SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974

Case No. 12199-2021

BETWEEN:

SOLICITORS REGULATION AUTHORITY LTD. Applicant

and

NABEEL AMER SHEIKH Respondent

Before:

Mr E. Nally (in the chair)
Ms A.E Banks
Mr R. Slack

Date of Hearing:
4 to 8 and 20 October and 1 November 2021

Appearances

James Ramsden QC, counsel, of Astraea Group, 7 Down Street, London, W1J 7AJ for the Applicant

Adrian Darbishire QC, counsel, of QEB Hollis Whiteman, 1-2 Laurence Pountney Hill, London EC4R 0EU for the Respondent

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JUDGMENT

Allegations

1. The allegations made against the Respondent were set out in a Rule 5 Statement dated 30 April 2021 and were that while in practice as the Senior Partner at Neumans LLP ("the Firm"):

1.1. On or about 27 June 2011, the Respondent caused a bill of costs and supporting materials (together "the Bill of Costs") to be submitted to the Court of Appeal pursuant to a Defendants' Costs Order made by the Court of Appeal in criminal proceedings brought against Client A ("the Proceedings"), which sought payment of £2,916,396 plus VAT, when the Bill of Costs:

a) made claims as to the work undertaken for Client A which did not reflect the work actually undertaken by the Firm;

b) did not include documents and information which ought properly to have been provided to the Court, including, in particular:

i. eight invoices sent by the Firm to Client A and settled by Client A;

and by reason of the matters set out at 1.1 a) to b) above or any of them, breached one or more of Rules 1.02, 1.06 and 11.01 of the Solicitors Code of Conduct 2007 ("the 2007 Code").

1.2 It was alleged that the Respondent acted dishonestly in respect of the matters set out at allegation 1.1 above.

Documents

2. The Tribunal considered all of the documents in the case, which were contained within an agreed electronic hearing bundle.

Preliminary Matters

Additional witness statement

3. At the outset of the hearing Mr Ramsden, for the Applicant, informed the Tribunal that a new witness statement had been served without notice on the Respondent's behalf shortly before the hearing. Mr Ramsden stated that the Applicant would not object to the statement of Mr AB, a chartered accountant, being admitted into evidence provided he attended the hearing to be cross-examined. In due course, on day 5 of the hearing, Mr Darbishire, for the Respondent, confirmed that Mr AB was available for questioning if required by the Tribunal or Mr Ramsden. By that stage of the hearing, by when the Applicant had presented and closed its case and the Respondent had completed giving his evidence, Mr Ramsden confirmed that he did not intend to cross-examine Mr AB. The Tribunal had no questions for Mr AB. The Tribunal determined that Mr AB's statement should be admitted into evidence and that in due course it would be given appropriate weight as part of the Tribunal's deliberations.

Submission of no case to answer

4. At the conclusion of the Applicant's case, Mr Darbishire submitted that insufficient evidence had been adduced by the Applicant upon which a reasonable Tribunal could find allegations 1.1(a) and (b) and 2 proved to the criminal standard. Accordingly, it was submitted that the allegations should be dismissed. The submission was based on the test set out in set out in R v Galbraith (1981) 73 Cr App R 124.

5. The parties' submissions and the Tribunal's reasoning in relation to the submission of no case to answer are set out below following the summary of the Applicant's case. The submission was not accepted and the Tribunal determined that there was a case to answer in relation to all of the allegations.

Factual Background

6. The Respondent was admitted to the Roll of Solicitors on 2 November 1998. The Respondent and his wife were managers and owners of the Firm until 21 June 2017, when the Respondent gave notice that he would cease to be a member of the Firm. The Respondent was the Firm's money laundering reporting officer ("MLRO"), Compliance Officer for Legal Practice ("COLP"), Compliance Officer for Finance and Administration ("COFA"), FCA Compliance Officer and the Senior Partner.

7. The allegations related to the Respondent's conduct in one single case. In January 2006 the Firm was instructed by Client A to defend fourteen criminal charges brought against him. In November 2007, twelve of the fourteen charges against Client A were discontinued and he was convicted of the remaining two (strict liability) offences. In November 2009, Client A's appeal against his convictions succeeded and they were quashed. An application for a defendant's costs order, under which his legal costs would be paid from central (public) funds, was made. The defendant's costs order was granted by the Court of Appeal in January 2010.

8. The allegations related to the submission of the Bill of Costs on or about 27 June 2011 pursuant to the defendants' costs order. In December 2011 an interim payment of £500,000 was made from public funds to the Firm. Various enquiries were made and an investigation undertaken by the Court of Appeal's Costs Office ("the Costs Office"). Between 2012 and 2014 the Police investigated the same matter (no further action resulted).

9. In December 2016 the defendants' costs order was revoked by the Court of Appeal and in January 2017 Client A repaid the interim payment plus costs. Master Egan, then Registrar of Criminal Appeals, referred the issue to the Applicant in January 2017.

10. On 28 June 2017 the Applicant's Adjudication Panel resolved to intervene into the current and former practice of the Respondent and into the Firm. The Firm closed on 3 July 2017 by reason of the Applicant's intervention. The Firm was placed in administration on 12 September 2017.

11. A differently constituted Panel of the Tribunal dismissed earlier proceedings against the Respondent, in a hearing in November 2019, on the basis that there was no case to answer on any of the allegations made by the Applicant. The Applicant successfully

appealed that decision, in relation to the allegations set out above only. Following the appeal hearing in October 2020 the Divisional Court remitted those allegations to be determined by a differently constituted panel of the Tribunal.

Witnesses

12. The written and oral 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 considered all o documents in the case and made notes of the oral evidence of all witnesses. The absence of any reference to particular evidence should not be taken as an indication that the Tribunal did not read, hear or consider that evidence. The following witnesses gave oral evidence:

- John Quentin, Legal Adviser in the Applicant's Legal and Enforcement directorate
- The Respondent

13. The following witnesses were not required by the parties to attend, but the Tribunal was invited to, and did, read their statements:

- Master Egan, former Registrar of Criminal Appeals
- Mr AB, chartered accountant engaged by the Firm

Findings of Fact and Law

14. The Applicant was required to prove the allegations beyond reasonable doubt. 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 right 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.

The relevant rules from the 2007 Code

15. The allegations alleged breaches of the following rules:

Rule 1.02: *You must act with integrity.*

Rule 1.06: *You must not behave in a way that is likely to diminish the trust the public places in you or the legal profession.*

Rule 11.01:

(1) *You must never deceive or knowingly or recklessly mislead the court or knowingly allow the court to be misled.*

(2) *You must draw to the court's attention:*

a. relevant cases and statutory provisions; and

b. the contents of any document that has been filed in the proceedings where failure to draw it to the court's attention might result in the court being misled; and

c. any material procedural irregularity.

(3) You must not construct facts supporting your client's case or draft any documents relating to any proceedings containing:

a. any contention which you do not consider to be properly arguable; or

b. any allegation of fraud unless you are instructed to do so and you have material which you reasonably believe establishes, on the face of it, a case of fraud.

16. **Allegation 1.1: On or about 27 June 2011, the Respondent caused the Bill of Costs to be submitted to the Court of Appeal pursuant to a Defendants' Costs Order made by the Court of Appeal in the Proceedings, which sought payment of £2,916,396 plus VAT, when the Bill of Costs:**

    a) made claims as to the work undertaken for Client A which did not reflect the work actually undertaken by the Firm;

    b) did not include documents and information which ought properly to have been provided to the Court, including, in particular:

    i. eight invoices sent by the Firm to Client A and settled by Client A;

    and by reason of the matters set out at 1.1 a) to b) above or any of them, breached one or more of Rules 1.02, 1.06 and 11.01 of the 2007 Code.

16.1 **The Applicant's Case**

Overview applying to all elements of the allegations

16.1.1 Mr Ramsden opened the Applicant's case by stating that the case was conceptually simple. The crux of the case was that the Bill of Costs for Client A was an improper attempt, for which the Respondent was responsible, to obtain payment of costs to which the Firm was not properly entitled.

16.1.2 The Firm had initially been instructed by Client A in January 2006 to defend fourteen criminal charges. For the purposes of the allegations, there were said to be two key agreements, the validity of which Mr Ramsden stated were not challenged. The first was a cap on fees agreed orally in January 2007 (which the Respondent accepted affected how he administered the retainer with Client A). This was in place for around two years. Whilst it was suggested in the Rule 5 Statement that the January 2007 fee capping agreement may not be genuine, Mr Ramsden did not put this to the Respondent or invite the Tribunal to consider this allegation; he stated that the validity of the agreement was not challenged. In March 2009 there was a second oral agreement in

which the cap on fees was abandoned. This agreement had retrospective effect so that the Firm was entitled to apply a higher hourly rate to work done during the period of capped fees. This agreement was put in writing six months later in October 2009 in a deed of variation ("the Deed").

16.1.3 Mr Ramsden stated that it was the Deed that the Respondent relied on, both contractually and in terms of professional conduct, to do what he did with the Bill of Costs. The Deed included recitals which mentioned the original 2006 retainer and the capping agreement of 2007. The effect of the Deed was that the costs incurred by Client A, for the period up to the agreement reflected in the Deed, were increased tenfold.

16.1.4 The Applicant's position was that the Respondent had misunderstood the Deed. Mr Ramsden submitted that the Deed must be construed strictly and whilst it entitled the Respondent to apply higher hourly rates to work completed during the earlier period of the fee capping agreement, it did not entitle the Respondent to reconstruct invoices, time sheets, and records which already existed. He submitted there was a significant difference between applying a higher hourly rate to work about which the client had been advised, and adding to the overall liability by charging for work which had never been brought to the attention of the client. It was submitted that a client would not expect wholesale reengineering of the basis for the fees. If the Deed had permitted the Respondent to reconstruct hundreds of new hours which could be billed it was submitted that the document would have said so on its face, which it did not.

16.1.5 The Rule 5 Statement listed eight invoices issued between March 2006 and November 2007 which Mr Ramsden stated included invoices reflecting the 2007 fee capping agreement. The fee cap was illustrated in the credit notes which reduced Client A's liability from £400,000 to the level of the agreed cap of £275,000. It was said to be significant that not only had the Respondent and colleagues sought to record work actually completed during the period of the January 2007 fee capping agreement, the Firm had also produced invoices which reflected that recorded time. The Tribunal was referred to an example invoice. The invoice contained a long descriptive narrative of the work completed. It was suggested that the invoice appeared to have been signed and sent to the client and that there was no suggestion that it was created for accounting purposes only. The Respondent had stated that after the January 2007 capping agreement he did not pay attention to time recording and said there was no proper time recording after that point. Mr Ramsden submitted that prior to that date records would have been kept. There was said to be no reason to suggest that time recording before the cap would not have been complete.

16.1.6 Mr Ramsden stated that a critical aspect of the Applicant's case was that the eight invoices were issued over a period to which a "huge" number of additional hours, never previously notified to the client, were subsequently added to the Bill of Costs for this same period. There was said, for example, to have been no explanation provided by the Respondent for why 500 extra hours were charged for the period already covered by the first three invoices issued by the Firm in 2006.

16.1.7 Mr Ramsden referred the Tribunal to the judgment of the Administrative Court which had remitted the remaining allegations back to the Tribunal (SRA v Sheikh [2020] EWHC 3062 (Admin)). Davis LJ had said at [65] that even if the Deed was genuine, it did not follow that it was not capable of being a platform for claiming unwarranted

costs. Mr Ramsden submitted this was precisely what it became when the Respondent used the Deed in the way he did.

16.1.8 The Applicant alleged that the Respondent knew that as the payer of any costs awarded would be the public purse, and this was not just an agreement with a private client, this took the costs situation beyond purely contractual considerations. Mr Ramsden referred the Tribunal to section 16 of the Prosecution of Offences Act 1985. Subsection 6 states:

> *"A defendant's costs order shall [...] be for the payment out of central funds, to the person in whose favour the order is made, of such amount as the court considers reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings."*

16.1.9 The Applicant's case was that when the Respondent submitted the Bill of Costs to the Costs Office, signed by him in the Firm's name, he knew, or should be taken to have known as COLP and COFA, that this Act applied to the application for costs. In other words, he knew that narrow contractual charging parameters no longer applied. A duty was imposed on the Respondent to be entirely candid in his submission to the Costs Office. It was submitted that this duty would have been obvious to the Respondent and that he was obliged to explain exactly what he had done in the preparation of the Bill of Costs. The Respondent should have been clear that the result was an attempt to restructure the retainer with Client A to cover work not contemporaneously recorded, invoiced or notified to the client at the time of the Deed.

16.1.10 The Respondent had applied a formula based on time per page reviewed to generate the overall time for which charges were applied. The attendance notes presented in support of the Bill of Costs were all prepared for the submission of that bill and were not, as they were alleged to appear on their face, contemporaneous. Mr Ramsden submitted that the Tribunal was entitled to ask why the Respondent clarified none of these things to the Costs Office. Mr Ramsden suggested that the answer was obvious: had the Respondent made these things clear there was no prospect of costs being paid from central (public) funds. Mr Ramsden submitted that the fact a commercial client may accept such an arrangement was irrelevant to the allegations. This would not allow the Respondent to tell the Court that the higher rate was reasonable or proper.

16.1.11 Mr Ramsden asked how a solicitor in April or May 2011 could reliably reconstruct what they were doing on a particular day four years earlier. He submitted that there was no way that a solicitor could honestly say he was reading a specific document on a specific day which was what the attendance notes presented in support of the Bill of Costs purported to show. It was submitted that the Respondent was under a duty to make his methodology clear and that given the way the time said to be incurred had been retrospectively reconstructed, it was impossible to see how the results of the exercise could be regarded as reliable.

16.1.12 The Respondent's case, and evidence to the Tribunal, was that he did all of the work even if it was not done on the precise day indicated on the Bill of Costs or supporting documents. Mr Ramsden submitted that the Respondent knew that if he had informed the Costs Office of this there was no possibility that he would have been paid for this work. It was submitted that the Respondent must have known the Bill of Costs was

unreliable to the extent that it was not honest. Mr Ramsden submitted that the questions for the Tribunal were:

- was the Respondent entitled to re-engineer the time and charges in the way he did; and
- was it excusable not to tell the Costs Office what he had done.

The Bill of Costs

16.1.13 In June 2011, the Bill of Costs for £2.9 million was produced and submitted to the Costs Office. A long explanatory memorandum was also produced as a preamble to the costs claimed. There were five boxes of supporting documentation provided but these did not include the eight invoices mentioned above nor the credit notes which were applied to them. In addition, there was no explanation in the memorandum to tell the Costs Office that the Bill of Costs or the supporting attendance notes (submitted in August 2011) were reconstructed after the event. It was submitted that any solicitor would have had at the front and centre of his mind the need to make this fact clear to the Costs Office.

16.1.14 The size of the Bill of Costs was said to have been unprecedented at the time. The concern at the Costs Office was such that Client A was asked to provide a sworn statement to the Court. He did so and stood by the history of contractual variations to fee arrangements put forward by the Respondent. On 28 June 2012, the Court of Appeal convened a hearing to consider the statement from Client A. Master Egan was directed to undertake a review of the matter.

16.1.15 The Tribunal was referred to Master Egan's report and Mr Ramsden submitted that the Tribunal was entitled to read it although was not bound by it. Where Master Egan had recorded a question he had posed and the answer the Respondent had provided within his report, the Respondent had not suggested that the report was inaccurate. Master Egan's report was submitted to be an important contemporaneous record of what the Respondent had said. Mr Ramsden stated that the Applicant relied only on the factual answers given by the Respondent as recorded in the report. It was submitted that the Tribunal would not find a candid response from the Respondent within the report and that he had provided nothing coming close to the explanation he now made before the Tribunal. There had been no explanation provided for how the time was reconstructed. The Applicant's case was that it was not enough to deliver retrospective attendance notes without identifying them as such and that the lack of explanation at the time was telling.

16.1.16 Within the Court of Appeal proceedings relating to the costs claim, counsel for the Lord Chancellor adopted Master Egan's conclusions in his statement of case in September 2016. Master Egan had concluded that "*there is clear evidence to support a case of fraud in this claim*". The Firm's statement of case was drafted by leading counsel. Mr Ramsden stated that at no stage in that process did the Respondent or the Firm advance any positive case to explain their conduct. He stated that when Client A "capitulated" and repaid the £500,000 which had been paid to him out of public funds (plus costs), the Firm simply acceded without challenge or protest. Mr Ramsden suggested this was because had the Respondent said even part of what he now said to the Tribunal, he would have made matters considerably worse.

16.1.17 The Firm accepted that no costs would be recovered, that the £500,000 paid to Client A should be repaid, and stated that:

> "*there is no longer any dispute to be resolved by the court*" and therefore they did "*not propose to file or serve any statement of case, relevant documents or witness statements*"

Mr Ramsden described this response as remarkable. The Court of Appeal had been concerned about the propriety of the Bill of Costs to the extent that a hearing was convened, and it was submitted that a solicitor with insight would have offered an explanation for their conduct.

16.1.18 The Firm made a self-report to the Applicant in April 2017 following the criticism from the Court of Appeal when the defendant's costs order was revoked. Mr Ramsden suggested that this self-report was far more assertive than the Firm had been before the Court of Appeal. It was suggested in the self-report that the criticism of the Firm and the Respondent was variously "wrong", "misconceived" and "rejected" by the Firm. The Applicant's position was that the Respondent should have explained himself before the Court of Appeal rather than waiting for the self-report to the Applicant to make a first attempt to do so.

16.1.19 It was only on 14 September 2021 that the Respondent had presented a detailed response to the allegations. He had produced no witness statement for the Tribunal proceedings. It was submitted that a solicitor showing insight would have provided the fullest explanation possible and that the Tribunal was entitled to weigh the Respondent's failure to do so in the balance. At all material times the Respondent was COLP and COFA for the Firm. This was submitted to be significant if the Tribunal was faced with what Mr Ramsden described as marginal matters. The Tribunal was entitled to assume, given those roles, that the Respondent would take particular care and that if in doubt on any matter, he would take advice on the appropriate thing to do.

The claims for work undertaken by the Respondent/ the Firm (allegation 1.1(a))

16.1.20 Mr Ramsden referred the Tribunal to extracts from the evidence of Mr Quentin, a legal adviser employed by the Applicant who had investigated the matters referred to the Applicant by Master Egan. This evidence was said to demonstrate the unreliability and invalidity of the Bill of Costs and supporting documents. By way of example, from 12 January 2006 to 8 January 2008, there were 32,251 units of time for which costs were claimed and for which there was no contemporaneous supporting record. In contrast, for the same period, the number of units for which there were contemporaneous records was 4,439. Mr Ramsden stated that the Respondent did not take issue with any specific facts recorded by Mr Quentin. Instead, he suggested that he did the work in question at other times.

16.1.21 Taking a further illustrative example, Mr Quentin analysed the period from 11 January 2007 to 11 September 2007. This was the period immediately following the fee capping agreement. It was noted that only one day out of the six months was not worked by the Respondent. Further, on all but ten of the days in that six month period, work was completed by the Respondent on Client A's matter. Mr Quentin noted in his report, and later in his evidence to the Tribunal, that 98.7% of the time recording for

this period, reflected in the Bill of Costs, was unsupported by any contemporaneous documents.

16.1.22 The Tribunal was referred to an example attendance note. The note was said to be illustrative of others. Mr Ramsden queried how a time figure of 5 hours and 45 minutes had been arrived at when the calculation was based on two or four minutes being allocated per page read. Similarly, he queried how reading specific pages on Client A's computer on a particular date could be recorded accurately on an attendance note produced four years after the event. The attendance note itself did not state that it was not created contemporaneously. The Tribunal was referred to various attendance notes which made detailed references to specific pages being read and to specific dates.

16.1.23 Mr Ramsden also referred the Tribunal to various other attendance notes which were said to be problematic. These included attendance notes recording lengthy conferences with Client A whilst phone calls were said to have been made on the same days to take Client A's instructions. For example, on 1 May 2007, one attendance note claimed 7 hours and 15 minutes in conference with Client A, whilst another note claimed 30 minutes spent on the telephone to Client A (without reference to the conferences held that day or the days before and after) and stated that on this day Client A was at a meeting with an expert witness. A further example was highlighted, of an attendance for 15 May 2007 which claimed 8 hours and 45 minutes in conference with Client A, whilst another note recorded 1 hour and 18 minutes being spent on three calls with Client A and a further 10 calls to clerks, counsel, or colleagues to check availability.

16.1.24 Master Egan was submitted to have asked various direct questions of the Respondent. For example, he asked a question about whether the attendance notes submitted in August 2011 were contemporaneous. The answer given was "*the sheets at D8 pps 1-155 are to the best of our knowledge accurate records of work undertaken*". This was said not to be an answer to the question posed. This was said to be very important for the Tribunal's assessment of whether the Respondent was "hapless or dishonest".

16.1.25 Time was also recorded reviewing documents on specific dates before the relevant documents had been served on the Firm. The attendance notes were also alleged to contain excessive amounts of time for simple tasks. Mr Ramsden submitted that it must follow that if the Respondent was compelled to apply a minutes per page formula to calculate the time incurred, he could not have had any memory to assert on which day he did particular tasks. This was not made clear on the face of the attendance notes. Mr Ramsden submitted that the attendance notes were critical to allegation 1.1(a). They were said to be the only basis on which the re-engineered cost claim was based and not to be transparent. It was submitted that the Tribunal could properly infer that the Respondent did not work the hours claimed.

The non-submission of the invoices (allegation 1.1(b))

16.1.26 The Applicant's case was that the Respondent deliberately withheld, when making the claim for payment under the defendant's cost order, invoices provided to Client A which would have undermined the apparent legitimacy of the claim. The Respondent was alleged to have deliberately failed to disclose the eight invoices because he knew of the consequences of disclosing them, which had been made clear to him by his costs draftsman.

16.1.27 Mr Ramsden referred the Tribunal to the Rule 5 statement which contained a summary of the information sought by Master Egan as part of his investigation. He first requested various documents on 20 July 2011, and the Firm replied. It was suggested that the Respondent was directly engaged in preparing the responses from the Firm. By letter dated 5 September 2011, the Costs Office requested various specific documents including the invoices relating to interim payments. The Tribunal was referred to the reply sent by the costs draftsman instructed by the Respondent. The invoices relating to the interim payments made by Client A were not provided; instead it was stated that:

> *"we intend to provide a detailed grid which provides the information you requested once we have an opportunity to review the 27 files and cross-refer with the internal solicitor client account for this file."*

16.1.28 The Tribunal was referred to a draft letter dated 4 October 2011 (which was a draft of the letter referred to above sent from the costs draftsmen). The letter contained a comment by the side of the text which stated it was important that no evidence of interim invoices appeared on the files. The Applicant's case was that this drew the Respondent's attention to this issue. In addition, in a letter from the costs draftsman to the Firm of 17 April 2011 the indemnity principle had been mentioned in relation to the invoices. It was submitted he knew that the Costs Office had requested these invoices specifically, and that honesty and integrity required that the requested information be provided.

16.1.29 On 19 March 2015 (delay from September 2012 to October 2014 having been caused by a Police investigation) Master Egan requested copies of various invoices, citing their specific invoice numbers. The Firm then responded by letter dated 7 April 2015 enclosing the invoices.

16.1.30 In his Answer, the Respondent had asserted that these invoices were raised for internal accounting purposes. Mr Ramsden submitted that this was plainly not the case and he stated that they had been sent to Client A and were the subject of a credit note also sent to the client. It was submitted that advancing this argument showed a lack of insight. In his Answer the Respondent had described the invoices as being of "no evidential value", something which was said by the Respondent to be consistent with the advice received from the costs draftsman. Mr Ramsden noted that the Respondent had chosen not to waive privilege on this advice to substantiate the point.

16.1.31 The invoices purported to reflect time expended and in due course credit notes were issued against the invoices. For this same period, following the oral agreement of March 2009 later recorded in the Deed, hundreds of additional hours were claimed. The Applicant's case was that when the hours reflected in the invoices were recorded the Firm's time recording system was in use. Mr Ramsden asked the rhetorical question why it would not have been used in those circumstances and why the Respondent would not have recorded his time. He submitted that the irresistible inference was that he had done so or tried to do so. Mr Ramsden submitted that a solicitor acting honestly would have explained these invoices.

Breaches of the 2007 Code

16.1.32 As the partner with conduct of the file and the senior partner of the Firm, it was alleged that the Respondent was responsible for confirming that the Bill of Costs was accurate prior to it being submitted to the Court and for deciding which materials (including the eight invoices) were submitted in support of it. It was alleged that the Respondent must have known that the hours claimed had not been worked by him and so the claim for those hours was therefore false and that he deliberately withheld the invoices until they were requested by individual invoice number by Master Egan in March 2015. In so acting, it was submitted that the Respondent failed to act in accordance with an ethical code, and so failed to act with integrity in breach of Rule 1.02 if the 2007 Code. It was also submitted that his actions were likely to diminish the trust the public placed in him and the profession and mislead or allow the Court to be mislead contrary to Rules 1.06 and 11.01 of the 2007 Code.

Dishonesty alleged

16.1.33 Mr Ramsden referred the Tribunal to the Rule 5 Statement in which the Applicant's case on dishonesty was particularised. It was alleged that the Respondent's actions, as summarised above, were dishonest in accordance with the test for dishonesty stated by the Supreme Court in Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67. The test was that the individual had acted dishonestly by "the (objective) standards of ordinary decent people". It was also submitted that the circumstances of the case showed that the Respondent realised that by those standards he was acting dishonestly (but that proof of such realisation was not necessary to prove dishonesty).

16.1.34 It was alleged that the Respondent acted dishonestly by the objective standards of ordinary decent people, in that:

- he submitted a claim for payment which he knew to be inconsistent with the agreements reached with Client A;

- he submitted data as to hours worked which he knew to be inaccurate and unsupported by underlying material or electronic time recording data; and

- he submitted a claim for payment which consciously omitted the interim invoices rendered to Client A.

16.1.35 It was the Applicant's case that no honest solicitor would act in such a way. Not only was his conduct dishonest by the objective standards of ordinary decent people, but he must also have been aware that it was dishonest by those standards. It was submitted that the Tribunal could safely conclude that a solicitor must have known that the conduct recited above would be viewed as dishonest at the time of the conduct.

16.2 **Submission of No Case to Answer**

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

16.2.1 It was submitted that there was insufficient evidence upon which a reasonable Tribunal could find allegations 1.1(a) and (b) and 2 proved to the criminal standard and that accordingly, the allegations should be dismissed at the close of the Applicant's case.

16.2.2 The Chair of the Tribunal had stated at the outset of the proceedings that the Tribunal: "*appreciates we are dealing with the allegations contained in the amended Rule 5*"; would respect the subsisting findings of the previous Tribunal; and would not "*stray outside the boundaries of the allegation*". Mr Darbishire stated that his submissions would not address two allegations said to be raised for the first time by the Mr Ramsden when opening the Applicant's case that:

- the Deed of Variation did not entitle the Firm to "re-engineer" the retainer or "revisit the ambit of the work done"; and

- the Respondent failed to explain in the Bill of Costs submitted on 27 June 2011 that "what was being presented to the Court was an *ex post facto* reconstruction whereby there were no contemporaneous records of the work done".

16.2.3 It was submitted that the two key factual issues, as summarised by Mr Ramsden to the Administrative Court, were: "*was work claimed for that was not done and were the eight invoices not disclosed deliberately or in circumstances that fall short of some kind of dishonest deliberate act but is nevertheless conduct which no professional would regard as acceptable*". It would be wholly unfair, indeed an abuse of the Tribunal's process, to allow the case to proceed on any other basis.

Allegation 1.1(a)

16.2.4 The heart of the Respondent's case was that the terms and basis of the Bill of Costs rendered to Client A were agreed. This was said to be put beyond any possible doubt by two striking features. First, Client A paid the entire sum invoiced to him (less about 5% in recognition of the final payment). Second, he did so having been closely involved in the work undertaken as part of the retainer.

16.2.5 The Applicant had not appealed the earlier Tribunal's dismissal of the allegations that the Bill of Costs *"sought payment of a sum which was in excess of that which was properly due to be paid by Client A*" or *"sought payment of a sum in excess of that which might properly be charged to Client A for the work undertaken*". It was submitted to follow that there could be no general complaint about the way in which the Bill of Costs was prepared; or the overall level of work charged for; or the basis of those charges.

16.2.6 What remained were specific allegations that the Bill of Costs contained claims for work undertaken which did not accurately reflect the work actually done. These were said to fall into two categories. First, examples where a comparison of the hours attributed to certain days was alleged to conflict with other records as to time spent, or activity on those specific days. Second, a single instance where it was said that work

described could not have been done on the specific days shown in the bill (something accepted by the Respondent as an error when this was first raised).

16.2.7 It was stressed that the minutes per page basis on which all relevant fees were calculated was set out in the attendance notes. Inherent in that approach was said to be a retrospective attempt to estimate the overall work done. No-one could sensibly claim that the Respondent actually spent precisely 2 or 4 minutes per page engaged in any specific activity. To suggest that the attendance notes purported to be a precise record of the time spent on a given day considering a given set of documents, was submitted not to be a logical inference.

16.2.8 Client A had agreed to pay, after the event, for all of the work done. The work was done, as Client A must have known. The Bill of Costs quantified and thus valued the work that had been done. If the Respondent's actions were to be judged fairly, that must be kept in mind. The Bill of Costs reflected what Client A had agreed to pay (and did pay). It therefore reflected that which he was entitled to have assessed as legal expenses incurred by him, under a defendant's costs order. Mr Darbishire stated that Client A was not entitled to recover everything and submitted that full recovery of all costs would be unheard of in any substantial case. Most importantly, the fact that Client A had agreed, after the event, to pay far more than the £275,000 fee cap, and the fact that the vast majority of the fees he had incurred were reflected in a minutes per page calculation based on the volume of material, was all set out in the supporting documents supplied to the Costs Office on 11 August 2011. It would have been open to the Costs Office to resist Client A's claim on the basis that it was not reasonable of him to have voluntarily incurred the additional liability.

16.2.9 In any event, by reference to the initial retainer letter, it was submitted that from the outset of the retainer in January 2006 the fees paid to the Firm were never determined by the total hours which the Respondent or the Firm recorded or billed. Throughout the case, up until the March 2009 variation, the fees which the Firm was entitled to be paid were subject to a limit or cap. Accordingly, there was submitted to be no proper basis upon which to exclude the inference that the Respondent simply failed to keep contemporaneous records of the work he carried out because he did not believe the Firm would be paid for that work.

Allegation 1.1(b)

16.2.10 This allegation focused on the failure to provide eight invoices to the Costs Office on or about 27 June 2011. The invoices were issued between March 2006 and November 2007.

Pre-27 June 2011

16.2.11 By 27 June 2011, the Respondent had been advised by specialist costs lawyers ("the Costs Lawyers"), instructed to prepare the Bill of Costs, that the eight invoices did not need to be included. The Costs Lawyers provided advice to the Firm on 26 April 2011 (by which time they had been involved with the case over a year and were on the way to incurring in excess of 1,000 hours' work in preparing the Bill of Costs): "*you have informed ourselves that the invoices rendered to your client were intended to be interim on account invoices and therefore a final statute bill will be rendered to your client for*

all work undertaken throughout the period concerned, giving credit for the interim invoices." It was noted that the amended Rule 5 Statement did not state that the eight invoices were "interim statute bills" for the purposes of section 69-70 of the Solicitors Act 1974. The Respondent's case was that the invoices were not interim statute bills: the initial 30 January 2006 retainer did not provide the right for such bills to be rendered, and the invoices were not a complete record of the work.

16.2.12 It was submitted that, accordingly, the Respondent and the Costs Lawyers were correct to proceed on the basis that the invoices were interim on account invoices. There was said to be no evidence, nor any suggestion, that the Costs Lawyers were wrong to treat the invoices as they did for the purposes of preparing the 27 June Bill of Costs, or that the advice they provided to the Respondent was wrong. In any event, it was submitted that there was no basis for any inference of conscious wrongdoing on the Respondent's part – he was entitled to, and did, rely on the advice provided by the specialist costs lawyers instructed for the purpose.

Post-27 June 2011

16.2.13 It was submitted that the Applicant's case rested on the Respondent's alleged failure to respond to requests for further documentation made by the Criminal Appeal Office from 20 July 2011 onwards. It was further submitted that nothing done by the Respondent after this date could establish a failure to provide the invoices a month beforehand together with the Bill of Costs, which at that stage was unsupported by any substantive documentation.

16.2.14 The Respondent's case was that in any event, that there was no failure to disclose the invoices on the part of the Firm. Mr Darbishire highlighted what was submitted to be the relevant chronology:

- On 20 July 2011 the Costs Office asked for "*Copies of bills to client*";

- Given the advice received that the eight invoices had been superseded by the final Bill of Costs the Firm replied on 11 August 2011 stating: "*A copy of the final bill to the client for £3,487,337.96 and receipted fee note confirming the payment of a further £600,000 towards the outstanding costs which amounts to a total of £1,214,910.94 which has to date been paid*";

- On 5 September 2011 the Costs Office wrote to the Costs Lawyers (not the Firm) seeking "*correspondence, attendance notes, invoices etc relating to the interim payments of £614,910*". The Costs Lawyers responded on 12 September 2011 undertaking to provide "*a detailed grid which provides the information you requested*". The Costs Office did not suggest that the response was inappropriate and there was no complaint about the completeness of the grid when it was provided;

- Just over three years passed, following which, on 19 March 2015, Master Egan wrote to the Firm requesting that the invoices be provided. The Firm duly provided them. The Firm made clear that they were "*interim on account invoices raised purely for internal accounting purposes and to reflect payments on account made*

by [Client A]. The final invoice that was raised pursuant to the deed rendered all other invoices obsolete in any event".

16.2.15 Mr Darbishire stated that there was no dispute that the invoices were "on account" (as opposed to "statute") invoices. It was submitted to be clear that the invoices were issued solely to enable the transfer of funds reflecting the agreed capped fees from the client account to the office account, i.e. for internal accounting purposes:

- The first invoice, dated 20 March 2006, was issued in the sum of £25,661, reflecting the £25,000 capped fee agreed in the original retainer letter to be transferred to the office account. The invoice did not reflect even the total hours recorded on iLaw by the Respondent for the relevant period;

- The second and third invoices were both signed on 2 October 2006. Their effect, taken together with a credit note issued on 31 August 2006, was to adjust the outstanding office balance to precisely £100,000, thereby allowing further payments made by Client A to be transferred to the office account;

- Thereafter, in 2007, the five remaining invoices were only issued for "*legal costs incurred in attending 1st trial at Kingston Crown Court*". Save for a single £28 phone call, none of the Respondent's work on the case was reflected in the invoices, including the time recorded on iLaw throughout this period. It was submitted that the invoices were therefore demonstrably not a complete record of the work undertaken by the Firm. However, taken together with a further credit note issued on 16 November 2007, the invoices adjusted the office balance to approximately £275,000, reflecting the further capped fee agreed with Client A;

- There was no evidence that the invoices were sent to Client A.

16.2.16 It was said to follow that the only information disclosed by the invoices was that prior to March 2009, the Firm had acted for Client A pursuant to a capped fee (something the Deed provided to the Costs Office on 11 August 2011 itself made clear). It was submitted that there was no evidence that the Respondent failed to disclose the eight invoices, on 27 June 2011 (as alleged) or at all. It was furthermore submitted that this was unaltered by the advice provided by an experienced partner at the Costs Lawyers, in a tracked-change comment on 6 October 2011, over three months after the alleged misconduct. It was said that the Applicant had taken no steps to investigate what was meant by the comment but that in any event, it was entirely consistent with the original advice that the invoices would be subsumed within the final bill. It was submitted that, in any event, nothing said by the Costs Lawyers in October 2011 could affect the Respondent's actions or state of mind in June 2011.

Allegation 2

16.2.17 Responding to paragraph [50] of the Rule 5 in which the particulars of the alleged dishonesty were set out:

- Paragraph [50.1] alleged: "*he submitted a claim for payment which he knew to be inconsistent with the agreements reached with Client A*". It was submitted that this did not reflect allegation 1.1 and was inconsistent with the subsisting findings of

the Tribunal. In particular, such a claim for costs which was inconsistent with the agreement with Client A would, unless it lowered the sum claimed, be one which "*sought payment of a sum which was in excess of that which was properly due to be paid by Client A*" and "*in excess of that which might properly be charged to Client A for the work undertaken*". These were allegations not pursued by the Applicant in the appeal against the earlier Tribunal's dismissal of the allegations and they were accordingly not remitted to the Tribunal by the Divisional Court.

- Paragraph [50.2] alleged: "*he submitted data as to hours worked which he knew to be inaccurate and unsupported by underlying material or electronic time recording data*". There was submitted to be no proper basis for the inference that the Respondent claimed for work which he knew had not been incurred. The minutes per page calculations reflected in the attendance notes were supported by underlying material, including the 27 boxes of files of papers (which it was said the Applicant had declined to consider). The fact that those calculations were not supported by "electronic time recording data" was not part of allegation 1.1 and, in any event, could not reasonably support a finding of dishonesty.

- Paragraph [50.3] alleged: "*he submitted a claim to payment which consciously omitted the interim invoices rendered to Client A*". For the reasons set out above, it was submitted there was no proper basis for the inference that the Respondent "consciously omitted" the eight invoices from the "claim to payment" submitted on 27 June 2011.

Legal Context – Submission of No Case to Answer

16.2.18 Mr Darbishire referred the Tribunal to the approach to dealing with a submission of no case to answer where the criminal standard of proof applies as set out in Galbraith. As the Divisional Court confirmed in these proceedings:

> *"In summary, a case will be withdrawn if (a) there is no evidence to support the allegation against the defendant or (b) where the evidence is sufficiently tenuous such that, taken at its highest, a jury properly directed could not properly convict. On the other hand, if, on one possible view of the evidence, there is evidence on which a jury could properly convict then the matter should be allowed to proceed to verdict."*

16.2.19 It was submitted that where the case against a Respondent was based on inference, deciding that there was a case to answer should involve the rejection of all realistic possibilities consistent with innocence. The Tribunal was referred to R v Bassett (Jordan) [2020] EWCA Crim 1376:

> *"17. A criminal case very often depends on a jury, safely, being able to draw logical inferences from a series of established facts. The ultimate question for the judge is, "could a reasonable jury, properly directed, conclude so that it is sure that the defendant is guilty?" In order to draw such an inference the jury must be able to "exclude all realistic possibilities consistent with the defendant's innocence", per Pitchford LJ in R v Masih [2015] EWCA Crim 477 at [3]."*

16.2.20 The Tribunal was also referred to R v Bush and Scouler [2019] EWCA Crim 29 in which it was observed that the requirement to take the prosecution case at its highest did not mean that every possible adverse inference must be drawn against a defendant. The court must consider the totality of the evidence.

Dishonesty

16.2.21 It was agreed that the Tribunal should apply the test for dishonesty as set out in paragraph [74] of Ivey:

> *"When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."*

16.2.22 Accordingly, to the extent that Mr Ramsden had suggested in opening the Applicant's case that "*what matters is what as a matter of objective analysis a solicitor would have understood or be taken to understand*", he was submitted to have been wrong to do so.

16.2.23 Mr Darbishire referred the Tribunal to the observation in R v Barton [2021] QB 685, at paragraph [108]:

> *"when Lord Hughes JSC talked in para 74 of the "actual state of mind as to knowledge or belief as to the facts" (our emphasis) he was referring to all the circumstances known to the accused and not limiting consideration to past facts. All matters that lead an accused to act as he or she did will form part of the subjective mental state, thereby forming a part of the fact-finding exercise before applying the objective standard."*

16.3 **The Applicant's Reply to the Submission of No Case to Answer**

16.3.1 Mr Ramsden submitted that the manner of the application made on the Respondent's behalf strengthened the Applicant's inferential case. He submitted that the Tribunal was being invited to make the same errors made by the previous Panel of the Tribunal. He stated that there were four key propositions where it was necessary to "reset the compass" following the no case to answer submission.

16.3.2 Firstly, it had been suggested the Applicant misunderstood the relationship between the Firm and Client A which contributed to the lack of basis for the alleged breaches. Mr Ramsden submitted that this revealed a fundamental misunderstanding of the focus of the allegations which was the relationship between the Respondent and the Court, rather than the Respondent and his client. In short, the case was about the Respondent's duty to the Court. The Applicant's case was that the Bill of Costs submitted to the Court

of Appeal was inappropriately inflated by the Respondent. In inflating the costs in this way, the Respondent had been dishonest.

16.3.3 Secondly, the Applicant was criticised for inferences it was inviting the Tribunal to make based on attendance notes and conflicts between, for example, a conference with Client A and a telephone made to Client A on the same day. Mr Darbishire had submitted on the Respondent's behalf that in assessing the no case to answer submission the Tribunal needed to be able to exclude all inferences consistent with innocence. Mr Ramsden submitted that this conflated the no case to answer stage with inferences to be drawn at the conclusion of the case when assessing guilt, at which stage the Tribunal must be sure that all such inferences consistent with innocent could be excluded.

16.3.4 Mr Ramsden referred the Tribunal to paragraphs [9] and [10] from the judgment of the Divisional Court remitting the case to the Tribunal. In [9] reference to the test in Galbraith was made:

> *"if, on one possible view of the evidence, there is evidence on which a jury could properly convict then the matter should be allowed to proceed to verdict."*

Mr Ramsden submitted that in [10] it was stated that this essential test should not be over-refined and that the Tribunal should focus on the essential question of whether or not there was evidence (taking the prosecution case at its highest) upon which a reasonable Tribunal could infer guilt. Mr Ramsden submitted that this was the test which the Tribunal should apply to the submission of no case to answer, and that this was a very different exercise to that which would be required at the end of the case.

16.3.5 Thirdly, it had been suggested on the Respondent's behalf that the Bill of Costs did not seek payment beyond that properly due to be paid by Client A or might properly be charged to him for the work undertaken. Mr Ramsden submitted that invited the Tribunal to assess the Bill of Costs through the prism of the Respondent's relationship with Client A rather than his relationship with the Court. Mr Ramsden submitted that the Administrative Court had been assiduous in establishing whether a case to answer had been demonstrated by the Applicant on the allegations successfully appealed (he agreed that the findings not appealed stood). The Applicant was said to have taken a proportionate approach and confined its appeal to some of the allegations and it was those which had formed the case before the Tribunal. It was wrong and misleading to suggest that the Rule 5 Statement was different to what the Administrative Court had found disclosed a case to answer.

16.3.6 Fourthly, Mr Ramsden invited the Tribunal to be wary to distinguish between legal submissions made on the Respondent's behalf and attempts to assert facts not in evidence. He referred the Tribunal to the judgment of the Divisional Court at paragraph [62]:

> *"Third, the SDT, inexplicably to my mind, purported to make final findings of fact adverse to the SRA's case without seemingly asking whether a contrary conclusion was reasonably sustainable. For example, it purported to find, at the half-way stage, that the respondent had relied entirely on Masters, the costs lawyers, in causing potentially important documents not to be disclosed lest they*

> *might "confuse matters". But if that was the respondent's position, then he should say so in a witness statement and be prepared to be cross-examined. Bare assertions to that effect - not assertions against one's interest but assertions in favour of one's interest - as raised in correspondence or as advanced through submissions of counsel cannot have weight when it is open to the individual to give evidence."*

16.3.7 Mr Ramsden stated that Mr Darbishire had made the same unevidenced assertions on matters of importance, for example about the Respondent being entitled to rely on the Costs Lawyers, that the previous Tribunal had been criticised for accepting. Mr Ramsden invited the Tribunal to reject any such assertions as to fact or the Respondent's state of mind or the reliance he placed on others which formed no part of the evidence before the Tribunal when the submission of no case to answer fell to be determined.

Allegation 1.1(a)

16.3.8 Mr Ramsden stated that it was clear that the Respondent misunderstood the Applicant's case. Mr Ramsden referred the Tribunal to the Divisional Court's judgment at [65] in which it was stated that even a genuine and legally effective deed of variation may be *"capable of being used as a platform for an improper, and potentially dishonest, claim for unwarranted costs*." Mr Ramsden submitted that one inference which the Tribunal may draw from the available evidence was that Client A agreed to inflate the fees payable, or that they were agreed without him being aware of the inflation. Mr Ramsden submitted that the Tribunal could not reach a view on this question at 'half-time'.

16.3.9 Client A had not been called to give evidence about what he understood and was content with. Mr Ramsden submitted that accordingly the Tribunal could draw various inferences, some helpful to the Respondent and some not. Mr Ramsden stated that Client A had "cut and run" in December 2015 and, in the light of the Lord Chancellor's case against him, had repaid the £500,000 he had been given from central funds. Mr Ramsden suggested there were various inferences the Tribunal could draw:

- Client A's business had flourished to the extent he decided he would simply dispose of the issue by making the payment; or
- Client A thought the work covered in the Bill of Costs had been done; or
- Client A didn't really care about the details. He considered the Firm had done a good job and that the fee was acceptable.

What the Tribunal could not do, it was submitted, was accept Mr Darbishire's submission that this was work which was done and which Client A knew must have been done. Neither Client A nor the Respondent had given any such evidence and Mr Ramsden submitted that the Tribunal must disregard it.

16.3.10 Mr Ramsden stated that the nub of the submissions made on behalf of the Respondent was that the 'minutes per page' formula was exculpatory and told the reader of the Bill of Costs (the Costs Office) everything they needed to know about his attendance and

the work completed such that they could properly allocate public funds to it. Mr Ramsden submitted that there were two problems with this:

- In some places 2 minutes per page had been allowed whereas in others it had been 4 minutes. Mr Quentin had said in evidence he was unable to tell the basis on which each had been applied.

- Mr Quentin's unchallenged evidence based on his review of the attendance notes was that they contained specific reference to documents and pages said to have been reviewed by specific people. None of this was based on contemporaneous documents or memory. The attendance notes had been written based on what the Respondent thought he would have read and his allocation of a date or a range of dates to that work. Mr Ramsden submitted that this went beyond applying a formula and stating transparently that he could not say on which days the work was completed and that the fundamental premise of the attendance notes was a fiction.

16.3.11 Mr Ramsden submitted that the reasonable inference for the Tribunal to make was that the Respondent knew that if he had told the Costs Office at the time what he now said about his attendance notes there was no prospect that the Firm's costs would be paid from public funds. The Tribunal was referred to an attendance note dated from 6 June to 17 June 2007. Reference was made on the attendance note to a 2 minute per page formula being applied to the various pages listed (2,514 pages in total). Mr Ramsden submitted that the Costs Office was entitled to believe that the listed pages were in fact reviewed in conference on the days listed on the attendance note.

16.3.12 Instead, the Respondent's case before the Tribunal was that the process was arbitrary and the time was allocated, after the event, based on the formula to fit the time period. Mr Quentin had noted that whilst the majority of the days included in the attendance note showed that 8 hours had been worked, there was some variation. The final day in the sequence showed 5 hours and 45 minutes for example. Mr Ramsden submitted that one inference was that the variation in the hours recorded against specific days was to give the appearance of a contemporary attendance note.

16.3.13 These matters were described as being "front and centre" of the Applicant's case. The Respondent had not told the Costs Office that the attendance notes submitted in support of the claim for costs were a "wholesale reconstruction" and that he had no idea what he had actually been looking at on what day. By submitting the Bill of Costs to the Court of Appeal it was submitted that the Respondent moved beyond mere considerations of what his client was happy with. Mr Ramsden invited the Tribunal to carefully review the explanatory memorandum sent with the Bill of Costs and he stated the Tribunal would "look in vain" for the type of candour the Costs Office would expect a solicitor to display when seeking to extract public funds.

16.3.14 Mr Ramsden invited the Tribunal to review a paragraph from the Rule 5 Statement which quoted from a witness statement produced by the Respondent in 2017 (in the absence of any witness statement produced for the Tribunal proceedings). The statement was produced for the proceedings relating to the Applicant's intervention into the Firm. The relevant paragraph stated:

"Master Egan's report identifies examples of attendance notes where the time has been calculated by multiplying the number of pages looked at by 2 minutes per page, rather than the actual time spent being claimed by the Respondent. This is accepted by the Respondent, who stated in his witness statement dated 5 June 2017 … *"although not all of the work was contemporaneously recorded it was carried out"* ... The Respondent states that "*when it came to preparing the bill of costs we appreciated that a significant problem existed in how to bill [Client A] for the work that had been performed given the absence of full records (either because records were never or only partly kept / and / or because of the fire)",* and that the *"only way that a bill could be drawn was to calculate the time incurred on the basis of a minute-per-page calculation"*."

16.3.15 Mr Ramsden submitted that these comments went some way towards admitting that the attendance notes were an 'ex-post facto' creation. He submitted that Mr Darbishire's submissions on the attendance notes missed the key point which was that they did not simply exist to record time but represented that certain work was done on the dates listed. Mr Ramsden submitted that before getting to how long the work was said to have taken, the reader was "mired in a fiction" and that the attendance notes represented an "egregious misleading of the Court of Appeal" irrespective of the total time recorded. There was, he submitted, manifestly a case to answer on allegation 1.1(a).

Allegation 1.1(b)

16.3.16 Mr Ramsden submitted that by focusing on whether the 8 invoices were sent to Client A or were interim or 'statute' invoices the submissions made on behalf of the Respondent missed the key issue. For the purposes of the Solicitors Accounts Rules, and VAT, an invoice was an invoice, and tax became due when the invoice was raised. Whilst a bill may be raised only internally, these obligations were still triggered.

16.3.17 Mr Ramsden stated that Mr Darbishire had sought to give evidence about what would have mattered to the Costs Office when he said their focus would be whether Client A had been billed. Mr Ramsden submitted that the Costs Office would have regard to what was just and reasonable and if a bad bargain had been made then public funds would not be paid. The invoices were submitted to be an important part of the basis of the charging.

16.3.18 The submissions made on the Respondent's behalf had relied upon the Respondent having received advice from the Costs Lawyers. Mr Darbishire had said there was no suggestion that Costs Lawyer's advice was wrong and that the Respondent was entitled to rely on their advice and that it was reasonable for him to do so. Mr Ramsden submitted that, again, this was an invitation for the Tribunal to make the mistakes which the Divisional Court had criticised the previous Panel of the Tribunal for making.

16.3.19 Mr Ramsden submitted that Gempride Limited v Bamrah and Lawlords of London Limited [2018] EWCA Civ 1367 was binding on the Tribunal. The case concerned an appeal by a solicitor who had engaged costs draftsmen. The solicitor's entire claim for costs had been disallowed on the basis that the Court had been misled. The solicitor's argument that she had engaged and relied on costs draftsmen had been rejected as she had signed the bill of costs as she was entitled to conduct litigation, whereas the costs draftsman in this case was not. It had been held that the solicitor, as principal, was

always liable for the action of the agent. Mr Ramsden submitted that whilst relying on advice may be relevant to the Respondent's belief and honesty, it was no answer to the allegation that misleading information had been provided or important documents, such as the invoices, had initially been omitted. Mr Ramsden submitted that one inference available to the Tribunal was that the annotated letter, containing the comment from the costs draftsman about ensuring there was no evidence of the invoices in the material supplied to the Costs Office, would have flagged to a solicitor of integrity that there may be a problem to investigate.

16.3.20 The Applicant's case was that the Respondent was obliged to provide the invoices to the Costs Office. As had been observed by the Divisional Court in [65.1], on one view of the facts:

> *"Given that iLaw was in use for preparing two of the interim bills of costs submitted for the period prior to the Capping Agreement, on what basis could a further 500 hours then be claimed for work done in that self same period, as sought to be claimed in the Bill of Costs?"*

Mr Ramsden submitted that the reply urged on the Tribunal by Mr Darbishire was another example of him asserting something not in evidence: that the Respondent and Client A both understood that not all work which had been completed had been billed. Mr Ramsden asked why any solicitor would issue a detailed bill which inexplicably failed to include 500 hours work done.

16.3.21 Mr Ramsden stated that the invoices did not state on their face that there was additional work completed but not recorded or billed and also that had there been 'work in progress' recorded then the Firm would become liable for tax on its value. Mr Ramsden submitted that in those circumstances a solicitor would bill the time or agree to write it off. The basis of the submission of no case to answer had been that the invoices were merely a mechanism to allow the agreed fixed amounts to be transferred to the Firm's office account. Mr Ramsden submitted that whilst that may be the ultimate position, invoices were issued because it was proper to issue them and to charge the client; work which could not be charged was written off.

16.3.22 Mr Ramsden submitted that the Tribunal did not know:

- The Respondent's state of mind when he received advice about the invoices;
- What he thought about that advice subsequently;
- What he thought when the Costs Office asked for the invoices (and they were not provided); or
- What he thought when they were finally provided following a further query from Master Egan which included the specific numbers of each invoice.

16.3.23 Mr Ramsden referred the Tribunal to the Court of Appeal's judgment setting aside the Respondent's defendants' costs order, R v Patel [2016] EWCA Crim 2001:

"81 Neumans has served a statement of case settled by Mr Winter QC and dated 9th December 2011. They are represented today by Mr King. The Neumans statement of case points out that [Client A] is now represented by separate solicitors and leading counsel. It also states Neumans' understanding that [Client A] does not contest the Lord Chancellor's application to revisit and revoke the [defendant's costs order] and order him to return the £500,000 paid, with a direction that no costs be recovered out of Central Funds. This did not, at least until this morning appear to be [Client A]'s position in point of fact. He has not served a statement of case in response, Instead Mr Whittam QC lodged a note for the hearing on his behalf dated 13th December.

82 In summary he recognises the court has jurisdiction to review and set aside the defence costs order and that if it had been aware of facts, particularly the existence of the eight statute bills and ex post facto voluntary assumption of liability for the large sums claimed, the court would not have made the [defendant's costs order]; and that [Client A]'s affidavit of 30th May 2012 was neither clear nor frank, and there were failures in relation to information it provided or omitted as identified by the Lord Chancellor's statement of case (paragraph 44 and 45() to (iv))."

Mr Ramsden submitted that it was entirely unrealistic and unclear why a different factual position was now taken by the Respondent with regards to the 8 invoices. There was submitted to be a clear case to answer based on the omission of the invoices.

Dishonesty

16.3.24 Mr Ramsden submitted that the case against the Respondent, summarised in paragraph [50] of the Rule 5 Statement was very clear: the "wholesale inflation" of the costs claimed seemed to be inconsistent with the Deed concluded with Client A. It was submitted that this element of the Applicant's case appeared to be clear to the Respondent's representatives when they stated in a "Further Response" to the allegations that the factual basis of the allegations was noted. It had not been suggested in that response that the Applicant's case lacked clarity or was impermissible. Mr Ramsden submitted that whilst the Tribunal may focus on the Deed, what mattered was whether the Bill of Costs was improperly inflated and/or the invoices were improperly omitted.

16.4 **Brief Further Submissions on behalf of the Respondent**

16.4.1 With regards to the law to be applied to the submission of no case to answer, Mr Darbishire submitted that what mattered was not what the Divisional Court had found previously. The Court of Appeal set out the applicable law in Bassett, which post-dated the Divisional Court's decision and set out the law on submissions of no case to answer from [17] onwards. The decision clearly stated that the jury, or Tribunal, must "*exclude all realistic possibilities consistent with the defendant's innocence*". Mr Darbishire invited the Tribunal to consider what a reasonable inference would be based on the attendance notes. He submitted that no reasonable fact-finder could say they were sure that a phone call and a conference with Client A could not have happened on the same day as indicated in the notes.

16.4.2 He referred the Tribunal to the Applicant's pleadings on dishonesty in which it was alleged that the Respondent had "consciously" omitted the invoices. Mr Darbishire submitted that this allegation was about state of mind and that as principal for his agent, the Costs Lawyers who provided the relevant advice about withholding the invoices, the Respondent could not be liable for his agent's state of mind. Mr Darbishire also rejected the repeated suggestion that the Respondent's case had only emerged recently and stated that his position had been set out in the witness statement produced in 2017 which was before the Tribunal.

16.4.3 Mr Darbishire also submitted that the available evidence suggested that the credit notes issued by the Respondent must be seen as a mechanism to reduce Client A's liability at that time to £100,000. He submitted this was the only available inference.

16.4.5 Finally, on the extract from the Court of Appeal's judgment setting aside the defendants' cost order, the Firm had made no submissions (and was not a party). Mr Darbishire stated that the extract at [82] to which the Tribunal had been taken, and which is set out above, made reference to eight "statute bills" when the invoices in question were not, and never had been, statute bills (they were interim bills). The Court of Appeal had proceeded on a false basis which was why the Tribunal was invited to focus on the material before it.

16.5 **The Tribunal's Decision on the Respondent's Submission of No Case to Answer**

16.5.1 The Tribunal focused on the pleaded case as set out by the Applicant in the Rule 5 Statement and determined the submission of no case to answer solely in relation to the allegations as set out in that document.

The Law

16.5.2 The Tribunal had close regard to the test set out in Galbraith in which it was stated at [9]:

> *"In summary, a case will be withdrawn if (a) there is no evidence to support the allegation against the defendant or (b) where the evidence is sufficiently tenuous such that, taken at its highest, a jury properly directed could not properly convict. On the other hand, if, on one possible view of the evidence, there is evidence on which a jury could properly convict then the matter should be allowed to proceed to verdict."*

16.5.3 The Tribunal accepted the submission that taking the prosecution case at its highest did not mean it was obliged to draw every possible adverse inference against the Respondent but that the totality of the evidence must be considered. The Tribunal had been directed to [135] in Barton:

> *"135. ... [W]e endorse the approach of the Divisional Court in R (on the application of the Inland Revenue Commissioners) v Crown Court at Kingston. We acknowledge, as the Divisional Court acknowledged, that it is important that a trial judge in dismissing charges or upholding a submission of no case does not usurp the function of the jury. But, where evidence is capable of more than one reasonable interpretation, a trial judge is not obliged to proceed on*

the basis that every possible adverse inference must be drawn against a defendant, especially where he considers the totality of the evidence points in the opposite direction. There may be a fine balance between withdrawing a case from a jury and thereby usurping their function and leaving a case to the jury where the evidence is barely sufficient. Hence the margin of judgment that this Court allows to a trial judge who has heard the evidence and seen the witnesses."

16.5.4 The Tribunal reminded itself of one criticism of the previous Tribunal decision in [66] of the Divisional Court's decision:

> *"Moreover, where a prosecution case is circumstantial and cumulative, it is common defence strategy to seek to undermine each strand of the evidence cumulatively relied on, saying that a different inference as to each strand can be drawn and so on. But a jury does not have to be sure as to each individual strand of the evidence: what matters is whether, on the totality of the evidence, it is made sure of guilt. With respect, I get no impression at all of the required "holistic" approach being taken by the SDT in this case in its appraisal of the submission of no case to answer on these allegations."*

16.5.5 The Tribunal also had regard to Bassett, recognising that this decision post-dated the Divisional Court's judgment and that it was from the Court of Appeal. The Tribunal had been referred to [17] in particular:

> *"17. A criminal case very often depends on a jury, safely, being able to draw logical inferences from a series of established facts. The ultimate question for the judge is, "could a reasonable jury, properly directed, conclude so that it is sure that the defendant is guilty?" In order to draw such an inference the jury must be able to "exclude all realistic possibilities consistent with the defendant's innocence", per Pitchford LJ in R v Masih [2015] EWCA Crim 477 at [3]."*

Allegation 1.1(a)

16.5.6 The allegation was that the Bill of Costs "*made claims as to the work undertaken for Client A which did not reflect the work actually undertaken by the Firm*". A major focus of the Applicant's case on this allegation was the attendance notes which were, on the Respondent's own account, prepared retrospectively and recorded time not contemporaneously recorded. These notes recorded the formula applied by the Respondent, the application of 2 or 4 minutes per page, and the resulting time incurred. The attendance notes, along with other documents, were submitted in support of the Bill of Costs on 11 August 2011 (the Bill of Costs having been submitted on 27 June 2011).

16.5.7 It was said on the Respondent's behalf that it was plain that the attendance notes did not precisely reflect exactly when each specific task had been completed; that was an inevitable consequence of the application of a 2 or 4 minute formula to the documents which had been worked on. The Respondent's case was that all the work on which the Bill of Costs was based had been completed, albeit not necessarily on the precise date indicated, and Client A was liable for the resulting fees. However, viewed in context,

the Tribunal did not consider that it was able, at the conclusion of the Applicant's case, to assess whether or not the position urged on the Tribunal by Mr Darbishire was a *realistic* possibility.

16.5.8 The context in which the Bill of Costs, and the supporting attendance notes, were submitted included periods where the available evidence appeared to indicate that 98% of the included time was unsupported by any contemporaneous record of any kind. The evidence of Mr Quentin about the proportion of the Bill of Costs unsupported by any contemporaneous documents was not disturbed during cross-examination. The attendance notes included some variation in the hours worked on specific days and included, for example, days where 5 hours 45 minutes were worked. This figure could not be reconciled with the simple application of a 2 or 4 minute formula to pages within the documents worked.

16.5.9 The context also included, importantly, the fact that the Bill of Costs was submitted to the Court of Appeal Costs Office as part of a process to obtain public funds. The possibility that the Respondent was not more forthright and candid about the methodology involved in creating the attendance notes and the Bill of Costs, and about the complete absence of any contemporaneous documents to support the overwhelming proportion of time included, because he knew that if he was there was no chance of central public funds being paid out appeared to the Tribunal to be one inference open to it. This was a rebuttable possibility, but without evidence from the Respondent, it was not clear that an approach which simply left it to the Costs Office to realise that the attendance notes were not contemporaneous and that the specific times worked and documents worked on, reflected in the Bill of Costs, were approximations was an adequate response to the alleged professional breaches.

16.5.10 Taking the Applicant's case at its highest, the Tribunal considered that the evidence may support a conclusion that the claims made did not reflect the work actually done. This could be because the work claimed was inflated or because the way the claim was presented meant that it presented an account which could not reflect what actually happened as this was unknown and this fact was not made sufficiently clear. Whilst the Respondent's case and evidence may provide an answer to some or all of the alleged professional breaches, or the Applicant may not satisfy the criminal burden of proof, the Tribunal considered there was a clear case to answer on the allegation.

Allegation 1.1(b)

16.5.11 The allegation was that the material submitted with the Bill of Costs did not include everything which "*ought properly to have been provided*" including in particular "*eight invoices sent by the Firm to Client A and settled by Client A*". The focus of the Applicant's case was that was potential relevance of these invoices was clear from the comments made by the Costs Lawyers. It was submitted the distinction between a statute bill and an interim bill missed the point: given the unusual circumstances and methodology involved in the creation of the Bill of Costs, the duties on the Respondent as a solicitor meant he ought properly to have provided the invoices to the Costs Office.

16.5.12 The Court of Appeal had made prominent reference to the invoices when revoking the defendant's cost order. Client A had acknowledged that had the Court known about the invoices the defendant's costs order would never have been made. However, this had

been in 2016 and so the submission that it did not illuminate what was in the Respondent's mind in 2011 had obvious force. In addition, the Court had referred to the invoices as "statute" bills when the Respondent's case was that they were not.

16.5.13 The Tribunal considered that whether they were interim bills or statute bills, the invoices raised had some legal effect. Credit notes were subsequently issued against the invoices and on the Respondent's case the invoices and credit notes were used in combination to arrive at the agreed lump sums to be paid by Client A. The invoices were part of the evolution of what was an unusual process with an unusual culmination in the Deed and the Bill of Costs. The Respondent's position was that having instructed experts he received clear advice that the invoices were irrelevant and should not be submitted (and also that they were provided in due course when requested).

16.5.14 The Tribunal accepted that it had no evidence about the Respondent's state of mind when he received advice about the invoices; what he thought about that advice subsequently; what he thought when the Costs Office asked for the invoices (and they were initially not provided); or what he thought when they were finally provided (in April 2015) following a further request which included the specific numbers for each invoice. The Tribunal had some concern about the comment made by the Costs Lawyers which had been included on the draft letter to be sent to the Costs Office in October 2011 which stated "*it is important that no evidence of interim invoices appear on the files*".

16.5.15 As stated above, the context of the decision of whether to include the invoices with the material submitted to the Costs Office, either when the Bill of Costs was submitted or when the invoices were first requested in September 2011, was an application for £2,916,396 in legal fees to be paid from central (public) funds, in a case where the vast majority of the time for which fees were charged was based on an after the event reconstruction of the work completed. The Tribunal considered that this context was relevant to what the professional duties on the Respondent as a solicitor required. It was potentially relevant to what documents and information ought properly to have been provided.

16.5.16 Taking the Applicant's case at its highest, the Tribunal considered there was a clear case to answer. Notwithstanding the advice said to have been received by the Respondent, and his stated reliance on that advice, about which the Tribunal had no evidence, the Tribunal considered that the obligations on the Respondent to act with integrity, behave in a way likely to uphold public trust and ensure that the Court is not misled may mean that the allegation could be proved on the evidence adduced by the Applicant. The Tribunal considered that one inference on the available evidence was that the Respondent was aware that the invoices may undermine the costs claim, based on the comment by the Costs Lawyers, and elected to omit the invoices rather than include and explain them to avoid this scrutiny. This would be consistent with the subsequent failure to provide the invoices when requested. The Respondent's account of why he acted as he did may well provide a realistic account which answered the allegation, but, in the absence of that, the Tribunal was satisfied that there was a case to answer.

Dishonesty

16.5.17 The Tribunal determined that there was similarly a case to answer on the aggravating allegation that the conduct alleged in 1(a) and 1(b) was dishonest. Taking the Applicant's case at its highest, one view in relation to both allegations was the Respondent acted as summarised above in order to avoid scrutiny and so that the costs order was not undermined. Taken as a whole, the evidence presented by the Applicant suggested, at the end of the Applicant's case, tended to suggest that the account put forward on the Respondent's behalf was implausible. Without evidence from the Respondent about his actions and beliefs at the relevant time, the Tribunal considered that inferences could be drawn from the context such that his actions may be regarded as dishonest according to the test in Ivey. As things stood, when assessing the 'half-time' submissions, the Tribunal was unable to determine whether the unevidenced explanation put forward on the Respondent's behalf was a realistic and plausible answer to the allegation.

16.6 **The Respondent's Substantive Case**

16.6.1 The allegations were denied in their entirety. The submissions made on the Respondent's behalf are summarised below. Where points made as part of the submission of no case to answer were repeated they are not set out again in any detail.

The previous Tribunal's Findings

16.6.2 Mr Darbishire submitted a note on the findings made by the previous Tribunal when the case against the Respondent had been dismissed on the basis there was no case to answer. The Applicant had challenged this finding in respect of the matters set out in the amended Rule 5 Statement only; the findings of the previous Tribunal which had not been challenged stood and it was submitted that the current Tribunal was bound by them.

Overview

16.6.3 Mr Darbishire invited the Tribunal to carefully assess the evidence adduced for each factual element of the allegations in issue between the parties (to the criminal standard). He submitted that during the Applicant's case, and the Respondent's oral evidence, the essentials of what had happened and why had been laid bare. He submitted that the picture which emerged, whilst not wholly in the Respondent's favour, made it impossible for the Tribunal to find the allegations proved to the criminal standard.

16.6.4 In his oral evidence the Respondent had spoken of his regret and embarrassment at the Firm's systems and some of the practices he had employed. Mr Darbishire stated that the Respondent's admitted conduct represented the best and worst of his practice at the relevant time. He had acknowledged failing to keep proper records of time spent on Client A's matter and there had been vagueness over the recording of the retainer; for example, in the absence of a clear record it was necessary to infer the existence of a £100,000 fee cap from the surrounding circumstances.

16.6.5 Mr Darbishire submitted that these matters may be a breach of best practice but that it was clear that the Respondent was utterly devoted to his client. His workload had been determined by Client A's needs and not by any consideration of fees. There had been negligence in the Respondent's bookkeeping but a total devotion to Client A's cause. The Respondent, in his oral evidence, and his wife, in a written statement provided, described the Respondent as working "all hours" which had had a significant impact on his family life. Mr Darbishire submitted the evidence indicated that the Respondent was driven by his cases and clients and that other things were woefully neglected.

16.6.6 The Respondent's case was that there had been three fee capping agreements under which fees were capped initially at £25,000 (from January 2006 when the Firm was instructed), then £100,000 (from around October 2006) and then £275,000 (from January 2007). Mr Darbishire submitted that it was the obvious consequence of these three capping agreements that there was no time period when Client A was charged by reference to time incurred on specific work. It was said to follow that at the time there was no financial point in keeping records of specific tasks completed or time incurred. All that was required was for sufficient time to be logged on the Firm's billing system for appropriate invoices to be raised. Mr Darbishire acknowledged that such an approach would undoubtedly not be recommended by the Applicant, but the Respondent's evidence was that the Firm's accounts software was not fit for purpose at the relevant time and that workarounds needed to be found.

Client A's instructions

16.6.7 When the Respondent was instructed by Client A, in 2006, he was a young and ambitious solicitor. He had been in practice for seven years. He had no experience of dealing with heavy, quasi-regulatory criminal litigation such as that facing Client A and no experience of negotiating private fees for cases of any substance. Mr Darbishire stated that this was not an excuse, but was part of the picture to be assessed by the Tribunal.

16.6.8 The Respondent was conscious that the case could prove to be an important opportunity for him and the Firm. Beyond the substantial new instruction itself, it presented an opportunity to break into the world of complex, privately paid, "white collar" criminal litigation. The charges against Client A were serious and an adverse outcome may have involved imprisonment or post-conviction proceedings which could have destroyed his business and reputation. The Respondent's case was that he and the team he put together secured a remarkable result. In the Crown Court, following hard-fought legal arguments at the outset of the trial, the prosecution abandoned all allegations of deliberate wrongdoing. What remained were two strict liability offences to which the trial judge had ruled Client A had no defence. The result was a small fine and no possibility of regulatory sanction. Client A was described as entirely happy both with the Respondent's services and with the fee which was ultimately charged for them.

16.6.9 The Respondent's case was that he had completed a massive amount of work which had not been recorded contemporaneously. Given the capped fees agreements, in place from the outset of Client A's instruction, the fees paid to the Firm were never going to be determined by the actual hours which the Respondent (or the Firm as a whole) recorded or billed. It remained the case until fees were revisited with Client A in 2009 that the fees paid as agreed lump sums represented only a proportion of the full value

of the work that had been done. From January 2006 to March 2009, neither the invoices raised in respect of Client A, nor the fees paid by him, nor the hours recorded by the Respondent, reflected the work actually done on this case by the Respondent.

Client A's criminal case

16.6.10 Client A's confiscation proceedings (in respect of the two offences to which he had pleaded guilty) and sentencing were adjourned until mid-2008. At a hearing on 25 July 2008, Client A was sentenced to a total fine of £3,000 and a confiscation order in the sum of a little over £200,000 was made.

16.6.11 Client A subsequently appealed against the conviction based on the guilty pleas. At the end of October 2009, the Court of Appeal quashed the convictions which exonerated Client A and, for the Respondent, represented the successful resolution of the case to which he had been devoted since 2006. Judgment was handed down on 12 November 2009, and leading counsel for Client A applied for a defendant's costs order in favour of Client A. At the Court's suggestion, that application was made in writing the same day. On 20 January 2010, the defendant's costs order was made in principle, with the amount to be assessed by the relevant taxing authority. As the law stood then, the granting of such an order was described as something of a formality. Which costs would actually be recovered by Client A under the order was described as an entirely separate question, which would depend on the taxation process.

The Deed

16.6.12 In the Respondent's further response to the Rule 5 Statement, some background information about Client A's means were provided by way of context for the voluntary assumption in 2009 of liability for additional fees. The period from early 2007 (when fees were capped at £275,000) to October 2009 coincided with an increase in the average monthly turnover of Client A's main business from about £200,000 to over £14m. It was said this success could not have occurred without the successful resolution of the criminal proceedings and that this was something of which Client A was well aware.

16.6.13 The agreement made orally in March 2009, and recorded in the Deed in October 2009, set out the obligation for Client A to pay fees reflecting all of the time incurred by the Respondent on his case. It was submitted that it was impossible to understand the actions of the Respondent or Client A on any basis other than it was understood that the "mammoth" task of reconstructing the actual time spent on the matter would be reflected in Client A's fees. The restriction suggested by the Applicant, that the Deed permitted the rate charged to be varied but not for additional hours to be billed, was described as fanciful.

16.6.14 The Deed was described as a sensible and proper step taken by the Respondent to assist Client A. The Deed had been prepared by Leading Costs Counsel described as eminent in this field. It was executed by Client A before an independent solicitor. It was submitted that the effect of the Deed was to render otiose all that had gone before in relation to the retainer between the Respondent/his firm and Client A in relation to costs liability – in particular the eight invoices and the capping agreement made orally. This was said to explain the advice given by the Costs Lawyers that the invoices should not

be filed with the Costs Office along with the Bill of Costs. The Respondent's evidence was that he had told Client A that he believed the total fee would be in the region of £2-3m.

16.6.15 Having agreed under the Deed to pay fees relating to all time incurred, Client A was entitled to have his costs assessed by the Court. Under a defendant's costs order an individual states what they have spent on legal fees and through the assessment process the Court determines what costs may be reimbursed. It was submitted that recording the fee agreement in the Deed was the best way the Respondent could help Client A get his costs assessed. Mr Darbishire described it as a mystery why the Costs Office did not simply reject the claim for fees representing Client A's voluntary assumption of liability for fees over £275,000 (something which was clear from the face of the Deed which was supplied with the Bill of Costs). Mr Darbishire stated that had Client A asked the Respondent whether he was entitled to claim for reimbursement of the fees the answer would be "yes, let's put in a claim and see how you get along". By submitting the claim, the Respondent was described as assisting his client.

The Bill of Costs

16.6.16 Following the agreement and finalisation of the Deed in October 2009, and after the defendant's costs order was granted in January 2010, the Respondent instructed specialist Costs Lawyers who prepared and submitted the Bill of Costs. The costs draftsmen were subject to professional duties akin to those applying to solicitors and it was said that no regulatory action had been taken against them.

16.6.17 The preparation of the Bill of Costs was described as an enormous and necessarily retrospective exercise. The Respondent's evidence was that because of the history of the retainer, he had never kept contemporaneous records of the time he had worked on the case. He stated that Client A understood the Respondent would have to provide a best estimate of the time spent, based on the work done. A fire at the Firm's offices in May 2008 made the position worse as some contemporaneous documents from which work done could have been reconstructed had been destroyed.

16.6.18 In the absence of time records or contemporaneous documents the Respondent decided to apply a fixed, minutes-per-page multiplier to the papers known to have been considered by him and/or reviewed together with the client in conference. Page-based payment was described as a common basis for calculating the fees for reading and considering evidence in legal aid cases. It was further stated that since the introduction of the Litigators Graduated Fee Scheme, the fee for most publicly funded cases in the Crown Court had been calculated by reference to the number of pages of prosecution evidence.

16.6.19 The Respondent estimated that it would have taken him, on average, a minimum of four minutes per page to consider each page of prosecution evidence, including cross-referencing, analysis and the identification of salient issues for and against the defence case, and two minutes per page to consider the evidence with Client A, noting and highlighting any comments and thereafter carrying out any further cross- referencing or analysis that was required. The Respondent's case was that the resulting figure, which equated to around 20 hours per week over the currency of the case, felt right

given the proportion of his working time which the Respondent had devoted to the case and that the minutes-per-page approach was made clear to, and agreed by Client A.

16.6.20 The Respondent's evidence was that he, and a junior colleague, had then gone back to the evidence in the case; attendance notes; schedules; conference notes and other work products; hard copy and soft copy diaries; case emails and any other extant relevant material, in order to record what had been done and when. In his oral evidence the Respondent stated that the bulk of this work had been completed by a junior colleague on his instruction. When the volume of material reviewed was identified, the minutes per page calculation was applied, and the resulting time was allocated across the days in the period in which, as far as could be determined, the work had been done. This approach was said to be clearly reflected in the relevant attendance notes which underpinned the Bill of Costs.

16.6.21 It was submitted that such an approach was inherently and obviously only an approximation. Only on very few occasions would it have taken precisely 240 seconds in total to consider and analyse a page of material, or 120 seconds to discuss it in conference. The Respondent stated that the system adopted was intended to be a fair reflection of the work actually done on the case by him, and thus a fair basis upon which to charge his client. It was submitted that it was also transparent: in every case, the relevant attendance notes explained, on its face, the basis of the time calculation.

16.6.22 The Respondent's evidence was that he explained to the Costs Lawyers the history of the various fee agreements and the basis on which he proposed the fees due be retrospectively calculated. No concern was raised by the Costs Lawyers about that approach and in due course they, together with the Firm and the Respondent, prepared the Bill of Costs for Client A and for submission to the Costs Office as instructed. It was stressed that at all times, the Firm and the Respondent relied upon the specialist and experienced costs lawyers instructed concerning how the Bill of Costs should be prepared and formulated, and what documentation should be submitted in support.

16.6.23 The exercise was completed on 10 June 2011. The Firm's costs were assessed at £2,916,396 (plus VAT). Client A was said not to have expressed any concern about the basis on which the bill had been prepared. Client A paid the outstanding fees in agreed instalments until the bill was fully discharged in early 2014 (save for a small part which was waived in recognition of prompt payment). These payments continued even after it had become clear that he would not be reimbursed from public funds. It was submitted that as an experienced and successful businessman, Client A would not have done so unless he believed that the costs fairly reflected the work done by the Respondent and the Firm.

Submission of the Bill of Costs

16.6.24 The Bill of Costs was submitted to the Costs Office on 27 June 2011. This submission simply contained a narrative of the work done and time charged, together with various disbursement vouchers. Prior to the submission of the Bill of Costs there had been correspondence between the Costs Lawyers and the Costs Office concerning a possible penalty for late submission, it being almost 18 months after the defendant's costs order had been granted. The Respondent stated that it became increasingly clear that to avoid any such penalty the Bill of Costs needed to be submitted urgently. The Respondent

therefore ensured that the process was started without further delay. The Respondent's case was that it was inevitable that supporting documentation would have to be provided thereafter.

16.6.25 On 11 August 2011 the Respondent provided a further five boxes of supporting documentation to the Costs Office, including evidence of the previous fee agreements and the 'minutes per page' attendance notes.

Claims which did not reflect the work actually undertaken (allegation 1.1(a))

16.6.26 As noted above, the Firm's time-recording system was felt to be flawed such that the contemporaneous recording of hours for a privately-paid matter was described as cumbersome and time consuming. This was made worse by flaws in the Firm's computing systems such as the Respondent's laptop and home desktop computers not synchronising with each other, and neither linking directly to the office systems. The Respondent accepted that proper time records could and should have been created, but his case was that he was extremely busy, doing so was inconvenient and time-consuming, and such records did not, at that time, seem to be necessary in light of the fee capping agreements.

16.6.27 It was denied that any proper inference could be drawn that the work recorded in the Bill of Costs was "falsely claimed" on the basis of the absence of contemporaneous records. The attendance notes prepared by (or for) the Respondent and submitted to the Costs Office made clear that following the 2009 fee agreement, Client A had been charged based on a retrospective estimate of the work carried out calculated on a minutes-per-page basis. The claim made was for recovery of the costs incurred by Client A. The claim could be refused. The extent of any refusal would be based on the reasonableness of the costs incurred or the sufficiency of how the costs were evidenced. It was submitted that did not mean that the claim was in any way false.

16.6.28 Given that the hours of work done were calculated on an estimated, minutes-per-page basis and then allocated across the relevant period, it was said to be inevitable that the estimated figures would conflict in places with contemporaneous records. Whilst the Respondent could have spent additional time going through other records, seeking to ensure that he did not allocate any time on the afternoon of day x, if other records showed him to have been at the dentist that afternoon, it was submitted that what would have resulted would have been precisely the same number of pages, therefore the same number of hours and the same figure for costs, allocated to slightly differently time periods. It would not have led to any material difference in the actual fees charged to the client, or the costs Client A sought to recover.

16.6.29 The Respondent accepted that the work on two files highlighted by the Applicant could not have been done on the dates given, as the material was not received until a later date. It was submitted that the totality of the available records tended to confirm that the material was received and reviewed and that the only question was when and therefore that even on the Applicant's case this error as to dates, made some years after the event, had no impact at all on the value of the work done or the costs incurred.

16.6.30 It was submitted that the suggestion that the Respondent spent "an excessive amount of time" on the case could not be reconciled with the Applicant's acceptance that the Bill of Costs did not seek to recover costs "in excess of that which might properly be charged to Client A for the work undertaken". It was further submitted that it could not begin to establish that the Bill of Costs contained costs which were false. Whether the costs incurred by Client A were reasonable was a different question and a matter for the relevant taxing authority rather than a disciplinary tribunal.

16.6.31 The Respondent's evidence was that he devoted an enormous amount of time to the preparation and conduct of the case over a period of nearly four years. It was not disputed by the Applicant that Client A agreed to pay and did pay the entire fee asked of him in the Bill of Costs (less approximately 5%). The Respondent stated that he had offered to provide, both to the Costs Office and the Applicant, twenty-seven boxes of files comprising the case papers and remaining work product on the case, and upon which the minutes per page calculation was largely based. He stated that this offer had repeatedly been declined.

16.6.32 The attendance notes were clear that the time spent had been calculated on the basis of a formula applied to the documents which had been reviewed. It was plain that the hours indicated were not precise. Mr Darbishire stated that it would no doubt have been helpful in avoiding potential misunderstandings if this had been made more explicit. However, Master Egan had noted that it was obvious that the times indicated were not precise and that the exercise and attendance notes had been completed retrospectively. The introductory memorandum to the Deed stated clearly that the exercise was based on a reconstruction.

16.6.33 Mr Darbishire asked the Tribunal to consider how that submission could possibly be demonstrative of dishonesty or a lack of integrity if the Bill of Costs had no result other than more information being requested by the Costs Office. Mr Darbishire stated that the Applicant case seemed to rely on the Respondent not making it clear on 27 June 2011 that the attendance notes he did not lodge with the Court until 11 August 2011 were not contemporaneous. Mr Darbishire invited the Tribunal to consider if it was not unrealistic and unfair to condemn someone for failing to draw attention to shortcomings in a document (the attendance notes) before they were submitted.

16.6.34 In response to the allegation that the Bill of Costs itself did not make the 'broad brush' approach to the reconstruction of time spent on Client A's matter clear, the Respondent's case was that it was clear from the face of the supporting attendance notes. As to the complaint that it was not clear on the attendance notes that they were not contemporaneous, it was accepted that this should have been clearer. The attendance notes themselves did not state that they were created some years after the work was completed. However, by reference to one such note as an example, the note stated that 4,000 pages had been reviewed over a period of a month. It was said to be clear that a single note could not possibly be contemporaneous, by definition, in respect of all of the work covered and the entire period of the note.

16.6.35 The case against the Respondent was not that he had failed to be clearer about the process involved in the hours set out in the attendance notes and reflected in the Bill of Costs. The allegation was that he had claimed for work that he had not done. The Rule 5 Statement had alleged: "*The Respondent knew, or must have known, that the hours*

claimed had not been worked by him and so that the claim for those hours were therefore false." Mr Darbishire submitted that not being clear enough was not the same as work not being done and that the Applicant's case was unsustainable. The most likely explanation was that put forward by the Respondent.

Documents and information not included (eight invoices) (allegation 1.1(b))

16.6.36 As noted above, the Respondent's position was that at all times he acted on the advice of specialist costs lawyers. The Firm had provided the Costs Lawyers with all of the available relevant material, including the fee agreements in 2006-2007, documents concerning the retrospective variation of those agreements in 2009, and the eight invoices with which the allegation was concerned. The Costs Lawyers advised that it was not necessary to include the eight invoices, or indeed any other material apart from some disbursement vouchers, with the Bill of Costs in June 2011. In fact, they had given the Respondent strict instructions to the effect that the invoices should not be filed along with the Bill of Costs.

16.6.37 Mr Darbishire stated that the Applicant overlooked the fact that the 2007 invoices did not include or charge the Respondent's time (save for £28). But for the time giving rise to this £28 charge, all of the time for which charges were made was recorded by a junior colleague of the Respondent. Mr Darbishire submitted that once this was understood it was clear that the invoices were purely a mechanism by which the agreed fixed fees would be reached and charged. There was no greater significance to the invoices or the time recorded than that. Further, the eight invoices were preserved and had not been suppressed. They had been provided to the Costs Lawyers when the Bill of Costs was drafted.

16.6.38 As stated above, the Respondent's case was that the invoices were generated for internal purposes. They were based on hours recorded on the Firm's time recording system and represented only a fraction of the total work carried out on the case. The invoices raised showed sufficient profit costs to allow client money, payable under the prevailing limited fee agreement, to be transferred to the office account. The first invoice, dated 31 August 2006, was generated to correspond with the £25,000 paid to the Firm by Client A. The Respondent's evidence was that he did not believe that any of the invoices were in fact provided to Client A. It was submitted that because the invoices were created simply for the purpose of the prevailing fee agreements, they were of no evidential value once those agreements fell away. From March 2009 onward, all earlier the invoices were both superseded by, and irrelevant to, the calculation of the June 2011 Bill of Costs.

16.6.39 When corresponding with the Costs Lawyers the Respondent had stated that the Costs Office would require a full account. Mr Darbishire submitted that there was no basis on which to conclude that the Respondent was withholding anything when the bare Bill of Costs was sent to the Costs Office in June 2011. At that time there was no suggestion that any action would be taken before a mass of supporting documentation had been provided. When assessing what needed to be provided by the Firm to the Costs Office on 27 June 2011, the date the allegations focused upon, Mr Darbishire invited the Tribunal to ask what were the potential consequences on that day? The allegations related to that day, and not thereafter. He submitted that nothing would flow from what had been provided, other than the clock would stop (for the purposes of the time limit

by when the claim for costs needed to be made). There was no allegation remaining that the Respondent had failed to disclose the Deed or costs cap. It was said to be illogical to criticise the Respondent for failing to provide the invoices when it was acknowledged that the Deed and details of the fee caps were provided. These rendered the invoices irrelevant. Nothing was said to flow from the provision of the Bill of Costs on 27 June 2011; the process of assessment of costs would last for months or years thereafter.

Further general submissions

16.6.40 Mr Darbishire referred the Tribunal to two character references. A reference from a QC and friend of the Respondent's since 1995 described him as cautious, straightforward and meticulous and someone who cared deeply about his clients and who behaved with professionalism. A second reference from a solicitor advocate stated the Respondent was a workaholic whose desk was a complete mess but he was someone who was incredible with clients and displayed extreme integrity. Mr Darbishire stated that the Tribunal would be guided by evidence of fact first, but was entitled to have regard to this information about the Respondent's character.

16.6.41 Mr Darbishire stated that the Respondent's insight had been raised by the Applicant. He invited the Tribunal to consider what had been levelled against the Respondent. In the last ten years he had been accused of creating a sham deed, having conspired with Client A and charging fees higher than those to which he was entitled. These allegations had all been abandoned and Client A had paid the bill presented. The Rule 5 Statement stated that the Deed and capping agreement was not in the box of documents sent to the Costs Office when it was now known by both parties and the Tribunal that they were provided. The list of abandoned allegations and complaints was described as astonishing.

16.6.42 In his witness statement of 5 June 2017 the Respondent had stated:

> *"I readily accept that there are areas, particularly looked at in hindsight, that cause concern. There were genuine mistakes on my part and on the part of my firm. We were unused to billing in privately funded cases and we did not focus on our record keeping as well as we should have done."*

These were said not to be the words of someone wilfully denying the obvious. It was said to be hard for anyone to be entirely candid when it is alleged their mistakes were deliberate deceptions and their actions were described as a sham. The allegations, many of which were no longer before the Tribunal, had destroyed the Respondent's professional life. Mr Darbishire invited the Tribunal to consider there was a lot of scope to make mistakes and to fail, something everyone did to some degree, before questions of acting without integrity or dishonestly arose.

16.6.43 Mr Darbishire submitted that it would be illogical to read back from answers given by the Respondent to his regulator in 2015 to the assessment of the Bill of Costs and the further information supplied in 2011. The Respondent's state of mind at the time, in 2011, was clear from the fact he told the Costs Lawyers the Costs Office would require everything as part of the assessment process. This was said to be revealing; the Respondent's instruction was that everything should be provided "warts and all". Further, it was clear from what was provided in support of the Bill of Costs (in August

2011) that 90% of the total costs had been voluntarily assumed by Client A. Given that this was made clear it was submitted to be absurd to criticise the Respondent for being unforthcoming with information.

16.6.44 Mr AB, a Chartered Accountant who had audited the accounts of the Firm between 2000 and 2010, provided a witness statement which was admitted into evidence. In a letter which was before the Tribunal, and which the Applicant had had since 2017, Mr AB had described the Firm encountering issues recording payments from Client A on to the accounts software. He stated that he advised the Firm:

> *"to log time costs in order that invoices could be raised, matched against the payments received and cleared off the system. This was done purely because of the problems created by iLaw. At the time, it was considered that there would be no detrimental implications of doing this as it was purely an internal accounting exercise to reflect the payments received. It was my understanding that there was a fixed fee agreement in place and that a cost draftsman would be instructed in any case."*

16.6.45 In his witness statement, dated 1 October 2021, Mr AB described the Respondent as being hard working to the point of constantly working. He stated:

> *"During my work for [the Firm] I had unfettered access to all of the Firm's financial records. I can confirm that I have had no concerns at all about his honesty or integrity in any of my dealings with him, over the course of more than ten years."*

16.6.46 It had been said on the Applicant's behalf that it was "inapt" for the Respondent to rely on the advice of the Costs Lawyers he instructed to prepare the Bill of Costs and to liaise with the Court of Appeal costs office. The Respondent accepted the responsibility he assumed when the Bill of Costs was submitted, and accepted that he could not pass his responsibility to his agent (the costs draftsman). Mr Darbishire submitted that it was nevertheless not right that factual advice from a qualified expert should be considered irrelevant to the question of whether the Respondent had acted with integrity. The Respondent's subjective understanding must play a part in the Tribunal's assessment. Mr Darbishire submitted that if a solicitor was guided by experts who did not see a problem, and the individual solicitor did not either, then that would at least be a significant factor in the assessment of whether the solicitor had acted without integrity. The Respondent's position was, in essence, that he had received advice with which he felt comfortable, and he acted upon it. Mr Darbishire submitted it was not clear what was said to be wrong with this.

Response to allegation of Dishonesty

16.6.47 The Bill of Costs was based upon a valid and effective agreement (the Deed). The claim submitted on behalf of Client A, together with the supporting documents, reflected the costs incurred by Client and which he was liable to pay. The basis on which that bill was calculated, however imperfect or unorthodox, was made clear to Client A, to the specialist costs lawyers instructed to prepare the bill, and to the Costs Office. It was submitted that the defect in the Bill of Costs, namely that it was an approximate record of the times and dates on which the work was done, that work being based upon a crude

multiple of the volume of documents considered, could not support a finding of dishonesty.

16.6.48 It was submitted that the same applied to the omission of the eight invoices. First, those documents had been wholly superseded. To the extent that the documents revealed the absence of contemporaneous time records, that was said to be apparent from the dozens of attendance notes recording blocks of hours, derived entirely from the minutes per page calculation set out in the document.

16.6.49 The Rule 5 Statement summarised the aggravating allegation of dishonesty in three bullet points in paragraph [50]. Mr Darbishire submitted that the allegation on [50.1] that the Respondent had dishonestly "*submitted a claim for payment which he knew to be inconsistent with the agreements reached with Client A*" could not be reconciled with allegation 1.1 or the allegations remitted by the Administrative Court. In addition, paragraph [50.2] alleged that the Respondent dishonestly "*submitted data as to hours worked which he knew to be inaccurate and unsupported by underlying material or electronic time recording data*" when electronic time recording data had formed no part of the case against the Respondent in allegation 1.1. The formula used to calculate time charged on a minutes-per-page basis was evidenced and the absence of electronic time recording data had not been alleged.

16.6.50 Mr Darbishire submitted that the purpose of assessment, and its "whole point", was that there were various stages. A bill of costs is submitted and there was likely to be submission of further supporting or clarifying information in due course. The allegation was that there had been a conscious omission of the invoices from the bare Bill of Costs submitted in June 2011. Mr Darbishire submitted that it could not be right that the Respondent's responses to Master Egan in 2015 in relation to the invoices could determine whether or not the Respondent's omission of the invoices had been dishonest four years previously.

16.6.51 As set out above, Mr Darbishire referred the Tribunal to Bassett and stated that this case was authority for the Tribunal needing to be able to exclude all realistic possibilities consistent with innocence to find the allegations proved to the criminal standard. In other words, the Applicant had to show that the only likely explanation was that the Respondent was guilty as alleged. It was submitted that the Applicant did not come close to excluding the Respondent's case and justifying the drawing of inferences of guilt.

16.6.52 When applying the Ivey test to assess whether the Respondent's conduct was dishonest, the Tribunal was required to focus on the Respondent's genuinely held belief, when applying the objective standards of ordinary, decent people. In Bassett the Court had held that the Tribunal should not ask "what would a solicitor in this situation have understood" but "what am I sure that the Respondent understood". As also set out above, reference was made to Barton in which it was said that:

> "*All matters that lead an accused to act as he or she did will form part of the subjective mental state, thereby forming a part of the fact-finding exercise before applying the objective standard.*"

The Tribunal should accordingly take account of all matters which led the Respondent to act as he did before assessing the honesty of those actions by applying the objective standard.

16.6.53 The issues over the Bill of Costs arose from Client A initially not being charged for the work which had been completed on his case. This had been on the basis that the Respondent had completed a massive amount of work for which he had not expected to be paid. This reflected his commitment to his client. Whilst the Tribunal may conclude that the Respondent had been insufficiently candid in earlier answers, it was submitted that there was nothing in the lengthy cross-examination, or otherwise, to suggest that there was any dishonest attempt to submit misleading documents or omit relevant documents. The picture which had unfolded throughout the hearing was of an unhappy and messy series of events, but nothing approaching what had been alleged.

16.7 <u>The Tribunal's Decision</u>

16.7.1 The Tribunal accepted that the Respondent undertook a huge amount of work on a case which dominated his working life between the beginning of 2006 and November 2009. The references supplied on the Respondent's behalf described a very focused and hard-working individual whose working style was somewhat disorganised. The description appeared to the Tribunal to match the Respondent's own account.

16.7.2 The Tribunal could not understand why the Respondent did not keep records at the time the work was done. Even where payment is not determined by reference to hours completed, it invites serious professional and commercial difficulties to be unable to evidence the work undertaken. This very basic fundamental of practice was even more important when claiming funds from the public purse in which case a solicitor needed to be even more transparent about the basis of the charges. Ethical conduct when claiming costs from the state required a solicitor to be, and to be able to demonstrate that they were scrupulous. The Respondent acknowledged this to a significant extent in his evidence and had said it was a lesson learned for which he had paid a heavy professional price.

16.7.3 The Tribunal accepted that a solicitor submitting a bill of costs would ordinarily expect to be asked for explanations or additional details on some aspects. To that extent, Mr Darbishire's submission that the Bill of Costs submitted on 27 June 2011 just 'got the ball rolling' had some force. In addition, the Respondent (along with colleagues and the Costs Lawyers) had completed the Bill of Costs under time pressure and the Tribunal accepted there was pressure to lodge the 'bare bones'. The Tribunal considered that practical common sense required that the analysis of the Bill of Costs submitted on 27 June 2011 must, to some extent, extend to what necessarily followed shortly thereafter.

16.7.4 At the relevant time, Master Egan was a senior costs judge in the Court of Appeal. The Tribunal considered that his opinion carried weight and whilst it was not determinative of the questions before the Tribunal, it was relevant, and the Tribunal reviewed his observations with care.

16.7.5 The Tribunal accepted that there were three phases of capped fees: £25,000 initially, then £100,000 and then £275,000. The available documentation, including in particular the credit notes which adjusted Client A's liability, supported the Respondent's account.

16.7.6 Having carefully assessed the Respondent's oral evidence, in the context of the available documentation, the Tribunal did not consider that the Respondent set out to persuade his client or the Court that he had completed work he had not done. The Tribunal could not be sure that the working pattern described by the Applicant, primarily as set out in the evidence of Mr Quentin, and largely accepted by the Respondent, could not have been accurate. The working pattern, and the totality of the time worked, as described by Mr Quentin and not challenged by the Respondent to any significant degree, was punishing, and quite possibly ill-advised, but The Tribunal did not find that it was impossible to reconcile the information on time worked with what may have happened. That being the case, applying the criminal standard of proof, the Tribunal could not be sure that the time outlined and relied upon by the Applicant had not been worked by the Respondent.

16.7.7 The Tribunal was taken to specific examples of time records which were alleged to be inconsistent. For example, where there were very lengthy conferences with Client A and also calls made to him on the same day for instructions to be taken. The Tribunal considered that these examples illustrated the dangers of retrospective and general recreation of time records but did not find that the examples were so completely implausible that a finding that they were false could be made. The Tribunal was taken to other examples, such as time allocated where there was alleged to be very little output. Again, the Tribunal could not be sure that the time claimed had not been worked.

16.7.8 The inclusion of time spent working on a document on a date when it was not yet issued, something accepted by the Respondent and said to be an error, was a glaring example of how the approach he adopted in retrospectively creating time records could go wrong. One mistake was potentially explicable, but the Tribunal considered it was highly significant in illustrating the risks of the approach adopted.

16.7.9 The Tribunal did not find the minutes per page approach objectionable in itself. The Tribunal found that the Respondent had done his best to recreate the work he had done. However, cumulatively, the working pattern revealed in the evidence and described by the Respondent did support the inference that the degree of specificity in the costs claim was misleading. There were obvious limits to the Respondent's ability to say with confidence years after the fact that a certain task was completed on a specific date, largely in the absence of contemporaneous records. This was something he accepted; yet this is what the attendance notes stated. They did not simply say that the Respondent had calculated that it was likely that a certain number of hours had been worked on specific tasks over the relevant period. As the Respondent had stressed, the attendance notes all contained the minutes per page formula, but they also showed how many hours had been worked on specific days, in some cases which pages had been reviewed on which days, and in some cases included a total number of hours which was not a multiple or either 2 or 4 minutes which were said to be the building blocks of the time charged.

Allegation 1.1(a)

16.7.10 The costs claim submitted to the Costs Office (which included the attendance sheets submitted subsequently) included a degree of specificity which created a misleading impression that specific tasks were undertaken on specific dates. As a minimum, the Respondent could not have known this to be the case, whereas the documents presented the information without caveat or qualification. To this extent, the claims did not reflect the work actually undertaken because, due to the retrospective exercise undertaken, the actual work undertaken was not known, even to the Respondent. The claims submitted created an impression which was at odds with this underlying position. That the claims may have been an *attempt* to reflect the work which had been undertaken did not alter the finding that they did not, contrary to appearances, reflect the work actually undertaken.

16.7.11 The Tribunal considered that the only acceptable available option to the Respondent was to indicate on the face of the documents submitted that they were after the event creations which sought to show the work undertaken but not recorded contemporaneously. The Respondent's evidence on how the Bill of Costs was created lacked some detail but the Tribunal could not be sure that it was not accurate.

16.7.12 The Applicant had not pursued the overcharging allegation which had featured in the Rule 5 Statement featured in the previous Tribunal hearing. Client A paid the Bill of Costs produced by the Respondent. However, the Tribunal found that the Bill of Costs and supporting documents did not *reflect* the work completed as alleged. The dates included in the attendance notes stating that certain tasks were done on certain dates could not reflect the work accurately undertaken by the Firm as it could not be known what had been completed when given the paucity of the available records.

16.7.13 The Tribunal did not find, however, that it had been proved that the Respondent had not completed the work for which he claimed. The Tribunal reminded itself that the Applicant did not pursue the allegation of overcharging, and the Tribunal made no finding on the quantum of the Bill of Costs.

The breaches of the 2007 Code

16.7.14 The Tribunal found the alleged breach of Rule 11.01 proved beyond reasonable doubt. Given the way, on his own case, the Respondent had generated the information reflected in the Bill of Costs and in particular had reconstructed the time spent and created the attendance notes some years after the periods to which they related without clearly identifying this fact, the Tribunal found that the Respondent must have been aware of the risk of the Court being misled. The notes were not identified as creations after the event, and the degree of specificity they contained and the variation in the length of the days recorded (despite the presence of the minutes-per-page formula) suggested the contrary. The Tribunal did not consider that the Respondent deliberately deceived or knowingly mislead or allowed the court to be misled, but found that he was reckless as to this possibility.

16.7.15 The email sent by the Firm to Master Egan in March 2015 was not as frank as it could and should have been and the risk was taken that the Court of Appeal Costs Office may thereby be misled. Master Egan had asked whether the attendance notes submitted in

August 2011 were contemporaneous and the answer had been was "*the sheets at D8 pps 1-155 are to the best of our knowledge accurate records of work undertaken*". The Tribunal recognised that this answer was provided some years after the submission of the Bill of Costs and supporting documentation but considered it revealed the extent to which what had been submitted was inadequately clear and was consistent with an approach which was cavalier to the obvious risk of the Court being misled. There was a risk that the Costs Office would assume that the attendance notes were contemporaneous when they were submitted in August 2011, and whilst they were submitted after the Bill of Costs they were an essential part of material submitted as part of the costs claim. The Respondent could not claim simultaneously that the material lodged on 27 June 2011 was just the 'bare bones' to 'get the ball rolling' and so he should not be judged harshly for omissions and also disavow the essential supporting material which followed promptly on 11 August 2011.

16.7.16 The Tribunal accepted that the Respondent had completed a very significant amount of work and the Bill of Costs may very well reflect a genuine effort to recreate what had been completed. However, the way in which it was completed, supported and presented could not accurately reflect the work completed and there was a risk that the Court would be misled. Accordingly, the Tribunal found Rule 11.01 (1) proved with regards to recklessly allowing the Court to be misled. The Tribunal also found beyond reasonable doubt that that Rule 11(2)(b) had also been breached as the Respondent had not taken adequate steps to draw to the Court's attention the matters on which it may have been misled.

16.7.17 The Tribunal considered that it was critical to public trust in the profession that the public had confidence that solicitors would not mislead the Court, or take appreciable risks that the Court may be misled. Public confidence in the administration of justice and the role of solicitors within that required strict compliance with professional regulations and ethics with regards to misleading the Court. Given the Tribunal's findings in relation to Rule 11.0.1, set out above, the Tribunal determined that the Respondent's recklessness as to the possibility that the Court may be misled, in the circumstances in which the Bill of Costs was submitted, was conduct likely to diminish the trust placed by the public in the Respondent and in the legal profession. The Tribunal found the alleged breach of Rule 1.06 of the 2007 Code proved beyond reasonable doubt.

16.7.18 The Tribunal had regard to the test for conduct lacking integrity set out in SRA v Wingate and Evans [2018] EWCA Civ. 366. The risk that the Court may be misled was of such fundamental importance that the Tribunal considered that basic ethical requirements of the profession were engaged. In a claim for costs to be paid from the public purse the Respondent needed to be absolutely transparent about, and cautious in, his methodology. The way in which the documents had been created was not made sufficiently clear to the Court, in particular the attendance notes as set out above. This was intrinsically linked with the submission of the Bill of Costs. The Tribunal found that the failure to be clearer and ensure that the risk that the Court may be misled was proactively addressed, amounted to a clear failure to meet the ethical requirements of the profession. The Tribunal found beyond reasonable doubt that the Respondent's conduct had lacked integrity in breach of Rule 1.02 of the 2007 Code.

Dishonesty

16.7.19 The Tribunal had found above that the Respondent did not go far enough to satisfy the professional obligations on him. In letters sent to the Costs Office on 27 June 2011 and 11 August 2011, the Firm did inform the Costs Office that the Firm had to "reconstruct" various files which were used in the process of generating the Bill of Costs. The letter dated 27 June 2011 stated that due to a fire "*a considerable number of files were destroyed including correspondence files which contained all our attendance notes, letters etc*". The Tribunal accepted that the Respondent, as the owner and senior lawyer within the Firm, and having been involved in correspondence with the Costs Lawyers about drafts to be sent to the Costs Office, had as a minimum authorised the letter.

16.7.20 The Tribunal accepted the summary of the test for dishonesty provided by the parties. When considering the allegation of dishonesty, the Tribunal applied the test in Ivey. Accordingly, the Tribunal adopted the following approach:

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

- secondly, once that was established, the Tribunal then considered whether this conduct would be thought to have been dishonest by the standards of ordinary decent people.

16.7.21 As to the state of the Respondent's knowledge, the Tribunal found that the Respondent knew:

- He had told the Court about the reconstruction exercise including the fact that the Firm's attendance notes had been lost (when submitting the Bill of Costs on 27 June 2011 and when submitting the bulk of the supporting documentation on 11 August 2011);

- The offer had been made to meet with officials from the Costs Office or to provide further information;

- He had provided full information to the Costs Lawyers who had advised him on the costs claim and to whom he had delegated much of the costs process.

16.7.22 The Tribunal considered that the public would be concerned about the Bill of Costs and the documents submitted in support of it, for the reasons set out above. The Respondent should have been clearer and some of the replies for which he was ultimately responsible were cagey and guarded as set out above. However, the Tribunal found that applying the objective standards of ordinary decent people in the light of the Respondent's knowledge and belief, the Respondent's conduct was not dishonest.

Allegation 1.1(b)

16.7.23 The parties agreed that the eight invoices were only provided when specifically requested by reference to their individual numbers by Master Egan in 2015. Invoices

relating to the interim payments made by Client A had been requested by the Costs Office in September 2011.

16.7.24 The Respondent had provided the invoices to Costs Lawyers which was submitted to be inconsistent with an attempt to hide them. The Respondent's evidence was that he acted on the advice from the specialist and experienced costs draftsman. The Tribunal had been referred to comments from the senior costs draftsman stating that evidence of the invoices should not appear amongst the material submitted to the Costs Office in support of the costs claim. The Tribunal noted that the Costs Lawyer's advice was to some extent dependent on information they had received from the Respondent (about the intent behind and status of the invoices). However, the Tribunal accepted that the Respondent followed the advice he had been given by the costs specialists.

16.7.25 The invoices were not provided when the bulk of the supporting material was sent to the Costs Office on 11 August 2011. A deliberate decision was taken, for which the Respondent was ultimately responsible, to put the Costs Office in a position where it did not have the full picture of the evolution of the costs arrangements. Whilst the preamble to the Deed included details of the fee cap and its subsequent abandonment, as the invoices were on their face seemingly or potentially at odds with the picture in the Bill of Costs submitted, they may have been relevant to the assessment exercise. The Tribunal considered that the Respondent should have disclosed the invoices and explained that they were considered to be irrelevant and to have been superseded. The Respondent was aware of the potential indemnity principle risk suggested by the invoices as the Costs Lawyers had specifically highlighted this in correspondence. Notwithstanding the Costs Lawyers' advice, the Respondent should have been cautious and transparent when it came to providing information to the Costs Office as part of a claim for public funds.

The breaches of the 2007 Code

16.7.26 The Tribunal considered that the suppression of the invoices from the documents submitted to the Costs Office ran the risk that the Court may not get the full picture. The Tribunal found that the mention of the indemnity principle by the Costs Lawyers would have alerted the Respondent to the risk that the Court may potentially be misled by the omission of the invoices. This risk was clear when the costs draftsman drew attention to it. Whilst it was obviously significant that the Respondent took expert advice, from someone qualified to provide it, and this issue is revisited in mitigation, the Tribunal nevertheless found that as an experienced solicitor who had been made aware of the issue, he perceived the risk and unreasonably took it. Even where the advice received was that the invoices were irrelevant, that advice may itself, to some extent, have been dependent on the information that the Respondent had provided to the Costs Lawyers. The omission of the invoices meant, as a minimum, the Costs Office was denied a fuller picture of the evolution of the treatment of costs between the Firm and Client A.

16.7.27 The context of the initial omission of the invoices was that the Respondent had just entered into an agreement with Client A to double his hourly rate, and attendance notes were produced in support of a costs claim which gave an impression of specificity as set out above; the omission of the invoices must be assessed in that context. The Tribunal was sure that the Respondent was aware of the risk of misleading the Court

and found to the requisite standard that it was not reasonable in all the circumstances for him to take that risk. The Tribunal accordingly found the alleged breach of Rule 11.01 of the 2007 Code proved in that the Respondent had been reckless as to the possibility of the Court being misled. The Tribunal found that the breach of Rule 11.01(2)(b) was proved beyond reasonable doubt as the Respondent had failed to draw the invoices to the attention to the Court's attention which "might result" in the Court being misled. The Tribunal found that the offer of a 'grid' setting out the information contained within the invoices was unimpressive; it was mentioned repeatedly in the hearing but did not amount to much and was no substitute for the provision of the invoices.

16.7.28 In light of the above findings in relation to the invoices, the Tribunal again determined that the Respondent's recklessness as to the possibility that the Court may be misled was conduct likely to diminish the trust placed by the pubic in him and in the legal profession. Being reckless as to the possibility of the Court of Appeal Costs Office being misled in a claim for monies from public funds would inevitably impact on public trust. The Tribunal found the alleged breach of Rule 1.06 of the 2007 Code proved beyond reasonable doubt.

16.7.29 The Tribunal again had regard to the test for conduct lacking integrity set out in Wingate. As set out in relation to allegation 1(a), the Tribunal considered that recklessness as to the possibility of the Court being misled engaged and offended the basic ethical requirements of the profession. The omission of the invoices, in circumstances where the Respondent was alert to the possibility that they may give at least the impression of an indemnity principle issue, ran the risk that the Court would not have the full picture. The Registrar of Criminal Appeals should not need to request invoices by reference to their individual numbers after the invoices had been requested previously in correspondence in September 2011 (and after their initial omission from the supporting documents). The Tribunal found that the failure to be provide the invoices in the circumstances described above amounted to a clear failure to meet the ethical requirements of the profession. The Tribunal found beyond reasonable doubt that the Respondent's conduct had lacked integrity in breach of Rule 1.02 of the 2007 Code.

Dishonesty

16.7.30 The Tribunal again applied the test for dishonesty from Ivey and had regard to Bassett. The Tribunal concluded that it could not exclude innocent explanations for the Respondent's conduct. He sought and followed expert advice. That the Tribunal had found that his obligations as a solicitor meant he should have gone further did not mean that his actions had been dishonest.

16.7.31 As to the state of the Respondent's knowledge, the Tribunal found that the Respondent knew:

- about the existence of the invoices and that interim payments had been received from Client A on the strength of them;
- that they may raise indemnity principle issues or as a minimum invite scrutiny;

- that specialist costs draftsmen had advised that the invoices should not be provided.

16.7.32 In light of that knowledge, the Tribunal found that the failure to provide the invoices to the Costs Office (whether initially in June 2011, subsequently when most supporting documents were provided in August 2011 or at the latest in September 2011 when they were first requested) fell below the ethical standards of the profession, but applying the objective standards of ordinary decent people was not dishonest.

Previous Disciplinary Matters

17. There were no previous Tribunal findings.

Mitigation

18. Mr Darbishire noted that it had not been found that the Respondent had knowingly misled or deceived the Court. Without diminishing the finding of recklessness, he submitted that Rule 11.01(1) set out three levels of seriousness and the misconduct found proved was the lowest level, albeit still serious misconduct. Dishonesty had not been found.

19. Not misleading the Court was an area of special importance for all lawyers. Mr Darbishire stated that the findings on Rule 1.02 and 1.06 (integrity and public trust) flowed from this finding. Recklessly allowing the risk that the Court may be misled was submitted to be a sensitive and important area of misconduct. In the Respondent's case, the findings were based primarily on what was sent to Court on 27 June 2011. It had not been found that the Firm had deliberately inflated its hours or costs and there was no question remaining over the legitimacy of the Deed.

20. Mr Darbishire invited the Tribunal to consider how different the case found was from what was alleged in 2015. The basis on which the Applicant intervened into the Firm was that the Deed was a sham and the Bill of Costs was a sham. This intervention spelled the end of a promising firm and had catastrophic consequences for the Respondent. Nevertheless, it was accepted that the allegations found proved were significant.

21. The lack of clarity in the costs claim and the lack of care in the way in which it was presented to the Court in 2011 were significant. The Respondent should have been more open and provided a fuller and clearer explanation of the way the Bill of Costs was prepared. The Tribunal was invited to review the witness statement prepared by the Respondent in the intervention process in 2017 in which he stated:

> *"I readily accept that there are areas, particularly looked at in hindsight, that cause concern. There were genuine mistakes on my part and on the part of my firm. We were unused to billing in privately funded cases and we did not focus on our record keeping as well as we should have done."*

The Respondent had apologised for the acknowledged shortcomings during his oral evidence to the Tribunal. He had said that he should have been far clearer about how the Bill of Costs was prepared. Whilst this was not a full admission it was submitted that it was a candid recognition of the case which it appeared that the Tribunal had

ultimately found. It was submitted that this did not reach the threshold of someone setting out to set the Court on a misunderstanding.

22. The Bill of Costs submitted on 27 June 2011 was an initial document which was the start of a long process of assessment. This was said not to be an excuse but to be relevant to what the public would make of the shortcomings found proved. This would depend, it was suggested, on where the process would end up. It was submitted there were degrees of culpability. In this case, the fundamental aspect of the claim, that it was based on a retrospective variation to the retainer recorded in the Deed was known to the Costs Office. It was to be expected that the result of the assessment would ultimately be that Client A's voluntarily assumed liability would not be met from central funds.

23. Mr Darbishire noted the heavy cost that the Respondent had paid for these events in the ten years since the costs claim was made. He submitted it was relevant that the Respondent had received specialist advice on the preparation of the Bill of Costs and the costs claim generally. It was not an excuse, but it was relevant to his culpability. Mr Darbishire submitted that this was a case where a suspension from practice was an appropriate sanction, and that a more severe sanction was not warranted in the absence of any dishonesty, deception or deliberate misleading of the Court. Mr Darbishire noted that paragraph [56] of the Tribunal's Sanction Guidance states that strike off may be appropriate where no dishonesty was found. He submitted that if the Respondent's conduct was of sufficient seriousness to warrant such a sanction, the Tribunal would have found that he had knowingly misled the Court.

24. In 2006 when the instructions from Client A were received, or in 2011 when the costs claim was made, the Respondent was relatively inexperienced. He was entirely committed to his clients but was admittedly not a good record keeper and was somewhat disorganised. Since 2015 he had built a successful firm which had been closed down with all the job losses and impact on the Respondent personally that involved. Whilst the public perception and reputation of the profession was the primary concern of the Tribunal when assessing sanction, it was submitted that personal mitigation was not irrelevant. The events with which the misconduct was concerned were one isolated incident and there had been no other regulatory issues before or since. Mr Darbishire submitted that the public would not consider that suspension was an insufficient sanction to protect the reputation of the profession.

Sanction

25. The Tribunal referred to its Guidance Note on Sanctions (8th Edition) when considering sanction. The Tribunal assessed the seriousness of the misconduct by considering the level of the Respondent's culpability and the harm caused, together with any aggravating or mitigating factors.

26. In assessing culpability, the Tribunal found that the Respondent's motivation for the conduct found proved was to enable him to present the costs claim as favourably as possible notwithstanding the incomplete and in many cases non-existent records. He sought to claim the maximum amount possible from public funds, to discharge his duty to assist his client having the costs assessed. The conduct was planned. It was preceded by the Deed which varied the terms of Client A's retainer and which underpinned the costs claim. A huge amount of work went into the costs claim and preparing the

supporting documents, including producing attendance notes from scratch and there was a dialogue with the Costs Lawyers during the preparation of the Bill of Costs which lasted over twelve months. As an officer of the Court any solicitor was in a position of trust inasmuch as any solicitor had a particular duty not to mislead or take the risk that the Court may be misled. The Respondent had direct control over the circumstances of the misconduct. Whilst others were involved, the Costs Lawyers provided authoritative advice and a junior colleague carried out much of the reconstruction exercise (albeit they did so at the Respondent's instruction and the colleague used the Respondent's methodology). At the relevant time he was a sole practitioner and responsibility and control rested with him. At the relevant time, ten years ago, the Respondent had been twelve years qualified. His experience of cost claims of the type he submitted on Client A's matter was extremely limited although, ultimately, the principles involved, and with which the misconduct was concerned, were common to all bills of costs. The Tribunal assessed the Respondent's culpability as high.

27. Turning to the harm caused, the Tribunal considered first direct harm. The Costs Office had been affected by virtue of the additional time which the lack of clarity had required them to take on the matter. Costs officers had had to piece together the information they required. £500,000 had been paid out of central funds. Had Client A not returned this money there was a risk that this public money may have been at risk. The principle harm, however, was to the reputation of the profession and public trust in it. The events, including the lack of clarity in the context of a claim which inflated the costs due tenfold as a result of the Deed, played to harmful stereotypes of lawyers seeking to maximise payments from the public purse. As stated repeatedly above, complete transparency was required in such claims. The misconduct created a risk that there may be unwarranted payments made from the public purse, although this risk did not materialise. The Court of Appeal had been deeply concerned by the Respondent's conduct and the Tribunal considered that the profession generally would be similarly offended by the conduct found proved. The harm caused by the misconduct was foreseeable.

28. The Tribunal then considered aggravating factors. The methodology adopted was deliberate and calculated. The conduct involved a lack of clarity and openness, but not to the extent that matters were deliberately concealed. The Tribunal did not consider that the Respondent sought to blame others, including the Costs Lawyers, unfairly. The Tribunal considered that the Respondent ought to have known that the conduct found proved was in material breach of his obligations as a solicitor to guard against a risk the Court may be misled.

29. The Tribunal also considered mitigating factors. The Respondent had an otherwise unblemished record and had produced positive testimonials which spoke about his professionalism and commitment to his clients. The misconduct was related to a single matter, albeit one with consequences which flowed over an extended period. The Tribunal accepted that the Respondent showed genuine insight. He had acknowledged shortcomings in his 2017 statement and had expanded upon this and apologised during his oral evidence to the Tribunal. He had said that he would never act in the same way again and the Tribunal believed that this was sincere. There had been no lack of cooperation with the Applicant's investigation.

30. The Tribunal assessed the misconduct as very serious. The Tribunal had found that the Respondent's actions had lacked integrity. The misconduct involved recklessly taking the risk that the Court may be misled. Such conduct offended a fundamental tenet of legal practice. Whilst the Tribunal had not found the Respondent had acted dishonestly, or had deliberately set out to mislead the Court, failing to take steps to ensure the risk that the Court would not be misled was a very serious professional failing. In view of this seriousness and the potential for damage to the reputation of the profession, the Tribunal did not consider that No Order or a Reprimand were adequate sanctions.

31. The Tribunal carefully considered whether a fine was an appropriate sanction. However, given the particular importance of ensuring the Court is not misled and the risk of the Court being misled being proactively addressed, the Tribunal did not consider that a fine would adequately reflect the seriousness of the conduct found proved. The protection of the reputation of the profession required that a period of suspension from practise be imposed. The Tribunal determined that a fixed period of suspension of 12 months was the appropriate sanction to punish and deter whilst being proportionate to the seriousness of the misconduct. The Tribunal considered but rejected the possibility of imposing restrictions on the Respondent to run from the end of a period of suspension. The conduct took place ten years ago and in light of the insight demonstrated by the Respondent the Tribunal accepted that the risk of any repetition was extremely low. There was no specific risk against which to target restrictions.

Costs

32. Mr Ramsden applied for the Applicant's costs of £41,400 as set out in a statement dated 29 April 2021. The fees were based on a Capsticks fixed fee of £34,500 plus VAT and were inclusive of Counsel's fees. There were 114.2 hours recorded on the schedule as having been completed by Capsticks personnel. After his own fee, Mr Ramsden stated that the notional hourly rate was in the region of £20 to £30 per hour. He submitted that the costs were reasonable. Whilst any reduction for the fact that the aggravating allegation of dishonesty was not found proved was a matter for the Tribunal, Mr Ramsden submitted that any such reduction should be modest.

33. In reply, Mr Darbishire stated that the case alleged and put forward during the hearing was much more serious than that which had been found proved. The Tribunal was entitled to have regard to this. He suggested that the Tribunal may consider that no more than 60% of the costs claimed should be awarded, a figure which he stated was based on an assessment of what seemed fair given what had been found proved. The Respondent had not submitted any statement of means and did not invite the Tribunal to take his means into account.

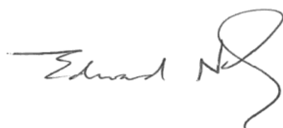
34. The Tribunal assessed the costs for the hearing. In all of the circumstances the Tribunal considered that the costs claimed by the Applicant were reasonable. Whilst the aggravating allegations of dishonesty had not been proved, two findings of conduct lacking integrity had been made. The case had reasonably, necessarily and proportionately involved a very significant amount of work by the Applicant. The notional hourly rate was between £20 and £30 was extremely low. The Respondent had not invited the Tribunal to take his means into account. The Tribunal ordered the

Respondent to pay the Applicant's costs of and incidental to this application fixed in the sum of £41,400.

Statement of Full Order

35. The Tribunal Ordered that the Respondent, NABEEL AMER SHEIKH, solicitor, be suspended from practice for a period of 12 months to commence on 1st November 2021 and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £41,400.

Dated this 2nd day of February 2022
On behalf of the Tribunal



JUDGMENT FILED WITH THE LAW SOCIETY
02 FEB 2022

E. Nally
Chair