeditious consideration of allegations and fairness to the Applicant required the matter to proceed in the Respondent's absence as there was nothing to suggest that he would a substantive hearing at a later date if the matter was adjourned.

10. The Tribunal therefore granted the application to proceed in the Respondent's absence.

Factual Background

11. The Respondent was admitted to the Roll of Solicitors in June 2006. At the material time he held a practising certificate free from conditions, but had not subsequently been issued with a practising certificate since October 2017.

12. The Respondent was, at the material time, employed by SC Law Solicitors Ltd ("the Firm") as a Consultant Solicitor between 1 May 2013 and 13 October 2017 predominantly in relation to personal injury claims. The Respondent worked from home and from the Firm's office.

13. On 4 August 2017, the Firm received a request from Pennington's solicitors for the transfer of a client file on the basis that they were to take over conduct of the claim on behalf Claimant A, an infant who had suffered brain damage in a road traffic accident. The Respondent had conduct of that claim on behalf of Claimant A. The request and an attendant application indicated substantial concerns as to the Respondent's conduct of the matter.

14. Following that request CH, solicitor (now deceased) at the Firm, inspected the file and noted that the Respondent had failed to comply with a number of Court Orders, that the defendant had applied for an "Unless Order" in March 2017 and that issues arising from that Order were to be dealt with at a hearing at Swansea County Court on 9 October 2017. Consequently, CH attended the Court with the Respondent on 9 October 2017 and formed the opinion that he was unable to give a coherent explanation to the Court as to the lack of progress of the claim.

15. By way of an email dated 21 August 2017, the Respondent provided the Firm with links to a "dropbox" said to contain information in relation to Claimant A. He further stated that there were other folders which were "not completed" and on which he was working. Further links were provided by email on 22 August 2017. On 23 August 2017, CH emailed the Respondent identifying missing correspondence and requesting relevant passwords to the links he had provided.

16. Due to the concerns identified, the Firm conducted an audit of the Respondent's files, which exposed, to their mind, serious issues regarding his handling of claims. The Firm terminated the Respondent's Consultancy Agreement in October 2017 and reallocated his matter files primarily to CH.

17. On 2 November 2017, SC, Principal of the Firm, reported concerns about the Respondent to the Applicant.

Witnesses

18. The written evidence of witnesses is quoted or summarised in the Findings of Fact and Law below. The evidence referred to will be that which was relevant to the findings of the Tribunal, and to facts or issues in dispute between the parties. For the avoidance of doubt, the Tribunal read all of the documents in the case and made notes of the submissions made. The absence of any reference to particular evidence should not be taken as an indication that the Tribunal did not read or consider that evidence.

19. For the avoidance of doubt, the Tribunal did not receive any oral evidence and considered the allegations on the basis of the documentary evidence filed as well as the Applicant's oral submissions. Civil Act Evidence notices had been served in respect of those witness statements, without response from the Respondent.

Findings of Fact and Law

20. The Applicant was required by Rule 5 of The Solicitors (Disciplinary Proceedings) Rules 2019 to prove the allegations to the standard applicable in civil proceedings (on the balance of probabilities). The Tribunal had due regard to its statutory duty, under section 6 of the Human Rights Act 1998, to act in a manner which was compatible with 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.

21. **Allegation 1.1 - Failure to return client files and/or complete client files to the Firm**

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

21.1 By agreement with the Firm, the Respondent worked primarily from his home, attending the Firm's office as necessary. On a practical level, documents and materials were scanned, emailed and thereafter posted to the Respondent for his retention at home. Therefore, at the conclusion of the consultancy agreement, the Firm required the Respondent to return the matter files that he retained at home as set out in the Consultancy Agreement. The Respondent failed to do so.

21.2 By way of email dated 9 October 2017, CH specifically asked the Respondent to provide the complete file of papers in the Claimant A matter. The Respondent failed to do so.

21.3 On 13 October 2017 during a telephone call between the Respondent, CH, SJ (legal adviser to the Firm employed by Seddons) and as the Firm's bookkeeper/practice manager the Respondent provided a verbal undertaking to which was subsequently recorded by Seddons in the following terms:

> "get the files over to them [the Firm] for Tuesday and he said that he undertakes that he will be looking to arrange a courier on Monday so that he has a couple of days to get everything clear so that they will have [the files] on Tuesday [17th October 2017]".

21.4 The Firm sent an email to the Respondent following the telephone call stating that they would arrange for a courier to attend his home address to collect all outstanding files and confirmed the terms of the undertaking set out above by stating that the Respondent:

> "confirmed (by way of undertaking) that you [the Respondent] will put all the files together to come out to us by courier on Monday".

21.5 An undertaking is defined by the Applicant as "a statement, given orally or in writing, whether or not it included the word "undertake" or "undertaking", made by or on behalf an individual or a firm, in the course of practice but as a solicitor or Registered European Lawyer, 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." The Respondent provided an undertaking to the Firm during a formal meeting with CH of the Firm in circumstances which the Respondent did or should have understood that he was accepting an obligation to return all client files and materials in his possession. The Firm relied upon the undertaking given by the Respondent as a solicitor.

21.6 On 16 October 2017, two boxes of files were collected from, what the Firm believed, was the Respondent's residential address. By way of an email dated 17 October 2017 CH confirmed receipt of the same. However, upon inspection it transpired that the two boxes contained a partial file in respect of Claimant B matter and a partial file in respect of Claimant C matter. CH therefore created a list of a further 14 matters in relation to which papers had not been returned namely papers relating to the matters of clients Claimants D, E, F, G, H, I, J, K, L, M, N, O, P, Q and R. The email noted "surprise" that all client files had not been returned given the Respondent's undertaking to do so.

21.7 The Respondent replied later on the same day stating that he had sent "further work" to her by Royal Mail Parcelforce and that links would follow by email for Dropbox access. He noted that two cases had been settled (Claimant P and Claimant E), and that one case was with another firm of solicitors (Claimant J).

21.8 By way of email dated 18 October 2017, CH acknowledged receipt of a further box delivered via Parcelforce containing partial files for the matters of Claimant R, Claimant B and Claimant P. CS reminded the Respondent of the terms of his undertaking to return all files by 16 October 2017 at 2pm. The Respondent replied on 19 October 2017 and confirmed that the Firm would have such remaining outstanding cases by Monday [23 October 2017].

21.9 On 20 October 2017, a further email was sent to the Respondent noting that it had come to light that he no longer lived at the home address previously provided by him and asking for immediate confirmation of his current address. No response or further files had been received by 24 October 2020.

21.10 Having not received the remainder of the files and information due to be returned by the Respondent to the Firm, CH and SC sought to contact the Respondent and the Respondent's partner via text message on or around 24 October 2017.

21.11 On 24 October 2017, Seddons wrote to the Respondent having identified the documentation and client files which remained outstanding in breach of the undertaking given by the Respondent on 13 October 2017 namely:

Claimant A:	Correspondence and partial files remained outstanding
Claimant R	Partial files remained outstanding
Claimant B	Partial files remained outstanding
Claimant D	
Claimant E	The Respondent had stated that the claim had settled
Claimant F	
Claimant I	
Claimant G	
Claimant H	
Claimant J	The Respondent had stated that the claim was with other solicitors from 2015
Claimant K	
Claimant L	
Claimant M	
Claimant N	
Claimant O	
Claimant P	The Respondent had stated that the claim had settled
Claimant Q	

21.12 The Respondent failed to respond and failed to provide the outstanding further documentation as required.

Outcomes Not Met

21.13 **Outcome 1.2** of the SRA Code of Conduct 2011 ("the Code") required the Respondent to provide services to their clients in a manner which protected their interests and was subject to the proper administration of justice.

21.14 Mr Collins submitted that the Respondent's apparent refusal to return client files and/or complete client files failed to ensure that services were provided to his and/or the Firm's clients in a manner which protected their interests in their matter. In failing to return the outstanding material, the Firm was hindered in its ability to review, address and

progress client matters promptly or at all in the absence of client files or complete client files and therefore were unable to act in each client's interests. The Firm was required to reconstruct client matter files through email and soft copy documents, by obtaining further documents from clients and, on occasion, by requesting copy documents from solicitors instructed for other parties. That delayed the progress and resolution of matters for clients which was plainly not in their best interests.

21.15 Mr Collins submitted that the Respondent should have ensured that all client files, materials and documentation were returned to the Firm promptly, in accordance with the Firm's request and the undertaking he provided. His failure to do demonstrably showed that he did achieve Outcome 1.2 in that regard.

21.16 **Outcome 11.2** required the Respondent to perform all undertakings given within an agreed timescale or within a reasonable amount of time.

21.17 Mr Collins submitted that the giving of and compliance with an undertaking by a solicitor was intended to promote the proper operation of the legal system and played a fundamental role in the trust and reliance placed in the legal profession. The Respondent was aware that the Firm accepted his undertaking, which was confirmed in an email exchange between him and CH from 13 – 17 October 2017.

21.18 The Respondent failed to return to the Firm the client files which he held by 17 October 2017 to the extent that the Firm was required to take steps to recover those files by way of an order of the High Court. His failure to do demonstrably showed that he did not achieve Outcome 11.2 in that regard.

Breaches of Principles

21.19 **Principle 4** of the Code required the Respondent to act in the best interests of each client.

21.20 Mr Collins submitted that in failing to return client files or complete client files following termination of his consultant agreement with the Firm, the Respondent failed to ensure that he was acting in the best interests of each client.

21.21 Mr Collins submitted that the Respondent's failures delayed the progress and resolution of matters for clients which was plainly not in their best interests and therefore contrary to Principle 4.

21.22 **Principle 10** of the Code required the Respondent to protect client money and assets which includes money, documents, wills, deeds, investments and other property.

21.23 Mr Collins submitted that the Respondent failed to ensure that client documentation and files were complete and promptly returned to the Firm. The Firm was, upon termination of the Respondent's Consultancy Agreement, required to ensure that client files were protected and held in the possession of the Firm or available to transfer on to new legal representatives subsequently instructed by clients.

21.24 The Respondent should have ensured that all client files, materials and documentation were returned to the Firm promptly and in accordance with the Firm's request and the undertaking which he had given to do so.

21.25 Mr Collins submitted that the Respondent's failures undermined the safeguards which existed in place to protect client money and assets contrary to Principle 10.

The Respondent's Position

21.26 The Respondent failed to file an Answer to the Rule 12 Statement and had never engaged in the Tribunal proceedings. His position with regards to the allegations was therefore unknown. He was taken to deny all allegations.

The Tribunal's Findings

21.27 The Tribunal bore in mind that the onus of proving Allegation 1.1 lay with the Applicant. The Tribunal therefore considered the evidence filed and the submissions made by Mr Collins. In so doing the Tribunal found that, notwithstanding a variety of excuses that had been advanced by the Respondent during the course of his interactions with the Firm, as a matter of fact he had failed to return the complete client files upon termination of his consultancy and in accordance with the undertaken given in that regard.

21.28 The Tribunal determined that the Respondent's failed to provide services to his clients in a manner that protected their interests and was not in accordance with the proper administration of justice.

21.29 The Tribunal further determined that the Respondent's failures were not in the best interests of his clients, failed to protect client money and assets in that it delayed and on occasion prevented settlement payments due to them promptly or at all.

21.30 The Tribunal therefore found Allegation 1.1 proved in its entirety.

22. **Allegation 1.2 - Failure to comply with the Order of Master Yoxall, of 25 October 2017**

The Applicant's Case

22.1 When the Respondent failed to return the totality of the files and materials required to be provided to the Firm, the Firm applied for pre-action relief on short notice to the Respondent which resulted in the Order of Master Yoxall ("the Order") dated 25 October 2017. The application was heard by Master Yoxall on 25 October 2017. The Respondent did not attend the hearing and was not represented as confirmed in the Order.

22.2 The Respondent was served with a copy of the draft order by email dated 24 October 2017 at 18:51 to a personal email address used by the Respondent for the purpose of correspondence with the Firm immediately prior to application for the order.

22.3 The Claim Form and supporting evidence also were sent by email on 25 October 2017. Notice of the hearing and its anticipated timing was given to the Respondent by email on 25 October 2017 at 14.00, 14:22, and 15:10. The outcome of the hearing was confirmed by email at 19:41 on 25 October 2017 and a copy of the unsealed order was served.

22.4 No acknowledgment or response was received from the Respondent.

22.5 The Order required that the Respondent (under warning of contempt of court):

1. Do forthwith deliver to the Firm any and all files, papers and documents of any description belonging to the Firm or pertaining to the Respondent's work as a solicitor;

2. Within 48 hours of service of the order permit the Firm to inspect all electronic devices used by the Respondent in his work as solicitor and to take or transmit copies of any document, or to provide copies within 48 hours of any request.

22.6 The Order permitted the Firm to serve all documents in the proceedings by email to the Respondent's personal email address with service deemed two days after sending the email.

22.7 The Order was served on the Respondent by email and in person. The unsealed Order was served by email on 25 October 2017. The sealed order was served by email to the email address last used by the Respondent on 26 October 2017 at 16:31 and again on 30 October 2017 at 10:22. The order was served in person in Spain by the Firm's enquiry Agent on 20 December 2017.

22.8 The Firm issued proceedings against the Respondent claiming damages for breach of the Consultancy Agreement and alternatively damages for wrongful interference with goods (in relation to the firm's files, papers and documents). By that claim, the Firm sought the return of files, papers and documents in the Respondent's possession.

22.9 The Firm instructed an enquiry agent ("Conflict International") to make enquiries as to the whereabouts of the Respondent and to effect personal service. They confirmed, amongst other matters, that the Respondent owned property in Manilva, Spain, that a vehicle registered to the Respondent had been observed leaving the address and that a neighbour had confirmed that the Respondent resided at the address. The Respondent was personally served on 20 December 2017 in or around the location of the Manilva property with copies of the civil proceedings (namely the claim form, particulars of claim, application notice and the Order).

22.10 On 29 November 2017, Parcelforce delivered a parcel to the Firm which contained partial files for the cases of Claimant Q (made up of the documents which the client had given to the Respondent), and Claimants D, I and C.

22.11 On 20 December 2017, an agent on behalf of Conflict International spoke to the Respondent in Spain. By text message the Agent, JF, stated that:

> "He [the Respondent] basically says is that he already gave all documents and file that he had. He is saying he did not previously receive any legal documents. He is saying he will review the files and call [J] tonight or in the morning. We have asked him to provide all files".

22.12 On the same date the Respondent was handed a letter from Seddons dated 30 October 2017 by personal service which enclosed documents previously served by email, namely the claim form, application notice sealed on 25 October 2017, the (sealed) Order and evidence in support.

22.13 The Respondent, upon personal service of the documentation, commented that he had not previously received the documents and that he had already given all of the documents which he had. The Respondent further commented that he would do a further search to try and establish if any of the emails may have gone astray or were not sent.

22.14 On 21 December 2017, Conflict International advised the Firm and/or Seddons that the Respondent had relayed via telephone call that he had (a) reviewed the Firm's list of files and had searched through the list of documents missing and (b) that he had sent all of these documents in various emails.

22.15 The Respondent later agreed to meet with Conflict International and a meeting was arranged for 27 December 2017. The meeting was postponed. On 3 January 2018, the Respondent called Conflict International and stated that he still did not have his laptop, that he would have it the following day, when he would telephone to arrange a further meeting. The Respondent did not telephone again. The Respondent failed to arrange or attend a further meeting or to provide access to his laptop.

22.16 The Firm sought to effect service of further documents in relation to the Firm's civil claim against the Respondent by "Burofax", a method of service permitted by Spanish law, and the Respondent was served personally with a hearing bundle in the civil litigation on 9 July 2018.

22.17 SC confirmed that the Respondent "only returned a few files". SJ (of Seddons) and further confirmed that the Firm identified client files which have not been provided at all, with three being incomplete or partial files.

22.18 The Respondent contacted SJ by email marked "without prejudice" dated 9 July 2018 at 10:13 (sent from a different email address to that had been used previously) and stated, amongst other matters, that he (a) "thought this matter was resolved around Christmas time" (b) by reference to files "all such were sent/passed on to representatives and back to SC law and there is nothing more I have to give" and in relation to email and computer access: "…as previously stated, I have not had access to my email since last year and therefore there is no point in using this email as anything sent to it I do not see and the computer I used for my work broke last year and I did not replace it".

22.19 Seddons replied on behalf of the Firm on 10 July 2018 and advising the Respondent that he had failed to provide inspection of the laptop and had only delivered a small volume of client files.

22.20 A further email (marked "without prejudice") was sent by the Respondent to Seddons on 10 July 2018 from a new email address at 13:36 in which he stated that he did not agree with much of the content of the witness statement of SJ. He further stated that in relation to the application he would be asking to file a defence. He made a proposal to vacate the hearing of the Firm's application on the basis of a without prejudice payment schedule of £1,000 per month of the sum claimed.

22.21 By email dated 11 July 2018 at 06:44 from the Respondent's new email address to Seddons he provided a link to a case summary/submissions document and asserted that he had not had use of the previous email address given used by the Firm for service of the Order. The Respondent was out of the country and "had not arranged representation for the hearing as his position will be straight forward". He sought adjournment of the application hearing. He served a two paragraph witness statement and, through his written submissions, sought an adjournment and permission to file a defence within 21 days. As to the alleged non-compliance with the Order Respondent stated:

- He had thought that the matter of disclosure of 'remaining files' had been finalised over the Christmas period.

- He had arranged for a 'number of deliveries to the claimant of files he had' and had no reason to retain these, not being in practise and no longer residing in the UK.

- His computer had broken and not been replaced.

- He had said that he would check if he had any further documentation on any memory stick, his position was that he had made such disclosure as he could do comply with the request of the Firm.

- Any final documentation that he had searched for was passed over to the Firm's representative when they met over the Christmas period.

22.22 The Respondent's application to contest service and/or adjourn proceedings was dismissed. The Respondent failed to provide any outstanding documents or inspection of electronic devices and therefore breached the Order.

Outcomes Not Met

22.23 **Outcome 5.3** of the Code required the Respondent to comply with Court Orders which placed obligations on him. Mr Collins submitted that the Order of Master Yoxall dated 25 October 2017 placed specific obligations on the Respondent as an individual in respect of which he failed to comply.

22.24 Mr Collins therefore submitted that the Respondent failed to meet Outcome 5.3.

Breaches of Principles

22.25 **Principle 1** of the Code required the Respondent to uphold the rule of law and the proper administration of justice.

22.26 Mr Collins submitted that the Respondent repeatedly and consistently failed to comply with the Order despite having been served personally and by email in that he failed to:

- Provide to the Firm any and all files, papers and documents belonging to the Firm in accordance with the Consultancy Agreement and subsequent undertaking.

- Return material for all client matters and either failed to return client files or returned partial client files.

- Permit inspection of all electronic devices used by him in the course of the Consultancy Agreement and/or allow copies of documents or media to be taken.

- Agree to and attend meetings with those acting on behalf of the Firm to provide access and/or outstanding materials.

22.27 Mr Collins therefore submitted that the Respondent's failures were contrary to Principle 1.

22.28 **Principle 6** of the Code required the Respondent to behave in a way that maintained the trust the public placed in him and in the provision of legal services.

22.29 Mr Collins submitted that the public would not expect solicitors to breach Court Orders which had been made against them. The public was entitled to expect that solicitors would give due respect and deference to the Court in compliance with any Orders made against them. The public was also entitled to expect the prompt return of client files and work related information upon termination of employment/consultancy agreement so as to ensure continued and effective client care.

22.30 Mr Collins submitted that the Respondent's failures to comply was therefore contrary to Principle 6.

The Respondent's Position

22.31 The Respondent failed to file an Answer to the Rule 12 Statement and had never engaged in the Tribunal proceedings. His position with regards to the allegations was therefore unknown. He was taken to deny them.

The Tribunal's Findings

22.32 The Tribunal bore in mind that the onus of proving Allegation 1.2 lay with the Applicant. The Tribunal therefore considered the evidence filed and the submissions made by Mr Collins. In so doing the Tribunal found that, notwithstanding a variety of excuses that had been advanced by the Respondent during the course of his interactions with the Court/the Firm/the Firm's representatives, as a matter of fact he had failed to comply with the Court Order dated 25 October 2017 which required him to return all Client files to the Firm when required or at all.

22.33 The Tribunal determined that the Respondent plainly failed to comply with the Court Order that imposed obligations on him in respect of which compliance was expected.

22.34 The Tribunal further determined that the Respondent therefore failed to uphold the rule of law and the proper administration of justice as well as undermining the public trust vested in him and in the provision of legal services.

22.35 The Tribunal therefore found Allegation 1.2 proved in its entirety.

23. **Allegation 1.3 - Failure to comply with Court Orders / claims being struck out**

The Applicant's Case

Claimant C's Claim

23.1 In the course of auditing the files that the Respondent had been responsible for, the Firm reviewed a file relating to a claim for damages (compensation) pursued by Claimant C which was issued in the High Court and related to a claim for damages arising from personal injury.

23.2 Claimant C was a passenger involved in a motorcycle accident that led to life changing injuries on 24 June 2012. Liability was admitted by the defendant, with quantification of damages to be determined.

23.3 The Respondent had acted for Claimant C since August 2012 when he was employed at a previous firm prior to his consultancy agreement. The defendant in the Claimant C matter was represented by Ellisons solicitors.

23.4 A case management conference took place on 27 June 2016 at which it was Ordered that the claimant be entitled to judgment with damages to be assessed. Directions were issued in respect of both parties and the matter was listed in a "trial window" of July 2017.

23.5 Ellisons sought disclosure from Claimant C in respect of the loss of earnings element of the claim. The Respondent was Ordered to disclose material to them by 23 December 2016. That Order confirmed that failure to comply would bring an end to the claim for loss of earnings sought on behalf of Claimant C. The Respondent failed disclose the material sought as Ordered.

23.6 Throughout October and November 2016, Counsel instructed on behalf of the defendant raised concerns with the Respondent as to the progress of the claim particularly in relation to Claimant's C's expert evidence and interim schedule of loss. The Respondent failed to respond to any of Counsel's communications nor did he respond to an email from Ellisons on 8 December 2016 similarly chasing the same.

23.7 The Respondent was required to serve updated medical evidence by 25 November 2016. The deadline was extended by agreement between the parties until 23 December 2016. On 21 December 2016, the Respondent applied to extend time for service of expert evidence until 1 March 2017.

23.8 On 5 and 10 January 2017, Ellisons wrote to the Respondent noting that they had not received the updated schedule of loss or medical evidence which had been due by 23 December 2016.

23.9 On 8 February 2017, Ellisons served an application for an "Unless Order" on the Respondent by email and Document Exchange namely that Claimant C be prohibited from relying on a schedule of loss and medical evidence unless the claimant served an updated schedule of loss and medical evidence within 14 days. The hearing of the application was listed for 22 March 2017 and the Unless Order granted in the terms sought on 24 March 2017.

23.10 A schedule, described as an interim schedule, was filed and served by the Respondent on 5 April 2017 relating to loss of earnings and pension rights with no reference to care or occupational therapy claims. No medical evidence was served.

23.11 On 12 July 2017, CH emailed to the Respondent following a telephone call and potential complaint from Claimant C that the case had not settled and that there was no trial date. The Respondent replied via email on 14 July 2017 and asserted that he had spoken to Claimant C and his wife, had explained "various things" and that "it did calm it down".

23.12 The Respondent thereafter failed to respond in a timely manner or at all to either Claimant C or Ellisons.

23.13 Ellisons issued an application dated 31 May 2017 for the claim to be struck out or, in the alternative, to prohibit Claimant C from claiming special damages or future losses. The Respondent/Claimant C was ordered to serve a witness statement in response to the Defendant's application by 27 September 2017, and to issue any application for relief from sanction by the same date.

23.14 The Respondent made an application in reply dated 25 September 2017 for relief from sanctions, permission to serve a further schedule of loss and file a witness statement aswell as relief from sanction to enable further medical evidence to be served and fresh occupational therapy or care evidence to be obtained.

23.15 On 20 October 2017, the Firm advised Claimant C that the Respondent was no longer employed by the Firm, that their file had been reviewed, and that:

- Directions had been issued, which Ellisons claimed had not been complied with.

- Updated medical evidence should have been filed by the end of December 2016. No experts had been instructed to provide the same as the Agency (Premex) had not received necessary information and passwords to finalise the instructions.

- Ellisons had applied for the claim to be struck out, and that Claimant C could elect to instruct new solicitors.

23.16 Claimant C agreed that the Firm could continue to represent him until the outcome of the application to strike out was known. CH filed and served a witness statement dated 30 October 2017 in support of Claimant C's application for relief from sanction which broadly admitted that the Respondent had breached the Order requiring service of updated medical evidence and, on the basis of the statement filed by the Respondent, it appeared that all loss of earnings documentation had been disclosed.

23.17 Additionally, CH contacted Premex in order to determine the position in relation to the instruction of experts, and a summary as at 20 October 2017 revealed that:

- The Agency had chased the Respondent numerous times for passwords to allow access to CDs containing radiology images and medical records, and for formal instructions.

- The report of the orthopaedic specialist registrar was cancelled as records and instructions were not provided by the Respondent.

- The report of the occupational therapist expert remained in draft as requested information was never provided by the Respondent. In relation to the instruction of the occupational therapist reference was made to several emails in which the expert chased the Respondent for necessary updates and information.

- The reports of the plastic surgeon and consultant orthopaedic surgeon had been placed on hold as records were not provided by the Respondent.

23.18 Both applications were heard on 20 November 2017 in the High Court of Justice, Queens Bench Division, before His Honour Mr Justice Goss who determined that the Respondent had failed to comply with Court Ordered directions in relation to the service of updated medical evidence and disclosure of evidence and schedules in relation to loss of earnings. The claim was struck out as a result of "wanton failures" by the Respondent to comply with Orders and his application for relief from sanction was denied. Claimant C was ordered to pay the defendant's costs.

23.19 On 20 November 2017, the Firm wrote to Claimant C confirming the outcome and that his claim had been struck out. Thereafter, as a consequence of the Respondent's failures, the compensated Claimant C for their unjustified losses via a claim on its professional indemnity insurance.

Claimant R's Claim

23.20 The Respondent acted on behalf of Claimant R in personal injury proceedings following a road traffic accident. A case management conference took place on 2 November 2016. The claim was stayed on 3 January 2017 as the Respondent had failed to perfect the directions order. Claimant R, through default of the Respondent, failed to comply with the direction to provide disclosure.

23.21 The Firm became aware on 12 October 2017 that the claim had been struck out on 13 September 2017 following an application by the defendant, and that Claimant R had been ordered to pay the defendant's costs and repay all interim payments. The defendant had successfully applied to strike out the claim (in which liability had been admitted) following the claim being indefinitely stayed in January 2016 and there being no contact from the Respondent since.

23.22 On 18 September 2017, the Respondent applied to set aside the order striking out the claim. He did not file evidence in support of that application as required. That application was listed to be heard by way of a telephone hearing on 12 October 2017 at 3pm. The notice of hearing required the Respondent to arrange the telephone

conference. CH was notified at 3.10pm on 12 October 2017 (by telephone from the defendant's representative) that defendant's counsel had not received a call to join the hearing as expected. The Firm determined that the hearing had not been arranged by the Respondent as required by the order. The claim remained struck out.

23.23 The Firm was instructed by Claimant R to apply to the court for the Strike Out Order to be set aside. CH filed and served a witness statement in support of the application which made set out that it was identified, following internal review of the available file, that the (a) the Respondent had not perfected the directions contained within the Order for sealing, (b) that he had been required to do after the case management conference on 2 November 2016, (c) that he applied to set aside the strike out but filed no evidence in support of the application and (d) that he received the notice of hearing for 12 October 2017 but failed to arrange the telephone hearing.

23.24 The hearing was convened to consider the application during the course of which judicial criticism of the Respondent's conduct was recorded, including the statement that "the failures represent the worst case of wholesale failure that the Judge had seen in his life on the bench". The Respondent was found to have been on notice of the applications. Claimant R's application for relief from sanction was dismissed and the claim remained struck out, with Claimant R to pay the defendant's costs of the application.

Outcomes Not Met

Outcome 1.2

23.25 **Outcome 1.2** of the Code required the Respondent to provide services to his clients in a manner which protected their interests in their matter, subject to the proper administration of justice.

23.26 Mr Collins submitted that there were persistent and repeated failures by the Respondent to comply with court orders, obtain and serve updated medical evidence, disclose documentation in support of claims for special damages/schedule of loss, arrange and attend telephone hearings. Furthermore, his failures resulted in two client's claims being struck out, both cases in which liability had been admitted by the defendants. Both clients lost the ability to recover damages from those defendants, and were ordered to pay the defendant's costs of litigation.

23.27 Mr Collins therefore submitted that the Respondent failed to meet Outcome 1.2.

23.28 **Outcome 5.3** of the Code required the Respondent to comply with Court Orders which placed obligations on him.

23.29 Mr Collins submitted that the Respondent, as the instructed solicitor acting on behalf of clients Claimant C and Claimant R, failed to comply with Court Orders which demonstrably showed that he failed to meet Outcome 5.3

Breaches of Principles

23.30 **Principle 4** of the Code required the Respondent to act in the best interests of each client.

23.31 Mr Collins submitted that, with regards to Claimant C, the Respondent failed to comply with directions and Court Orders, which resulted in the claim being struck out. In doing so the Respondent failed to act in the client's best interest.

23.32 As a consequence of the Respondent's failures to comply with the Court Order to serve medical evidence and/or to serve a complete interim schedule on behalf of his client, Claimant C was prohibited from relying upon any further medical evidence and from pursuing claims for loss of earnings and pension rights, care or occupational therapy claims.

23.33 Mr Collins submitted that, with regards to Claimant R, the Respondent failed to perfect the directions Order, failed to correspond with the Court and the defendant's representatives, thus resulting in the claim (in which liability had been admitted) being struck out and an order that the Claimant R pay the defendant's costs and repay all interim payments. Further, the Respondent subsequently failed to comply with the Court Order requiring him to set up the hearing on 12 October 2017 such that Claimant R lost the opportunity to set aside the order striking out the claim. The claim remained struck out and a further costs order was made against the claimant.

23.34 Mr Collins therefore submitted that the Respondent's conduct was contrary to Principle 4.

23.35 **Principle 5** of the Code required the Respondent to provide a proper standard of service to his clients. Mr Collins submitted that the repeated failures of the Respondent in respect of more than one matter file over a protracted period of time was contrary to Principle 5.

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

23.36 The Respondent failed to file an Answer to the Rule 12 Statement and had never engaged in the Tribunal proceedings. His position with regards to the allegations was therefore unknown. He was taken to deny them.

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

23.37 The Tribunal bore in mind that the onus of proving Allegation 1.3 lay with the Applicant. The Tribunal therefore considered the evidence filed and the submissions made by Mr Collins. In so doing the Tribunal found as a matter of fact that Claimant A's Claim was struck out in November 2017 and Claimant R's proceedings were struck out in December 2017 with costs ordered in favour of the defendants payable by the Claimants C and R. In respect of both matters liability was admitted by the defendant and the amount of damages was the only matter in issue.

23.38 It was plain to the Tribunal Claimant C's matter was struck out as a consequence of the Respondent's repeated failures to (a) disclose material as ordered, (b) communicate with the defendant's legal representatives, (c) communicate with the Court, (d) comply with an "Unless Order" made by the Court and (e) provide full instructions to the agency appointed to secure medical evidence.

23.39 It was plain to the Tribunal that Claimant R's matter was struck out as the Respondent failed to comply with the Court Ordered directions which consequentially led to the failure on his part to disclose material as ordered by the Court. The Respondent further issued an application to challenge the striking out of the claim but failed to provide any supporting evidence in that regard and thereafter failed to arrange the telephone hearing for consideration of that application as required by the Court.

23.40 The Tribunal determined that the Respondent's failures, both individually and cumulatively, represented poor service that did not protect Claimant C and R's interests, was contrary to the proper administration of justice and breached Court Orders with which he was required to comply.

23.41 The Tribunal further determined that the Respondent therefore failed act in the best interests of Claimant A and R and fell far below the standard of service that they were entitled to expect from him.

23.42 The Tribunal therefore found Allegation 1.3 proved in its entirety.

24. **Allegation 1.4 - Manifest incompetence**

24.1 The concept of manifest incompetence was considered by the High Court in SRA v Iqbal [2012] EWHC 3251 (Admin) at §23 in the following terms:

> "…It seems to me that Trustworthiness also extends to those standards which the public are entitled to expect of a solicitor, including competence. If a solicitor exhibits manifest incompetence, as, in my judgment, the Appellant did, then it is impossible to see how the public can have confidence in a person who has exhibited such incompetence. It is difficult to see how a profession such as the medical profession would countenance retaining as a doctor someone who had showed himself to be incompetent. It seems to me that the same must be true of the solicitors' profession. If in a course of conduct a person manifests incompetence as, in my judgment, the Appellant did, then he is not fit to be a solicitor. The only appropriate remedy is to remove him from the Roll. It must be recalled that being a solicitor is not a right, but a privilege. The public is entitled not only to solicitors who behave with honesty and integrity, but solicitors in whom they can impose trust by reason of competence…"

24.2 It was further considered by the Court of Appeal in Wingate v SRA [2018] EWCA Civ 366 at §105-6 in the following terms:

> "Principle 6 is directed to preserving the reputation of, and public confidence in, the legal profession. It is possible to think of many forms of conduct which would undermine public confidence in the legal profession. Manifest incompetence is one example. A solicitor acting carelessly, but with integrity,

> will breach Principle 6 if his careless conduct goes beyond mere professional negligence and constitutes "manifest incompetence…
>
> In applying Principle 6 it is important not to characterise run of the mill professional negligence as manifest incompetence. All professional people are human and from time to time make slips which a court would characterise as negligent. Fortunately no loss results from such slips. But acts of manifest incompetence engaging the Principles of professional conduct are of a different order..."

24.3 Mr Collins submitted that the significant number of concerns arising from the Firm's audit of the Respondent's available files indicated a pattern of behaviour his part that amounted to manifest incompetence. Mr Collins reminded the Tribunal that the Respondent's conduct caused loss, stress and harm to clients and others which plainly had a detrimental impact on the reputation of the Respondent and the profession as a whole.

24.4 The Firm was contacted by clients who had not received responses or communications from the Respondent. JB of counsel provided evidence as to lack of communication from the Respondent namely that he noticed in 2016 and 2017 that the Respondent was not truthfully keeping him up to date as to the progress of cases in relation to which he was instructed. JB specifically referred to the cases of Claimant A, Claimant C and Claimant R in respect of which the Respondent ceased responding to emails or telephone calls from him and/or his clerk.

24.5 Mr Collins submitted that the Respondent could be properly described as being manifestly incompetent in respect of his failures to comply with Court Orders and issues of core personal injury practice in relation to Claimant C and Claimant R. The requirement to comply with Court Orders and Directions when conducting litigation was so basic and so fundamental that the Respondent's failure to do so extended beyond negligence and firmly fell within the category of manifest incompetence individually and cumulatively.

24.6 **Principle 6** of the Code required the Respondent to behave in a way that maintained the trust the public places in him and in the provision of legal services. Mr Collins submitted that the manifest incompetence of the Respondent in his conduct of litigation plainly breached Principle 6.

The Respondent's Position

24.7 The Respondent failed to file an Answer to the Rule 12 Statement and had never engaged in the Tribunal proceedings. His position with regards to the allegations was therefore unknown.

The Tribunal's Findings

24.8 The Tribunal considered the submissions made and the evidence before it cognisant of the principles set out in Iqbal and Wingate.

24.9 The Tribunal determined that the Respondent's failures extended far beyond mere negligence. The Respondent, in respect of two separate matters, repeatedly and consistently failed to adhere to Court Orders and directions over a protracted period of time from June 2016 until October 2017. The Respondent additionally failed to engage with his opponents in litigation and, following the termination of his Consultancy Agreement, prevented the Firm from progressing claims by his failure to return client files entirely or at all.

24.10 The Tribunal found the extent and repeated nature of the Respondent's failures deplorable. They could only be described as manifest incompetence.

24.11 The Tribunal further found that manifest incompetence breached Principle 6 of the Code as the public was entitled to expect a solicitor conducting litigation, particularly in respect of which liability was admitted and the only contentious issue was the value of damages due, to obtain justice for their client.

24.12 The Tribunal therefore found Allegation 1.4 proved in its entirety.

Previous Disciplinary Matters

25. None.

Mitigation

26. None.

Sanction

27. The Tribunal referred to its Guidance Note on Sanctions (Eighth Edition) when considering sanction.

28. The Tribunal determined that the Respondent (a) was solely culpable for his misconduct which was planned, in that he made a conscious decision to behave in the manner that he had, (b) in breach of the trust vested in him by his clients who had all suffered personal injury and (c) he bore sole responsibility for his misconduct and should have known better, having been admitted to the Roll in 2006. The Tribunal found that the Respondent was highly culpable.

29. The Tribunal firstly considered the direct harm caused to the Respondent's clients in general and determined that the Respondent's failures to progress their claims caused them significant harm.

30. The Tribunal then considered the direct harm caused to Claimants C and R which it found to be substantial. The defendants had admitted liability early in the proceedings. The only contentious issue was the amount of compensation due. The Tribunal noted that in the matter of Claimant C, who had suffered life changing injuries, "without prejudice" offers in the region of £200,000.00 were made prior to the claim being struck out.

31. The harm caused to Claimants C and R was extreme, in that the Respondent's misconduct resulted in their claims being struck out, delayed their access to justice, delayed their entitlement to compensation and resulted in costs orders in favour of the defendants for which they were liable. Claimant R was also ordered to repay all interim damages previously provided by the defendant.

32. The Tribunal determined that the harm caused to the profession and public confidence in the profession by the manifest incompetence of the Respondent was particularly grave. The Tribunal found that the harm, individually and cumulatively, was eminently foreseeable, a direct consequence of the Respondent's misconduct and as such was extremely serious.

33. The Tribunal found a number of aggravating features to the Respondent's misconduct, namely that (a) it was deliberate, calculated and repeated, (b) it continued over a protracted period of time, (c) the Claimants, most significantly Claimant C, was vulnerable and (d) the Respondent knew or ought reasonably have known that his failures amounted to a material breach of the duties incumbent on him to protect the public and the reputation of the profession.

34. The Tribunal did not consider there to be any mitigating features present.

35. In light of the above, the Tribunal determined that the Respondent's attitude to his clients, the Firm, the Court, his regulator and the Tribunal demonstrated a flagrant disregard for the proper administration of justice and regulation of legal services. The Respondent had abrogated all responsibility for his professional obligations despite having been given numerous opportunities by all concerned to remedy and/or explain the same. The Respondent's failure to engage in and with the Tribunal proceedings led the Tribunal to the conclusion that he was entirely unrepentant for his misconduct, the harm that he had caused and its severe detrimental effect on the profession.

36. The allegations found proved which demonstrated the manifest incompetence of the Respondent amounted to misconduct so serious that the public interest would not be served by the imposition of No Order, a Reprimand, a Financial Penalty, a Restriction Order or a Suspension Order. It was evident to the Tribunal from the findings of fact it had made that the Respondent did not subscribe to the fundamental tenets of the profession and did not consider compliance with the Rules, Outcomes and Principles mandatory.

37. The Tribunal therefore determined that the Respondent should be struck from the Roll of Solicitors in order to protect the public from harm, declare and uphold proper standards within the profession and maintain public confidence in the regulation of legal services.

Costs

38. Mr Collins referred the Tribunal to the Applicant's Statement of Costs at Issue which claimed fixed costs in the sum of £42,000.00 and the Statement of Costs at Hearing which claimed fixed costs in the sum of £22,800.00. Mr Collins explained that the large reduction reflected the lack of engagement by the Respondent and the consequential

reduction in work required by the Applicant in preparation for and attendance at the substantive hearing.

39. Mr Collins therefore applied for costs in the sum of £22,800.00 but acknowledged that a reduction was likely to be made in that regard to reflect the fact that the substantive hearing was listed for 3 days and concluded in less than a day.

The Tribunal's Decision

40. The Tribunal carefully considered the application cognisant of the fact that the Respondent had neither filed nor served a Statement of Means. The Tribunal considered amount claimed by the Applicant was both reasonable and proportionate but should be reduced to reflect the time taken to conclude the substantive hearing.

41. The Tribunal therefore determined that costs in the sum of £22,000.00 be awarded to the Applicant.

Statement of Full Order

42. The Tribunal Ordered that the Respondent, David Ellis, 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 £22.000.00.

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

P S L Housego
Chair