The Tribunal's decision dated 18 January 2023 is subject to appeal to the High Court (Administrative Court) by the Applicant. The Order remains in force pending the High Court's decision on the appeal.

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No.12230-2021

BETWEEN:

DAVID HINKEL Applicant

and

ERIN GHEISSARI NÉE ROSE First Respondent
MATTHEW HOOTON Second Respondent

Before:

Ms A Horne (in the chair)
Miss H Dobson
Mrs L McMahon-Hathway

Date of Consideration: 15 & 16 December 2022

Appearances

Mr Hinkel represented himself.

Mr Richard Coleman K.C. leading Ms Natalie Koh both of Fountain Court Chambers, Temple London, EC4Y 9DH, instructed by Clyde & Co LLP of St Botolph Building, 138 Houndsditch, London EC3A 7AR, for the Respondents.

DECISION RE RESPONDENTS' APPLICATION TO RECONSIDER THE CERTIFICATION DECISION AND TO DISMISS THE PROCEEDINGS

Relevant Procedural Background

1. The Rule 12 Statement in this matter is dated 23 July 2021. It was submitted with a Lay Application by Mr Hinkel, the Applicant.

2. On 6 August 2021, pursuant to Rule 16(1) of the Solicitors (Disciplinary Proceedings) Rules 2019 ("SDPR 2019"), the Tribunal adjourned the consideration of whether the Application raised an arguable case for the Respondents to answer, so that the Solicitors Regulation Authority Ltd, ("SRA") could investigate and consider whether to initiate its own Application or, by agreement with the Applicant, take over conduct of his Lay Application.

3. The matter came before the Tribunal on 19 October 2021, 13 January 2022 and 14 April 2022. On each occasion the SRA requested and was granted further time to conclude its investigation.

4. On 22 July 2022 the Tribunal refused the SRA's request for a further extension and certified the Lay Application, for the reasons set out in the Tribunal's Memorandum dated 22 July 2022.

5. The Tribunal concluded that the allegations comprised potentially serious misconduct on the part of both Respondents, and at paragraph 12 of its Memorandum it set out the matters it had certified as showing a case to answer by the Respondents:

   (1) whether the Firm was properly instructed at all;

   (2) failures to undertake due diligence;

   (3) the acceptance by the Respondents that enhanced due diligence was required of Person A (they proposed to meet him in person, but failed to do so, and yet issued contracts of sale nonetheless);

   (4) failure to heed the red flags surrounding Person A which included his position or not within Client B, the fact that Client B appears on the United Nations Sanctions list which gives rise to potential money laundering concerns, Person A's unusual residential address, and the fact that Person A was corresponding by a "Gmail" address.

6. The Tribunal directed that the matter be listed for a Case Management Hearing ("CMH") on 1 September 2022 with a time estimate of half a day, at which Standard Directions would be considered by the Tribunal.

7. The Tribunal also stated at paragraph 14 of its Memorandum that the Tribunal would be assisted by the Applicant distilling the allegations and identifying any breaches to the SRA Principles and/or Code of Conduct, in readiness for the next hearing.

8. In subsequent correspondence, after the Tribunal's decision to certify, the SRA indicated that it had completed its investigation and that it was likely to refer certain, but at that time, unspecified allegations to the Tribunal against the Second Respondent

and Simmons & Simmons LLP ("the Firm"). The SRA also indicated that it would not be referring the First Respondent.

9. At the CMH on 1 September 2022, the Tribunal considered, amongst other things, the Applicant's document distilling the allegations, and submissions from the parties. The Tribunal identified those matters within Mr Hinkel's 'distillation document' which it decided fell within the scope of the allegations certified by the Panel on 22 July 2022, and those which it considered fell outside of that scope.

10. On 21 October 2022 the Panel convened to consider the following:

- Mr Hinkel's application re Supplementary Statements made under Rule 14 of the SDPR 2019 ("Rule 14 Application").
- The Respondents' application for an extension of time to serve their Answers.
- The Respondents' application to vacate the CMH listed for 8 December 2022.

11. On that occasion the Panel granted Mr Hinkel leave to make the application under Rule 14, and it certified one additional matter, which appeared to be a new allegation, in that Rule 14 Application as raising an arguable case for the Respondents to answer. This matter was as follows:

> *"2.4. failing to terminate the engagement on an Entity B Asset as defined by UNSC resolution 2231 (2015) immediately it became apparent that special circumstances prevailed i.e., that he was either an Entity B Person, an Entity B Designated Person, part of the Entity B Government or an Entity B Body under sanctions and/or a Politically Exposed Person ("PEP").*

12. The Panel considered that, if proved to the requisite standard, the certified allegations could amount to breaches of the following SRA Principles 2011:

- Principle 6: public trust
- Principle 7: complying with legal and Regulatory obligations
- Principle 8: carrying out their role effectively.

13. On the same occasion the Panel directed that the matter was to be listed on 15 and 16 December 2022 to hear the Respondents' application for reconsideration of the certification decision made by the Panel on 21 July 2022, and in the alternative an application for abuse of process in the event the Panel considered it had no power to revisit certification.

The Application

14. Preliminary Matter

14.1 Prior to commencement of the substantive application Mr Hinkel confirmed that an application he had made in respect of the calling of witnesses was, at that stage, no

longer pursued by him. He had no witnesses available to call on the application under consideration, and he was willing for the hearing to proceed on submissions alone.

14.2 However, Mr Hinkel, raised a matter relating to Mr Coleman's ability to represent the Respondents in the proceedings. Mr Hinkel, submitted that Mr Coleman required a licence to act for them.

14.3 Ms Horne, Chair, intervened and informed Mr Hinkel that this was a matter which would not be entertained by the Tribunal. Mr Hinkel had made the same submission at the hearing on 1 September 2022 and on that date he was informed by Ms Horne that the Panel could consider only those certified allegations made against the Respondents. The Panel had no jurisdiction to consider allegations against non-respondents. Therefore, he would not be permitted to re-argue it in the present hearing.

15. <u>The Respondents' submissions presented by Mr Coleman KC</u>

The core submission

15.1 Mr Coleman explained that the instant application was made on the following bases:

(1) for reconsideration of the Tribunal's decision on 21 July 2022 to certify certain allegations made by Mr Hinkel ("the Certification Decision") on the ground that it was made on the basis of a fundamental mistake and, upon such reconsideration, an order that the Certification Decision be revoked and Mr Hinkel's application be dismissed;

(2) in the alternative, if the Certification Decision was not revoked, for the dismissal of Mr Hinkel's Application on the grounds that the certified allegations were nevertheless *res judicata* and/or that their pursuit by Mr Hinkel is an abuse of process.

15.2 Whilst there was substantial overlap between the two limbs of the application, the primary basis of the application was that the Certification Decision should be revoked on the ground of fundamental mistake. However, in any event, the proceedings should be dismissed whether or not the certification of the case was revoked.

15.3 Mr Coleman referred the Tribunal to a chronology of significant events in the life of Mr Hinkel's Applications for certification *(the chronology is appended to the judgment as Appendix 1).*

15.4 In brief, Mr Coleman's core submission was that Mr Hinkel's Application to the Tribunal, and certified by the Tribunal on 21 July 2022, was in substance, the same or materially the same as the Application which he made to the Tribunal in 2019, which the Tribunal refused to certify, and therefore stood dismissed, following an investigation by the SRA which found no evidence of misconduct on the part of the Respondents.

15.5 For reasons of simplicity Mr Coleman referred to Mr Hinkel's present Application and his previous Application as "the 2021 Application" and "the 2019 Application" respectively, and he invited the Tribunal to compare carefully the allegations made in

those Applications and supporting Rule 12 statements. The core matters and key extracts of the respective Applications were set out in a schedule *(the schedule is appended to the judgment as Appendix 2).*

15.6 Both Applications related to Mr Hinkel's attempt to acquire a high value property in London owned by Entity B during the period 2015 to 2017 ("the Transaction").

15.7 The Respondents took instructions from Person A, who they believed to be duly authorised by Entity B to act on its behalf in relation to the Transaction. The Transaction did not proceed to completion as Mr Hinkel and Person A (or someone identifying himself as Person A) were unable to agree the price for the property. Mr Hinkel later contended that Person A was not authorised to act on behalf of Entity B and was effectively an imposter.

15.8 Mr Coleman said that the most relevant allegation for purposes of the present application concerned an alleged failure on the Respondents' part to conduct appropriate due diligence on Person A; the certified allegations also related to alleged breaches of international sanctions, given the identity of Entity B.

15.9 In the years following the failure of the Transaction in 2017, Mr Coleman said that Mr Hinkel had subjected the Respondents and the Firm in which they work to repeated allegations of misconduct in respect of the Transaction. He had maintained his allegations persistently in the face of their rejection by the Courts, and by the Tribunal in 2019 when the Tribunal refused to certify his allegations as showing a case to answer by the Respondents.

15.10 In the light of that history of failure, the Certification Decision made by a panel of the Tribunal in July 2022 was surprising given that the certified allegations again concerned alleged failures in the due diligence conducted by the Respondents and alleged breaches of international sanctions, and as such, they were in substance the same, or materially the same, as those which, two years earlier, a different panel had refused to certify.

15.11 In Mr Coleman's submission, the effect of the 2022 Certification Decision had been to allow Mr Hinkel to continue to pursue his prolonged and oppressive campaign of complaints and proceedings against the Respondents beyond the point where they were entitled to believe that the matter was closed.

15.12 Further, Mr Hinkel persisted in seeking to re-introduce wide-ranging and extreme allegations which the Tribunal had already refused to certify. He had even applied to have the Respondents' solicitors and counsel barred from acting on the grounds that they too were in breach of international sanctions by representing the Respondents in these very proceedings.

15.13 This situation obtained because something had gone seriously wrong in the Tribunal's decision-making process which led to the Certification Decision.

15.14 In Mr Coleman's submission the Certification Decision was explicable only on the basis that, as it appeared from the evidence, the Panel which made the Certification Decision must have been unaware of the relevant history including the dismissal of the 2019 Application.

16. Fundamental mistake of fact

16.1 Mr Coleman argued that the Certification Decision was based on a fundamental mistake, in that the certifying panel could not have been aware that the Tribunal had previously refused to certify, and dismissed, the same or materially the same allegations, or which (if materially different) could and should have been advanced as part of the 2019 Application. As a result of that mistake, the Tribunal certified allegations in circumstances where (i) it had no power to certify them and/or (ii) it was acting unlawfully in certifying them. As the Certification Decision proceeded on a fundamental mistake, the Tribunal was entitled to reconsider it and to dismiss the proceedings.

16.2 There was a narrow power under the general law to correct a decision that had been made on the basis of a fundamental mistake of fact or obtained by fraud, as well as a power to correct minor slips and accidental errors.

16.3 The starting point, as explained by the Court of Appeal in R (Sambotin) v Brent LBC [2018] EWCA Civ 1826 [2019] PTSR 371 [3] is that*:*

> *"Once a public authority exercising a statutory power has decided how the power is to be exercised, it will lack further authority and be functus officio. Any later attempt to remake the decision will be outside the authority's powers (ultra vires)."* Peter Jackson LJ referred at [3] to the *"strong and obvious public policy interest in finality, which allows individuals to rely on statutory decisions, without having to worry that they may later be changed"*.

16.4 A public body is functus officio where it *"has performed a function in circumstances where there is no power to revoke or modify it"*: R (on the application of Demetrio) v Independent Police Complaints Commission ("IPCC") [2015] EWCA Civ 1248 at [42]. The Court of Appeal held in that case at [34]-[37] "*whether or not a public body has a statutory power to revoke or modify a previous decision depends on the proper construction of its statutory powers. The statutory provisions setting out the IPCC's investigation and disciplinary process "set out a regime… from end to end"*

16.5 The Courts proceed on the basis that, in the absence of a clear indication that a public body is empowered to reopen and reconsider its decision, it does not have any such general power. For example, in R v Parliamentary Commissioner for Administration ex parte Dyer [1994] 1 WLR 621 the Divisional Court held at p 629 that although the Parliamentary Commissioner Act 1967 provided the Commissioner with the power to *"act in accordance with his own discretion"* in respect of his investigations, this did not *"purport to empower the Commissioner to re-open an investigation"*. The Commissioner was therefore *funtcus officio* in respect of Miss Dyer's complaint.

16.6 Within the regulatory context R (on the application of B) v The Nursing and Midwifery Council [2012] EWHC 1264 (Admin), the High Court held that the Council had acted beyond its powers by rescinding its earlier decision that a nurse had no case to answer in respect of allegations made against her. The relevant statutory rules did not confer any power to reverse a decision that a registrant had no case to answer and that there was no inherent jurisdiction permitting the Council to do so.

16.7 Mr Coleman said that the Tribunal's rules did not confer on the Tribunal any general power to remake a certification decision. At the time of Mr Hinkel's first application to the Tribunal the rules were contained in the Solicitors (Disciplinary Proceedings) Rules 2007 ("the SDPR 2007"). These were replaced by the SDPR 2019.

16.8 Under Rule 5 of the SDPR 2007, an application to the Tribunal in respect of any allegation or complaint made in respect of a solicitor had to be in the form of Form 1 in the Schedule to the Rules. The application was required to be supported by a statement setting out the allegations and the facts and matters supporting the application and each allegation contained in it.

16.9 By Rule 6(1) of the SDPR 2007, an application made under Rule 5 was required to be considered by a solicitor member, who had to certify whether there was a case to answer. If the solicitor member was minded not to certify that there was a case to answer, or if in their opinion the case was one of doubt or difficulty, then the application had to be considered by a panel of three members of the Tribunal, at least one of whom had to be a solicitor member and one a lay member (Rule 6(2) and (3)). If a solicitor member or a panel decided not to certify that a case to answer was established, then the application would be dismissed without formal order unless any party to the proceedings required otherwise (Rule 6(4)). The certification procedure is now set out in Rule 13 of the SDPR 2019, which is not materially different from Rule 6 of the 2007 Rules.

16.10 By Rule 20 of the SDPR 2007 in the case of a lay application the Tribunal could, before or after certification of a case to answer, adjourn the matter for a period not exceeding three months to enable the Law Society to carry out its own investigation and (a) if it thought fit, initiate its own application, or (b) by agreement with the applicant, undertake the application. Rule 16 of the SDPR 2019 provides for materially the same procedure.

16.11 However, subject to the Rules, the Tribunal may regulate its own procedure (Rule 21(1) of the SDPR 2007 and Rule 6(1) of the SDPR 2019 Rules).

16.12 Rule 4(1) of the SDPR 2019 also states that the overriding objective of the Rules is to enable the Tribunal to deal with cases justly and at proportionate cost. The Tribunal will seek to give effect to the overriding objective when it exercises any power under the Rules or interprets any Rule or Practice Direction (Rule 4(2)). Dealing with a case justly and at proportionate cost includes, so far as possible:

(a) ensuring that the parties are on an equal footing;

(b) ensuring that the case is dealt with efficiently and expeditiously;

(c) saving expense; and

(d) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues (Rule 4(3)).

16.13 The parties are required to help the Tribunal to further the overriding objective (Rule 4(4)). The 2007 and 2019 Rules provide a complete statutory framework for the consideration of applications by the Tribunal. They do not provide for the remaking of certification decisions.

16.14 Although Rule 21(1) of the SDPR 2007 and Rule 6(1) of the SDPR 2019 contain a general provision that the Tribunal may regulate its own procedure, the Rules do not allow the Tribunal to remake certification decisions, in the absence of express provision for such a power.

16.15 However, in the absence of a statutory power, there is a narrow power under the general law which permits a public body that is otherwise *functus officio* to reconsider its decision in the following circumstances:

(1) where the decision was based on a fundamental mistake of fact;

(2) where the decision was obtained by fraud; and

(3) to correct minor slips and accidental errors.

16.16 Wade and Forsyth on Administrative Law (11th ed.) at page 191 states "*statutory tribunals have [the] power to correct slips and to set aside decisions obtained by fraud or based upon 'a fundamental mistake of fact'*.

16.17 Also, in the regulatory context R (on the application of Chaudhuri) v The General Medical Council [2015] EWHC 6621(Admin) [47] held that *"public bodies "have the power themselves to correct their own decisions based on a fundamental mistake of fact"*.

16.18 The case of Porteous v West Dorset DC [2004] EWCA Civ 244 [2004] HLR 30 gave an example of the exercise of such a power when the Court of Appeal held that a housing authority was entitled to reopen its decision to house a person, as it was taken in the mistaken belief that no housing was available.

16.19 Mr Coleman contended also that a certification decision could be revoked on the broad ground of preventing substantial injustice, and that there was support for that proposition in the 10th edition of Wade and Forsyth as quoted by Haddon J at paragraph 44 of *Choudhuri.*

16.20 In that edition, the authors stated: "*Even where such powers are not conferred, it is possible that statutory tribunals would have the power, as has the High Court, to correct accidental mistakes; to set aside judgments obtained by fraud; and to review a decision where facts subsequently discovered have revealed a miscarriage of justice."* The current (11th) edition of Wade & Forsyth described the power in the terms of a fundamental mistake.

16.21 Mr Coleman submitted that there was a fundamental mistake of fact on which the Certification Decision proceeded, and whilst it would not be appropriate for the present Panel to inquire into the subjective state of mind of the Panel that made the Certification Decision, it could be inferred from an objective assessment of the available evidence

(e.g., the documents which it had in its bundle) that the Certification Decision Panel had not been aware of the following facts:

- Mr Hinkel had previously made the 2019 Application to the Tribunal.

- The 2019 application raised allegations in respect of the same matter as the 2021 Application.

- The 2019 application raised allegations that were the same or materially the same as the allegations that the Tribunal certified in the 2021 Application. In so far as the 2021 application sought to raise materially different allegations, those allegations could and should have been advanced as part of the 2019 application.

- Following the Tribunal's referral of the 2019 Application to the SRA, the SRA had reported to the Tribunal that following its investigations (i) the evidential test had not been met as there was no evidence of misconduct on the part of the Respondents, and (ii) it would not be proportionate to investigate further (the SRA's letters dated 2 May 2019 and 16 May 2019)

- The Tribunal therefore refused to certify a case to answer in respect of any of the allegations in the 2019 application, on the grounds that there was no realistic prospect of Mr Hinkel bringing successful proceedings, and no evidence in support of the allegations. Mr Hinkel's appeal and subsequent judicial review of that decision had both been dismissed.

16.22 In its Memorandum dated 22 July 2022, recording the reasons for the Certification Decision, the Panel made no reference to any of these matters. The function of the Memorandum is to explain the reasons for the decision and the material considerations taken into account. If the Tribunal had been aware of the relevant history and had taken it into account, it would have referred to this in its decision.

16.23 Furthermore, Mr Hinkel did not refer to the relevant history in this Rule 12 Statement in support of the 2021 application.

16.24 Therefore, the Tribunal's mistake as to these facts was fundamental to the Certification Decision. If the Tribunal had been aware of the material regulatory history, then it would have been bound to conclude that:

(i) it could not lawfully certify the allegations that it certified and

(ii) the allegations that it certified were res *judicata* and/or the pursuit of them by Mr Hinkel was an abuse of the Tribunal's process.

16.25 Alternatively, the panel would have had to give serious consideration to those issues and record that it had done so.

16.26 Next, Mr Coleman expanded on two points.

17. The unlawfulness of the Certification Decision

17.1 As a result of the mistake as to the relevant history, the Certification Decision was unlawful because the Tribunal had no power to certify the allegations.

17.2 By making the Certification Decision, the Tribunal in effect remade the 2019 decision, and the Tribunal had no power under its Rules to do that. Moreover, the power under the general law to remake a decision on the basis of fundamental mistake or fraud was plainly not engaged when the Tribunal made the Certification Decision.

17.3 Indeed, the certifying panel did not consider whether in making a decision, a public authority has a basic duty to take reasonable steps to acquaint itself with relevant material, sometimes referred to as the *Tameside duty of sufficient inquiry* as set out in State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014.

17.4 The Tribunal has recognised in its own jurisprudence the importance of considering previous determinations. In SRA v Jamil Ahmud (Case No. 11955-2019) (published on 28 September 2020) the Tribunal held that the fact that an Application to the Tribunal by the SRA was made on substantially the same facts as had previously been found to warrant no further action by the SRA, was material to a decision whether to certify the allegations made by the SRA. It criticised the SRA for not drawing the Tribunal's attention to the relevant regulatory history.

17.5 The Tribunal would have had no power to change the 2019 decision, had Mr Hinkel asked it to do so (at least in the absence of fraud or fundamental mistake) and that legal bar could not be circumvented by submitting a further application some two years later raising in substance the same or materially the same complaints, or complaints which could and should have been included in the 2019 Application.

17.6 Furthermore, in certifying allegations which were in substance the same or materially the same as allegations which had previously been dismissed, or which could or should have been included in the 2019 Application, the Tribunal acted contrary to the overriding objective of dealing with cases justly and at proportionate cost, in accordance with Rule 4(1) and (2).

17.7 Mr Coleman contended that it was unjust and disproportionate for a Tribunal panel to certify allegations that were in substance the same or materially the same as allegations that a differently constituted panel two years previously, following the conclusion of an SRA investigation that there was no evidence of misconduct, had concluded did not have a realistic prospect of success, or allegations which could and should have been included in the 2019 Application.

18. The Certification Decision unlawfully frustrated the Respondents' legitimate expectations that the allegations would not be certified.

18.1 The Certification Decision unlawfully frustrated the Respondents' legitimate expectations that the allegations would not be certified. Mr Coleman drew the Tribunal's attention to the doctrine of legitimate expectation, as summarised at paras 41.1- 41.2 of the Judicial Review Handbook (7th ed.) by Sir Michael Fordham:

> *"A public authority's clear promise or practice may engender a procedural or substantive expectation protected from being unfairly or unjustifiably defeated… Necessary features of a legitimate expectation are that it arises out of a sufficiently clear and relevantly unqualified promise or practice. Other features frequently, but not invariably, found include communication, reliance and detriment".*

18.2 Also, the judgment of Laws LJ in Nadarajah v Secretary of State for the Home Department [2005] EWCA Civ 1363 at [68] stated:

> *"… a public body's promise or practice as to future conduct may only be denied … in circumstances where to do so is the public body's legal duty or is otherwise … a proportionate response (of which the court is the judge, or the last judge) having regard to the legitimate aim pursued by the public body in the public interest."*

18.3 The doctrine of legitimate expectation is rooted in fairness as set out in De Smith's Judicial Review (8th edition.) at 12-001: *"It is a basic principle of fairness… at the root of the constitutional principle of the rule of law, which requires regularity, predictability, and certainty in government's dealings with the public".*

18.4 It is not necessary for the representation to be communicated directly to the applicant. It is sufficient that the applicant *"was within the class of people to whom the representation was made or that it was otherwise reasonable for him to rely upon it"* as stated in R v Inland Revenue Commissioners ex parte Unilever Plc [1996] STC 681, 693.

18.5 Mr Coleman said that the doctrine may operate to prevent a regulator from pursuing allegations of professional misconduct which it had previously told the regulated person it would not pursue.

18.6 In Brabazon-Drenning v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2001] HRLR 6, a nurse had allowed her registration to lapse. The Preliminary Proceedings Committee of the UK Central Council for Nursing, Midwifery and Health Visiting informed the nurse that no action would be taken against her. It later pursued a charge relating to the lapse of her registration. Elias J quashed the charge on the basis that the Committee was bound by its previous decision, and had created a legitimate expectation that the matter would not be reopened. He said at [31]:

> *"… it seems to me that once the Committee has made its ruling and has determined that there should be no further action taken in respect of that charge, then unless there is some misrepresentation, or unless they are acting under some fundamental misconception of the true position, then they are bound by that determination. I do not think it is open to them to resuscitate it at will, or because they have discovered other charges and they wish to strengthen the case in some way against the individual. If I am wrong about that, then I have no doubt, in any event, that it would be unfair for the matter to be resuscitated in the circumstances of this case, particularly given the unambiguous and unequivocal way in which the decision not to pursue it had been notified to the appellant. The appellant did have a substantive legitimate expectation that the*

matter would not be reopened, and there was no countervailing public interest which justified the Committee frustrating that expectation."

18.7 Similarly, in R (on the application of B) v The Nursing and Midwifery Council [2012] EWHC 1264 (Admin), the Court held that the Nursing and Midwifery Council was not entitled to rescind its earlier decision that a nurse had no case to answer in respect of allegations of mistreating and/or neglecting a patient. The Council's decision had created a legitimate expectation from which it would be disproportionate and unfair for it to resile.

18.8 In the instant case Mr Coleman said the Respondents had a legitimate expectation that the Tribunal would not certify further allegations made by Mr Hinkel where those allegations were in substance the same or materially the same as those dismissed in the 2019 Decision, or where they could have been brought as part of the 2019 Application.

18.9 The 2019 Decision was a clear and unambiguous determination by the Tribunal that there was no case to answer in respect of the allegations contained in Mr Hinkel's 2019 Application, and that there was "*no realistic prospect of the Applicant bringing successful proceedings"* and *"no evidence in support of the broad allegations made"*

18.10 The 2019 decision was communicated by the SRA to the Respondents, who were entitled to rely upon the decision, and in fact did so to their detriment. It was immaterial that the Tribunal did not communicate their decision to the Respondents directly. This is not necessary to establish a legitimate expectation. Further, it was inherently likely that the Respondents would become aware of the 2019 decision, as they did. The Respondents were therefore within the class of people to whom the representation was made, and it was otherwise reasonable for the Respondents to rely upon it.

18.11 It was unfair and unjustifiable for the Tribunal to defeat the Respondents' legitimate expectation that they would not be called upon to answer allegations that were the same or materially the same as those that were dismissed in 2019, or allegations that could have been included in that Application.

18.12 The allegations, whilst serious, were not at the most serious end of the spectrum. No significant material evidence had emerged that was not considered by both the Tribunal and the SRA when the Tribunal decided not to certify and therefore to dismiss the 2019 Application, and there was no countervailing reason of public interest that would justify the Tribunal going back on what it decided in 2019.

18.13 The dominant public interest is that the Respondents' legitimate expectation that the matter was closed should not be frustrated, and that there be finality.

18.14 Alternatively if, contrary to the Respondents' primary submissions, it had been open to the Tribunal to make the Certification Decision, the Tribunal's duty to act fairly required it to give the Respondents an opportunity to make representations before certifying allegations that were in substance the same, or materially the same, as the allegations made in the 2019 Application or which (in so far as they were materially different) could have been included in that Application.

19. *Res judicata* and/or abuse of process

19.1 In respect of this second main strand of argument, Mr Coleman said there were three related principles:

1. *res judicata*,
2. *Henderson v Henderson* abuse of process and
3. abuse of process going to the integrity of the justice system.

Res judicata

19.2 Under the *res judicata* principle, a litigant cannot re-litigate a claim or issue which has already been determined. The central principle is as stated in Phipson on Evidence (20th ed.) at para 43-23:

> *"A final adjudication of a legal dispute is conclusive as between the parties to the litigation and their privies as to the matters necessarily determined, and the conclusions on these matters cannot be challenged in subsequent litigation between them (whether in separate proceedings or at a later stage of the same proceedings). This principle applies absolutely to a conclusion that a cause of action does not exist, but it will not apply to other issues necessarily determined if there are special circumstances."*

19.3 The public policy underlying the principle was explained by Lord Blackburn in Lockyer v Ferryman [1877] 2 App Cas 519, 530: *"The object of the rule of res judicata is always put on two grounds – the one public policy, that it is in the interest of the state that there should be an end of litigation, and the other, the hardship on the individual, that he should be vexed twice for the same cause".*

19.4 The conditions that must be satisfied for the *res judicata* principle to apply are set out at para 1.02 of Spencer Bower and Handley: Res Judicata (5th edition) as follows:

(1) the decision was judicial in the relevant sense;
(2) it was in fact pronounced;
(3) the tribunal had jurisdiction over the parties and the subject matter;
(4) the decision was final and on the merits;
(5) the decision determined a question raised in the later litigation; and
(6) the parties are the same or their privies.

19.5 In relation to requirement (1), the *res judicata* principle applied to disciplinary proceedings for example, in R (Coke-Wallis) v Institute of Chartered Accountants in England and Wales ("ICAEW") [2011] UKSC 1 [2011] 2 AC146 the Supreme Court held that cause of action estoppel applied to successive complaints before a professional disciplinary body. The ICAEW could not bring a second complaint against the accountant after the dismissal of its first complaint. The decision was a final decision on the merits and the substance of the underlying conduct was the same in both complaints.

19.6 As to requirement (4), a decision is on the merits if it determines an issue otherwise than on purely procedural grounds (Spencer Bower at 6.01).

19.7 A decision on the merits is final if it conclusively (as distinguished from provisionally) disposes of the matter, whether or not there has been a hearing of evidence and argument (Zuckerman on Civil Procedure (4th edition) at 26.104. Also DSV Silo-und Verwaltungsgesellschaft mbH v Sennar (Owners), The Sennar (No 2) [1985] 1 WLR 490, 494 (House of Lords) held: *"[a decision is final if it is] one that cannot be varied, reopened, or set aside by the court that delivered it or any other court of coordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction").*

Henderson v Henderson abuse of process

19.8 Under the rule in Henderson v Henderson [1843] 3 Hare 100, 67 ER 313 it is an abuse of process to advance causes of action or arguments which could have been advanced in earlier proceedings notwithstanding that they are not *res judicata*. The rule *"requires the parties… to bring their whole case before the courts so that all aspects of it may be finally decided once and for all. In the absence of special* circumstances, *the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion, but failed to raise"* as per Thomas Bingham MR in Barrow v Bankside Members Agency Ltd [1996] 1 WLR 257 [1996] 1 All ER 981.

19.9 Also, Zuckerman at 26.112: *"The court may use its general inherent jurisdiction to prevent litigation that amounts to abuse of process in order to stop a party from raising an issue which was, or could have been, determined in earlier civil proceedings notwithstanding that it is not caught by the rules of res judicata"*.

19.10 Mr Coleman said that it was settled that *Henderson v Henderson* abuse of process applied to regulatory proceedings, and cited Disciplinary and Regulatory Proceedings (10th edition) at para 2.85: *"once a regulator brings its disciplinary proceedings the rules of cause of action estoppel, issue estoppel, and the so-called rule in Henderson v Henderson will apply: there is no second bite of the proverbial cherry within the disciplinary proceedings themselves and any attempt by a regulator to re-litigate the same case more than once before the same regulatory body will be estopped"*.

Abuse of process going to the integrity of the justice system

19.11 The Tribunal will stay proceedings if it is necessary to protect the integrity of the regulatory system (R v Crawley [2014] 2 Cr. App. R 16 [J/466], applied by the Tribunal in SRA v Solicitor Z at [10], [44.3.1] and [46.1.1].

19.12 By applying the legal framework set out above, Mr Coleman said that the certified allegations were *res judicata* and Mr Hinkel was barred by a cause of action estoppel in pursuing them as they were in substance the same or materially the same as those which the Tribunal determined in 2019, following an investigation by the SRA, should not be certified as they did not have a realistic prospect of success and should be dismissed.

19.13 The requirements of *res judicata* were satisfied in the following ways:

- The 2019 Decision was judicial in the relevant sense.

- The 2019 Decision was pronounced.

- The Tribunal Panel that made the 2019 Decision had jurisdiction over the Respondents and Mr Hinkel, and in relation to the 2019 Application.

- The 2019 Decision was on the merits. In particular, the Tribunal panel made the decision after reviewing the 2019 Application and the substantial supporting documentary evidence, and making inquiries of the SRA, and concluded that the case did not disclose a case to answer. It did not matter that it did not hear oral evidence and argument.

- It was also a final decision of the Tribunal. A decision is final even if it can be appealed.

- The 2019 Decision determined, in substance the same, or materially the same, allegations as those that have since been certified by the Certification Decision.

- The 2019 Decision concerned the same parties. It was sufficient that the Respondents and Mr Hinkel were all parties to the 2019 Decision, albeit that the Application included two additional respondents who were not included in the later 2021 Application.

19.14 The principles of *res judicata*, and cause of action estoppel, therefore prevented Mr Hinkel from pursuing the certified allegations. The situation was not materially distinguishable from that in R (Coke-Wallis) v Institute of Chartered Accountants in England and Wales [2011] UKSC 1 [2011] 2 AC 146.

19.15 Next, if (contrary to the Respondents' primary case) the Tribunal was to take the view that the certified allegations were materially different from those advanced in 2019, the matters they raised nevertheless could and should have been advanced as part of the 2019 Application if Mr Hinkel wished to pursue them. Mr Hinkel's pursuit of them in separate proceedings some two years later represented *Henderson v Henderson* abuse.

19.16 Mr Coleman said that Mr Hinkel could not point to any significant fresh evidence that had emerged since he brought his 2019 Application. An issue which Mr Hinkel had identified as new evidence, namely a letter from Bank B stating that the bank details provided to Mr Hinkel by or on Person A's behalf, were not recognised by Bank B, was not in fact anything new and was a matter which could and should have been made at a much earlier stage.

19.17 Further, Mr Hinkel had acted oppressively in pursuing the proceedings, not only in ways set out hitherto but, in his attempts, to use the proceedings as a vehicle to pursue extreme allegations which the Courts and the Tribunal had already found could not be properly advanced. He had also made unfounded and threatening allegations against the Respondents' legal representatives, even suggesting that they should be imprisoned, with the intention of depriving the Respondents of representation.

19.18 Mr Coleman said that throughout, and up to the date of the present hearing, Mr Hinkel had conducted his case in an improper and abusive way.

19.19 Mr Coleman informed the Tribunal that Mr Hinkel had written to the Bar Standards Board, and to the New York Bar where Mr Coleman also practised, to make erroneous and defamatory accusations against Mr Coleman arising out of his representation of the Respondents. Mr Hinkel had also written to Mr Coleman's Head of Chambers, and to another member of Mr Coleman's chambers, a barrister with no connection to the case, to make similar false accusations.

19.20 Mr Coleman pointed out that Mr Hinkel had also continued to make allegations relating to the Respondents' honesty, in defiance of the Tribunal's rulings that matters relating to dishonesty had not been certified and were not within the scope of those matters which had been certified. Mr Hinkel had refused to take any direction from the Tribunal and had nevertheless continued to make these allegations.

19.21 In Mr Coleman's opinion, Mr Hinkel's actions were intended to be intimidatory, and were directed at forcing him and the Respondents' legal team to withdraw from acting, and this behaviour was entirely consistent with the way Mr Hinkel had pursued the Respondents from the start, i.e., in an oppressive and threatening way.

19.22 Mr Coleman said that, whilst he understood Mr Hinkel was not a lawyer, he could be expected to observe minimum standards of civility. Mr Hinkel's behaviour was not becoming of a prosecutor, and the Tribunal would note the extreme nature of the allegations which Mr Hinkel continued to seek to advance, including the allegations of dishonesty which the Courts and the Tribunal had found lacked any proper foundation.

19.23 With all this in mind, Mr Coleman said that the fair-minded, informed observer, knowing the relevant history, would be concerned about the fairness and propriety of continuing to make the Tribunal process available for Mr Hinkel to pursue his allegations about the Respondents' conduct in connection with the Transaction.

19.24 Dismissing the proceedings was necessary to protect the integrity of the Tribunal process.

20. <u>Final Submission</u>

20.1 Mr Coleman invited the Tribunal to revoke the Certification Decision and to dismiss the proceedings, or in the alternative, if the Tribunal was not satisfied that it had the power to revoke the Certification Decision, it should nevertheless be dismissed on the grounds that the certified allegations were *res judicata* and/or Mr Hinkel's pursuit of them is as an abuse of process.

20.2 Further, the one additional allegation in the Rule 14 Supplementary Statement certified by the Tribunal, suffered from the same vice as the original certified allegations, and it could not survive the revocation of the Certification Decision or the dismissal of the proceedings. In substance it was the same or materially same as the allegations concerning sanctions in the 2019 Application. In so far as it was said to be materially different, it could and should have been advanced as part of that application, if Mr Hinkel had wanted to pursue it. That allegation was also barred by the principle of *res judicata,* and in seeking to pursue it Mr Hinkel was abusing the Tribunal's process.

20.3 Finally, Mr Coleman said that, as a matter of law and basic fairness, Mr Hinkel's pursuit of these proceedings should be brought to an end without further delay

21. Mr Hinkel's Submissions in response

21.1 Mr Hinkel said that he too wished to see finality, but not at the cost of a miscarriage of justice. Mr Hinkel referred the Tribunal to matters he had set out in his statement dated 14 November 2022.

21.2 Mr Hinkel stated that he was a Lay Applicant who made complaints to the Solicitors Regulation Authority ("SRA") about professional misconduct of the Respondents on 8 March 2019 and again in 2021.

21.3 The Respondents purported to be conveyancing solicitors acting for Entity B for more than two years during 2015 to 2018, having conduct of a proposed sale of a valuable undeveloped land site in central London ("the Property"). During this period, there was lengthy correspondence and contract drafting and negotiations between Mr Hinkel's solicitors and the Respondents. Mr Hinkel refuted the assertion made by the Respondents in their written material before the Tribunal that he had negotiated directly with Person A and/or Entity B.

21.4 He contended that the Respondents had presented no reason for the "dismissal" of a case where the certification had been made by a duly constituted Panel. The Tribunal in July 2022 determined that the allegations comprised potentially serious misconduct on the part of both Respondents as set out in paragraph 5 above. The Tribunal on that occasion concluded that there was a case to answer by both Respondents in relation to the matters he had raised.

21.6 The Respondents founded their application primarily on the contention that the July 2022 Tribunal made a "fundamental mistake" when deciding to certify the allegations before it because, in the Respondents' view, these allegations were the same or substantially the same as those he had made in 2019. Mr Hinkel noted that the Respondents' secondary argument was that the certified allegations were subject to *res judicata* and/or were an abuse of process.

21.7 Mr Hinkel considered both contentions to be flawed, and he observed in passing that Mr Coleman had relied heavily on authorities from civil cases which had limited relevance to proceedings before the Tribunal.

21.8 Mr Hinkel set out his core submissions.

22. The 2019 and 2021 Applications were not the same and there was no fundamental mistake

22.1 The Applications he had made to the Tribunal in 2019 and 2021 were not *"in substance the same or materially the same"*.

22.2 The Panel in 2019 adopted the SRA's information at face value that the complaint he had made related to a minor matter of a lack of record keeping, whereas there was actual evidence that Entity B had not been a client of the Respondents at all. The point was

that the Second Respondent and the Firm had lied about Entity B being a client. The SRA did not conduct a credible investigation, and the Tribunal based its 2019 Decision not to certify on the defective information supplied to it by the SRA.

22.3 It could not be said that 2019 Application and 2021 Application were the same, as the former had cited two additional Respondents who did not feature in the latter.

22.4 The 2019 allegations were made against four Respondents, the First and Second Respondent and two managing partners of the Firm. The allegations against the managing partners included their failure to maintain client records, as they had held no record of Entity B on the Limited Liability Partnership's client database, nor had they conducted any due diligence on this alleged client. The handling of Mr Hinkel's complaint also fell short of what was expected of managing partners. Those allegations were not made against the First and Second Respondents in the 2021 Application.

22.5 There were other differences. With respect to "Allegation 2" (excluding the fourth bullet point) of his document dated 29 July 2022, which the Tribunal ruled at the case management hearing on 1 September 2022 was within the scope of the certified case (failure to comply with the sanctions and money laundering regulations by failing to perform due diligence or enhanced due diligence measures) Mr Hinkel said that the 2019 Panel considered only the allegation that the Respondents had not informed their PI insurer that they were working for a Designated Person. The later certified allegation was therefore vaguely related to, but also vastly different from, the allegations considered in the 2019 Decision.

22.6 In addition, there was the matter which the Tribunal ruled at the Case Management Hearing on 1 September 2022 was within the scope of the certified case, namely providing false bank details when payment of a significant purchase price was imminent. Mr Hinkel said that the evidence in the form of a letter from Bank B, dated 28 July 2021, stating that the alleged bank account did not exist, was gained only after the 2019 Application was determined, when the Bank B confirmed this to be the case.

22.7 Mr Hinkel rejected the Respondents' claim that he could and should have obtained a letter from Bank B earlier, as he had had no cause to do so in 2019, as he was initially unaware of the extent of the Respondents' deception. In any event, as was usual practice, in accordance with banking confidentiality and secrecy laws, the bank refused to answer any such enquiries until the Ambassador of the home country of Bank B personally intervened.

22.8 Mr Hinkel said it was inconceivable that the constitution of the Tribunal which certified the allegations in July 2022 could not have been aware of the 2019 Application.

22.9 The Tribunal Chaired by Mr Ghosh would have read into the documents set out in the electronic bundle, which had included Mr Hinkel's statement appended to the "Form of Application" dated 23 July 2021, and in which the following was set out in paragraph 1:

> *"On 16 January 2021 Mr Paul Milton of the SRA was asked to review the decisions of HH Mr Justice Dight CBE and HH Mr Adam Johnson following court action against the Respondents, as had been proposed by Mrs Ogene* [sic] *of the SDT in her letter of 16 May 2019, case reference LL/1262574-2019."*

22.10 It could not reasonably be said by the Respondents that the three Panel Members including the Chair, Mr Ghosh, failed to read this first paragraph in the statement. The Panel would have known and recognised the name of Ms Ogene because she had worked for the SDT for many years. The statement referred to her as *"Mrs Ogene of the SDT*". From this the Panel would have reasonably inferred that the case was known to (a) Mrs Ogene, (b) the Tribunal, and (c) that it related to court decisions relating to the Tribunal and (d) it mentioned the Respondents.

22.11 Any Panel seeing the names of Judge Dight CBE and Judge Johnson in conjunction with Ms Ogene and the Tribunal, along with a Tribunal case reference number different to the one it was deciding upon, could not have failed to be on notice of the earlier Application. The Panel chaired by Mr Ghosh were plainly aware of the 2019 Application and certified the matter in the light of that knowledge.

23. <u>No legitimate expectation</u>

23.1 Mr Hinkel disputed the Respondents' submission that the Tribunal unlawfully defeated their legitimate expectation that the allegations would not be certified.

23.2 Mr Hinkel submitted that no such expectation had arisen, and even if it had arisen, the Respondents were not entitled to avail themselves of it in circumstances where there was self-evident misconduct on their part.

23.3 They had made false statements to the SRA and to the Courts, including the County Court at Wandsworth, the County Court at Central London, the High Court, the Bankruptcy Court, and the Tribunal. Respondents who have succeeded in evading justice by making false representations are not entitled to any expectation that the Law will not catch up with them. The 2019 Panel's judgement was fundamentally wrong as it was based on false representations made to the SRA by the Respondents.

23.4 Mr Hinkel disagreed with the Respondents' contention that the 2022 certifying Panel had failed to give them an opportunity to make representations before certifying the allegations and that this had been procedurally unfair.

23.5. Mr Hinkel said that the Respondents had had every opportunity in 2019 to make representations yet they had made only false representations, and by 2021-2022 the Respondents had had more than a year to make representations to the SRA.

23.6 That said, the Tribunal's procedure was not to seek a potential respondent's views prior to consideration of certification, and he did not understand how a solicitor could be requested or ordered to make representations to the Tribunal before allegations had been certified as showing a case to answer.

23.7 The time had now come for the Respondents to engage with the Tribunal process and to refute the allegations which had been rightfully certified as showing a case to answer by them.

24. Not *res judicata* nor an abuse of process

24.1 Mr Hinkel said the Respondents assertions of *res judicata* or an abuse of process were wrong, and he cited the following in support:

24.1.1 In Momin Ali v The Secretary of State for The Home Department [1984] 1 All ER 1009 the Court of Appeal considered an application for judicial review of the Secretary of State's decision to detain the applicant as an illegal immigrant, in circumstances where an adjudicator had previously determined the issue of identity in his favour, and had directed he be issued an entry certificate.

24.1.2 The Master of the Rolls described the flexibility inherent in the application of the principle of *res judicata* to public law stating that *"the doctrine of issue estoppel has, as such, no place in public law and judicial review ... However, I think that the principles which underlie issue estoppel ... namely that there must be finality in litigation, are applicable, subject always to the discretion of the court to depart from them if the wider interests of justice so require"*.

24.1.3 In Thrasyvoulou v Secretary of State for the Environment [1990] 2 AC 273, 289, the House of Lords considered whether the doctrine of *res judicata* was confined to the private law sphere or whether it also applied to public law proceedings. Lord Bridge determined that the twin principles on which the doctrine of *res judicata* rests, namely the public interest in the finality of litigation and avoiding the oppression of subjecting a defendant unnecessarily to successive actions are *"of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions"*

24.1.4 However, this was subject to the important public law requirement that a statutory body cannot fetter its own freedom to perform its statutory duties or exercise its statutory powers, it is for this reason that there can be no such fetter which arises from an estoppel by representation.

24.1.5 In Hillside Parks Ltd v Snowdonia NPA.4 [2022] UKSC the appellant developer appealed against a decision by the relevant planning authority that further development of a site in the Snowdonia National Park would no longer be lawful.

24.1.6 Before the Court of Appeal, one of the appellant's grounds was that the first instance judge had failed to deal with his arguments in relation to *res judicata*. Singh LJ considered whether the rule in *Henderson v Henderson*/abuse of process had the

consequence that the judge was wrong to reason as he did. The respondent authority argued that, although the line of authority beginning with Pilkington v Secretary of State for the Environment was not presented to Drake J, it would not be an abuse of process for it to rely on it in these proceedings. It submitted that it was entitled to seek to prevent building in a National Park which could be against the public interest. Singh LJ accepted this submission and determined that the rule in *Henderson v Henderson* did not prevent the respondent from arguing the Pilkington point in this case, despite the fact its predecessor (in whose shoes it stood) failed to do so before Drake J. In his view "*that would be too "dogmatic" an approach to take. The principle in Henderson /Abuse of Process is not an absolute one. It requires a merits-based assessment of all the facts, including the public and private interests concerned"*

24.2 Mr Hinkel said that the regulator and the Tribunal must act in the public interest. It is clearly in the public interest that solicitors do not breach the professional rules and code of conduct and do not break the law.

24.3 Mr Hinkel submitted that even if *res judicata* did apply, there were two recognised categories of exception to the principle, whereby a party who would otherwise be estopped is permitted to challenge the decision in other litigation.

24.4 These were where a party seeks to have a judgment set aside because it was fraudulently obtained (Takhar v Gracefield Developments Ltd [2019] UKSC 13); or, pursuant to the ratio in Phosphate Sewage (Limited) v Molleson (Peter Lawson & Son's Trustee) [1878] where new facts come to light that fundamentally change the complexion of the case:

24.5 The two criteria to be met were set out in in *Takhar v Gracefield Developments*

(a) There is a new fact that entirely changes the aspect of the case

(b) It could not by reasonable diligence have been ascertained hitherto.

24.6 In the present matter the new fact was the letter from Bank B, which it had not been possible with any reasonable diligence to obtain before the 2019 Application.

24.7 From a detailed analysis of the law in the area Mr Hinkel had distilled the following points:

- The jurisdiction to strike out proceedings as an abuse of process is an exceptional one, which should not be tightly circumscribed by rules or formal categorisation.

- Re-litigation of issues which have been determined by a court of competent jurisdiction may be an abuse of process. However, considering re-litigation as giving rise to even a prima facie case of abuse would be to adopt too rigid an approach; the individual circumstances of the case will always need to be considered.

- By virtue of the scope of the doctrine of *res judicata*, the abuse doctrine will only arise where one of the parties to earlier litigation sues a stranger to that litigation.

24.8 The Tribunal therefore had to take particular care to find there had been an abuse of process as alleged by the Respondents. There was no abuse of process present in this case.

24.9 Mr Hinkel also made some more general points:

24.9.1 The Respondents were wrong to state that the 2019 Tribunal decision constituted a final judgment, as that would require it to be no longer subject to appeal. Mr Hinkel said that it was not a final determination as the 2019 Administrative Court appeal could yet be appealed in the European Court.

24.9.2 Mr Hinkel maintained that The Office of Financial Sanctions Implementation ("OFSI") had an interest in the activities of the solicitors Clyde & Co LLP and the barrister Mr Coleman KC, who were acting for the Respondents, as the Respondents were Entity B Persons, as defined by United States Federal Law, having purported to act, or having acted, for Entity B and Person A.

24.9.3 Further, Mr Coleman KC and Mr Owolabi, an employee of Clyde & Co, were both New York State attorneys, and so they were required to obtain OFAC licences and were also required to have a licence from OFSI to represent the Respondents, but they did not have the required licence and were therefore acting illegally.

24.9.4 The Respondents had acted for Entity B and Person A without licences, and it was incumbent on the Tribunal to demand sight of the licences and to uphold the law by excluding the defence team from acting for the Respondents.

24.9.5 It was not open to the Tribunal to say it had no jurisdiction to exclude the Respondents' legal team. The Tribunal's jurisdiction was solicitors' conduct and solicitors were not permitted by their rules of conduct to commit criminal acts. The defence team (and the Respondents) by acting without OFSI and OFAC licences were therefore in breach of the SRA's Rules.

24.9.6 Mr Hinkel contended that the SRA and the courts had contrived a pattern of deliberate delays and the creation of "scenarios" to assist the Respondents to escape justice, and he cited by way of example HHJ Dight who, in Mr Hinkel's view, for reasons known only unto himself, had expunged statements which would have assisted Mr Hinkel from the court transcript.

24.9.7 As a further example of such conduct, Mr Hinkel expressed his concern that he had not been made aware of the SRA's decision to reverse or suspend its earlier decision to refer certain matters pertaining to the Second Respondent and the Firm to the Tribunal. This was a matter which had been touched upon by Mr Coleman in his submissions.

25. <u>Final Submissions</u>

25.1 Mr Hinkel said that the Respondents had shown no respect for the regulator and no respect for the Tribunal. They would not admit that their conduct had been a breach of the SRA's Rules and the Code of Conduct.

25.2 The evidence before the Tribunal was enough to determine that the Respondents had a case to answer, and the Tribunal had correctly identified and certified the allegations in July 2022 and the new allegation brought under Rule 14.

25.3 On this basis the Respondents' application should be dismissed and the matter should proceed to a substantive hearing.

26. Mr Coleman's observations re points of law and corrections

26.1 Mr Coleman said that the authorities relied upon by Mr Hinkel were to some extent old law, and had been superseded by more recent authorities.

26.2 The Tribunal should look to substance rather than form, and under such analysis it was clear that Mr Hinkel was not correct in stating that the 2019 and 2021 Applications were materially different.

26.3 Mr Coleman did not accept that the reference to Ms Ogene of the Tribunal would have put the 2022 Panel on notice of the existence of the earlier Application and the refusal to certify it. It was such an opaque reference that no Panel would have picked up from it that there was a previous Application which had been refused certification, and in any event, it was clear from scrutiny of the letter referred to as being sent by Ms Ogene to the SRA, that she was the recipient of it and not its sender. The reference it bore was not the reference attached to the 2019 Application considered by the Tribunal, and so would not have pointed to the existence of that Application. In truth there was no mention of the 2019 Application in the Application made by Mr Hinkel in 2021.

26.4 Mr Coleman informed the Tribunal he had provided a set of questions which he suggested would assist the Tribunal in its deliberations as follows. Mr Hinkel raised no objection to this course.

26.5 The questions were as follows:

1. Does the Tribunal have the power to set aside the certification of the 2021 Application on the grounds of fundamental mistake?

2. If it does, did the certifying panel make a mistake and, if so, was it fundamental?

3. In considering whether any mistake was fundamental, the Tribunal is invited to consider whether the certification was unlawful for one or more of the reasons relied upon, namely:

    a. the Tribunal had no power to certify allegations that were in substance the same as allegations contained in the 2019 Application and/or
    b. the certification of the 2021 Application was contrary to the overriding objective (Rule 4 of the 2019 Rules); and/or
    c. the certification of the 2021 Application unlawfully defeated the Respondents' legitimate expectation that allegations that were in substance the same as allegations in the 2019 Application would not be certified.

4. If the Tribunal concludes the certification of the 2021 Application was unlawful, then the Respondents' case is that the power to revoke the decision should be exercised and the 2021 Application should be dismissed, and that there is no alternative properly open to the Tribunal. (If this is the Tribunal's conclusion then it would not be necessary to give separate consideration to those parts of the Rule 14 Supplementary Statement that have been certified. That is because a Rule 14 Supplementary Statement is made "in support of the application" (see the final words in Rule 14(1) of the 2019 Rules). The certified parts of the Rule 14 Statement would therefore fall away).

5. If the Tribunal concludes that the certification of the 2021 Application should not be revoked, because it is not satisfied that the power exists and/or that the certification is unlawful, then the following further question would arise.

    a. Are the certified allegations (including the additional certified allegation in the Rule 14 Supplementary Statement) res judicata because they are in substance the same as allegations made in the 2019 Application? To the extent that they are, the Respondents' case is that they should be summarily dismissed. (In principle, if the Tribunal determined that some allegations were res judicata, but others were not, then it should confine the summary dismissal to those allegations that were res judicata.)
    b. In so far as any of the certified allegations are not res judicata, is Mr Hinkel's pursuit of them a Henderson v Henderson abuse of process, because these are allegations that Mr Hinkel could and should have pursued, if he wished to do so, as part of his 2019 application?
    c. Irrespective of the answers the Tribunal may give to the questions in (a) and (b) above, has Mr Hinkel conducted the proceedings in such a way as to undermine, or risk undermining, the integrity of the system of justice administered by the Tribunal, such as to amount to an abuse of process?

6. Relief:

    a. If the Tribunal decides the application in the Respondents' favour on either (or both) of the grounds set out in paras 4 and 5(a) above, then the appropriate Order would be to dismiss Mr Hinkel's 2021 Application.
    b. If the Tribunal decides the application in the Respondents' favour on either (or both) of the grounds set out in paragraphs 5(b) and (c) above, then the appropriate Order would be to stay the proceedings. (A stay is the conventional Order in the case of abuse of process.)

7. Given the prospect that Mr Hinkel may seek to appeal any decision to dismiss or stay the proceedings, the Tribunal was respectfully invited to reach a decision on all issues, even if, on the Tribunal's view of the case, not all of them arise for decision. For example, if the Tribunal decides to revoke the decision and dismiss the Application, see para 4 above, it is invited to say whether, if it is wrong in concluding that it has the power to revoke the certification decision and that the certification was unlawful, it would have summarily dismissed or stayed the proceedings (para 5 above). Similarly, it was respectfully invited to address all three issues in para 5 above, even though the issue in para 5(b) does not arise if the issue in para 5(a) is decided in the Respondents' favour.

8. This approach suggested in paragraph 7 would mean, for example, that if an appeal court disagreed with a decision by the Tribunal to revoke the revocation (para 4 above) but agreed with a conclusion, expressed by the Tribunal in the alternative, that it would have summarily dismissed the 2021 application on the grounds of res judicata, or that it would have stayed the proceedings on the grounds of abuse (para 5 above), then the appeal court could uphold the decision and there would be no need to remit the matter to the Tribunal. It was respectfully submitted that taking this approach may help to achieve finality in this matter, which is very much in the public interest.

The Tribunal's Decision

27. General points

27.1 The Tribunal carefully considered the submissions it had heard and read, and it 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 parties' rights to a fair hearing and to respect for their private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

28. Method

28.1 The Tribunal decided to adopt the questions posed by Mr Coleman as a useful roadmap to structure its analysis of the points which fell to be considered, with the caveat that it would not fetter its freedom to consider any other matter the Tribunal thought relevant to its deliberations.

28.2 *Does the Tribunal have the power to set aside the certification of the 2021 application on the grounds of fundamental mistake?*

28.2.1 The Tribunal noted that there was no statutory power contained within the SDPR 2019 which permitted the Tribunal to revisit a decision to certify a case to answer.

28.2.2. Whilst it could be assumed that for most cases there would be no need to reconsider such a decision, in circumstances where the single solicitor member or Panel of three members were in possession of the full facts, there would be a small residual class of cases where review was necessary.

28.2.3 The ability to review its own decisions where there had been a fundamental mistake of fact was an inherent power of the Tribunal which arguably resided within a conjunction of Rule 4 (the overriding objective) and Rule 6 of SDPR 2019 (regulation of its own procedure) (*each rule was set out in paragraphs 16.9 to 16.12 of the judgment).*

28.2.4 Taken together, Rules 4 and 6 of the SDPR 2019, enshrined the concept of 'natural justice' and the Tribunal's general duty to act fairly.

28.2.5 That said, the decision in R (on the application of Chaudhuri) v The General Medical Council [2015] EWHC 6621(Admin) [47] provided clear authority for the contention that *"public bodies "have the power themselves to correct their own decisions based on a fundamental mistake of fact"*.

28.2.6 Therefore, the Tribunal found in principle that it had the requisite power to review the certification decision in circumstances where there had been a fundamental mistake.

28.3 *If it does, did the certifying panel make a mistake and, if so, was it fundamental?*

28.3.1 During the hearing the Tribunal indicated to the parties that it was not aware of any evidence that the July 2022 Panel, chaired by Mr Ghosh, knew of the existence of the 2019 Application, and absent any evidence to the contrary produced by the parties, would be approaching the matter on the basis that the 2022 Panel had no knowledge, or insufficient knowledge, of the 2019 Application. Following this indication, neither party produced any evidence that the existence of the 2019 Application was brought to the attention of the 2022 Panel. Specifically, Mr Hinkel, when invited by the Tribunal to identify any document in the electronic bundle considered by the 2022 certification Panel (other than the passage in his statement of 23 July 2021 referred to at paragraph 22.9 above) which would have put that Panel on notice of the earlier, refused Application, was unable to do so.

28.3.2 The Tribunal did not consider that the passage relied on by Mr Hinkel, comprising paragraph 1 of his statement dated 23 July 2021, in support of his submission that the 2022 Panel was on notice of the existence of the 2019 Application, constituted such notice. That passage was both opaque and confusing, and it made no direct reference to Mr Hinkel's earlier lay Application. At most it mentioned the name of a Tribunal employee, Ms Ogene, but mistakenly identified her as the author of a letter. The Tribunal noted the reference number quoted on that letter, and recited in Mr Hinkel's 23 July 2021 statement, was not a Tribunal reference, and in fact the letter being referred to by Mr Hinkel was one which Ms Ogene had received from the SRA. There was nothing in the statement to suggest that this letter related to an earlier, refused, Application, and not to the Application which was before the Panel for certification in 2021/2. Objectively, therefore, this paragraph in Mr Hinkel's statement would unlikely have been sufficient to put the Panel on notice of the earlier Application. It would more likely have suggested that Mr Hinkel had made complaint to the SRA about the Respondents in advance of making his 2021 Application to the Tribunal, and that he had also brought proceedings against the Respondents in the civil courts. Neither of those circumstances would have been surprising, and so would not have intimated to the 2022 Panel that there had been an earlier Application relating to the same underlying transaction. The Tribunal was therefore satisfied that the 2022 Panel was unaware both of the existence of the 2019 Application and that it had been refused certification.

28.3.3 This conclusion was reinforced by the fact that none of the Panels which considered the 2021 Application had made any reference to the 2019 Application, its refusal, or the subsequent unsuccessful Appeals, in their respective Memoranda. Had those Panels been aware of the relevant background history they would inevitably have referenced it in their decisions.

28.3.4 The Tribunal having concluded that the 2022 Panel was operating under a mistake of fact, in that it was unaware that the Application it was being asked to certify was a second Application arising out of the same underlying transaction, then turned to consider whether that mistake of fact was "fundamental" to the decision to certify some of the allegations contained in the 2021 Application. It carefully considered the analysis conducted by Mr Coleman of the allegations made in 2019 and the later allegations

pursued in 2021 *(annexed to the judgment)* and it agreed that in substance they were the same.

28.3.5 At their core the allegations concerned the alleged failure by the Respondents to conduct appropriate due diligence, and related alleged breaches of international sanctions. When viewed together it was clear that the 2021 allegations were in substance the same or materially the same as those which a different Panel had refused to certify when made in the 2019 Application.

28.3.6 The Tribunal was not persuaded by Mr Hinkel's submissions that there were marked differences between the 2019 and 2021 allegations. Those differences to which he pointed primarily related to there being additional allegations (and respondents) in the 2019 Application, which were not pursued in the 2021 Application. This missed the point. He had not demonstrated that any of the matters certified by the 2022 Panel as showing a case to answer had not been mentioned in his 2019 Application and considered by the Panel which refused to certify that Application.

28.3.7 The Tribunal was therefore satisfied that the mistake of fact operating upon the 2022 Panel was fundamental to the decision to certify the 2021 Application.

28.3.8 An Applicant who brings a case before the Tribunal, whether they be the Regulator (SRA), or a Lay Applicant, is expected to be open and transparent. It is incumbent upon an Applicant to make full and proper disclosure of matters which should be drawn to the Tribunal's attention, and in a case where there has been a previous, refused, Application to state clearly how, and to what extent, the new Application may be distinguished from the one previously made and refused.

28.3.9 Through no fault of the Panel who first considered the 2021 Application, as a result of the Applicant's failure to disclose the existence of the 2019 Application and its fate, the wrong turn was taken on 6 August 2021 when that Panel requested the SRA to investigate. Had that Panel been aware of the 2019 Application, and the decision to refuse certification of it following a request that the SRA investigate the allegations arising from it, and the SRA's conclusions having done so, it would have been most unlikely to have taken the approach it did by issuing a repeat request to the SRA to investigate.

28.3.10 The Panel on that occasion was not in the position it should have been to take a holistic view of the Application, and to conduct the exercise of comparing the 2019 and 2021 Applications. Thereafter, several further adjournments followed to allow the SRA more time to investigate. When, by 21 July 2022, the SRA requested yet another adjournment, the Panel on that occasion not unnaturally refused this request and certified the allegations as showing a case to answer, in ignorance of the fact that the same, or substantially the same, allegations had already been investigated by the SRA, found not to evidence any misconduct, and refused certification by the Tribunal.

28.3.11 Given that a year had elapsed since Mr Hinkel had lodged his Application in June 2021 it is understandable why the certifying Panel made the decision it did. However, because it was not in possession of the full facts it fell into error and proceeded to certify on a mistaken premise, namely, that this was in form and substance an Application which had not previously been considered and adjudicated upon. Thereafter, this

resulted in a castle being built on air. The Panel had unknowingly acted beyond its powers.

28.3.12 Whilst no Panel of the Tribunal may bind another, it is an irregularity for a later Panel to reach a decision on the same facts which runs counter to an earlier decision made by a differently constituted Panel. Further, to do so without providing full and cogent reasons for its decision would represent an obvious injustice. Therein lay the fundamental mistake which required correction.

28.3.13 The certifying Panel had been in ignorance of the earlier refusal decision, and of the later judgment of the Administrative Court on appeal. This observation should not be taken as a criticism of the certifying Panel but as a recognition of the consequences which flow from not having complete information.

28.4 *In considering whether any mistake was fundamental, the Tribunal is invited to consider whether the certification was unlawful for one or more of the reasons relied upon, namely*

a. the Tribunal had no power to certify allegations that were in substance the same as allegations contained in the 2019 application and/or
b. the certification of the 2021 application was contrary to the overriding objective (Rule 4 of the 2019 Rules); and/or
c. the certification of the 2021 application unlawfully defeated the Respondents' legitimate expectation that allegations that were in substance the same as allegations in the 2019 application would not be certified.

28.4.1 The Tribunal considered it had answered (a) and (b) in its reasons set out above and, having found there to be a fundamental mistake on such bases, it did not feel constrained to formulate a particular view on (c) 'legitimate expectation'. That said, it found the reasoning set out by Elias J in Brabazon-Drenning v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2001] HRLR 6, persuasive, particularly the section underlined for emphasis below:

> *"… it seems to me that once the Committee has made its ruling and has determined that there should be no further action taken in respect of that charge, then unless there is some misrepresentation, or unless they are acting under some fundamental misconception of the true position, then they are bound by that determination. I do not think it is open to them to resuscitate it at will, or because they have discovered other charges and they wish to strengthen the case in some way against the individual.*

28.5 *If the Tribunal concludes the certification of the 2021 application was unlawful, then the Respondents' case is that power to revoke the decision should be exercised and the 2021 application should be dismissed, and that there is no alternative properly open to the Tribunal. (If this is the Tribunal's conclusion then it would not be necessary to give separate consideration to those parts of the Rule 14 Supplementary Statement that have been certified. That is because a Rule 14 Supplementary Statement is made "in support of the application" (see the final words in Rule 14(1) of the 2019 Rules). The certified parts of the Rule 14 Statement would therefore fall away).*

28.5.1 The Tribunal, for the reasons already given, revoked the Certifying Decision. In doing so it also revoked the decision it had made to certify a further allegation made by Mr Hinkel under Rule 14 SDPR.

28.5.2 The Rule 14 allegation was essentially 'parasitic' on the earlier Rule 12 Application, as it was a supplementary matter made in support of the initiating Application. As a matter of reason, therefore, the Rule 14 matter would fall away in the light of the revocation of the decision to certify the parent Application.

28.5.3 Having decided that the Certifying Decision should be revoked based on 'fundamental mistake', the Tribunal was not required to decide the matters set out in the remaining questions. However, for reasons of completeness the Tribunal made the following observations obiter dicta:

28.5.4 The allegations certified in July 2022, save for the matter brought under Rule 14, had, to the Tribunal's satisfaction been demonstrated as being in substance the same as those which were refused certification in 2019, and to this end the principle of *res judicata* obtained. The Tribunal agreed with Mr Coleman's reasoning:

- *The 2019 decision was judicial in the relevant sense.*
- *The 2019 decision was pronounced* in the sense that the decision was set out in a Memorandum which was available to the public.
- *The Tribunal panel that made the 2019 decision had jurisdiction in respect of the Respondents and Mr Hinkel and in respect of the 2019 Application.*
- *The 2019 decision was on the merits. In particular, the Tribunal panel made the decision after reviewing the 2019 Application and the substantial supporting documentary evidence, and making inquiries of the SRA, and concluded that the case did not disclose a case to answer. It did not matter that it did not hear oral evidence and argument.*
- *It was also a final decision of the Tribunal. A decision is final even if it can be appealed.*
- *The 2019 Decision determined in substance the same or materially the same allegations as those certified by the Certification Decision.*
- *The 2019 Decision concerned the same parties. It was sufficient that the Respondents and Mr Hinkel were all parties to the 2019 Decision, albeit that the Application included two additional respondents who were not included in the later 2021 Application.*

28.5.5 In relation to other matters, for example, the issue of the 2021 letter from Bank B, these were matters of which Mr Hinkel could reasonably have been aware in 2019, and which should have been addressed in his 2019 Application; his failure to do so and his later deployment of the information could be considered a ***Henderson v Henderson*** abuse.

29. Whilst litigation sometimes involves robust exchanges of views and heated disagreements, parties to proceedings are expected to conduct themselves with decorum and good faith.

30. Despite directions and warnings from the Tribunal, Mr Hinkel persisted in making allegations against the Respondents impugning their honesty and integrity, when such allegations formed no part of the certified case, and at the same time pursued a campaign of hostility against those who represented the Respondents, with the clear intention of causing those representatives to withdraw from acting, and so deprive the Respondents of representation. There was no place for such behaviour, and by conducting himself in this way the Applicant had undermined his own prosecutorial role.

31. Regretfully, the Tribunal considered the way Mr Hinkel had pursued his case, in particular his failure to heed the Tribunal's decisions and his campaign against the Respondent's representatives, risked undermining the integrity of the system of justice operated by the Tribunal.

32. However, the findings made by the Tribunal which resulted in it revoking and dismissing the certified matters, were not made because of Mr Hinkel's poor conduct as a prosecutor, but because of the now identified fundamental mistake of fact made by the certifying Panel.

Costs

33. The substantive matter having been resolved in the Respondents' favour, Mr Coleman sought an order that Mr Hinkel pay the costs of the application and of the proceedings.

A. The total costs claimed for the hearing was in the sum of	£146,639.25.
B. The total costs claimed for the proceedings was in the sum of	£247,670.00
Total of A +B	£394,309.25

34. Mr Coleman referred the Tribunal to Rule 43 of the SDPR 2019 which states as follows:

> *"43.—(1) At any stage of the proceedings, the Tribunal may make such order as to costs as it thinks fit, which may include an order for wasted costs.*
>
> *(2) The amount of costs to be paid may either be decided and fixed by the Tribunal following summary assessment or directed by the Tribunal to be subject to detailed assessment by a taxing Master of the Senior Courts.*
>
> *(3) Without prejudice to the generality of paragraph (1), the Tribunal may make an order as to costs in circumstances where—*
> *(a) any application, allegation or appeal is withdrawn or amended;*
> *(b) some or all of the allegations are not proved against a respondent;*
> *(c) an appeal or interim application is unsuccessful.*
>
> *(4) The Tribunal must first decide whether to make an order for costs and must identify the paying party in any order made. When deciding whether to make an*

order for costs, against which party, and for what amount, the Tribunal will consider all relevant matters including the following—

(a) the conduct of the parties and whether any or all of the allegations were pursued or defended reasonably;
(b) whether the Tribunal's directions and time limits imposed were complied with;
(c) whether the amount of time spent on the matter was proportionate and reasonable;
(d) whether any hourly rate and the amount of disbursements claimed is proportionate and reasonable;
(e) the paying party's means.

(5) If the respondent makes representations about the respondent's means, the representations must be supported by a Statement which includes details of the respondent's assets, income and expenditure (including but not limited to property, savings, income and outgoings) which must be supported by documentary evidence."

35. Mr Coleman said that although this was an unusual matter, in which the Applicant was not the regulator, the matters set out in Rule 43 and within the 10th Edition of the Tribunal's Sanction Guidance *(section E, paras.66-68, Costs)* were applicable in a case brought by a Lay Applicant.

36. Mr Coleman said that, whilst it was a matter for the Tribunal to determine whether in principle Mr Hinkel should pay the Respondents' costs, it was right for him to bear the costs of the matter which he had brought before the Tribunal and which he had pursued so oppressively.

37. His actions had forced the Respondents to defend themselves and to take all necessary steps to have the matter dismissed. The costs incurred by the Respondents in doing so were both proportionate and reasonable, given Mr Hinkel's claims of serious misconduct on their part, and his relentlessness in pursuing those allegations.

38. As to the quantum of the costs, Mr Coleman again said that the amounts claimed by the Respondents were reasonable and proportionate, however, this would also be a matter for the Tribunal to determine.

39. Mr Coleman invited the Tribunal to summarily assess the costs Mr Hinkel was liable to pay, rather than the costs being subject to a detailed assessment by a taxing Master of the Senior Courts.

40. Mr Coleman said the Tribunal had read all the papers and it was well acquainted with all the issues in the case, having considered matters in earlier hearings and over two days in the present hearing. The Tribunal was therefore best placed to assess the costs.

41. Whilst these had been needless and vexatious proceedings, they had also been complex and had required careful unpicking by a competent and expert team acting on the Respondents' behalf.

42. The structure of that team had been conventional in its organisation; in which junior members worked under direction from a partner, with the bulk of the work being delegated downwards to the appropriate level. The voluminous correspondence sent by Mr Hinkel and the applications he had made had required and justified a team comprising five lawyers, plus leading and junior counsel.

43. In response Mr Hinkel said that he had not wanted to take on the role of prosecutor, however this had been thrust upon him when the regulator had failed to take the matter seriously and prosecute the Respondents as it should have done. This matter had been ongoing for a number of years, and the costs should be met by the SRA instead of him.

44. Mr Hinkel requested a detailed assessment of the Respondents' costs, and a close consideration of all receipts and invoices. The Respondents had not needed such a large team of lawyers, and they had had unreasonably over-resourced themselves.

45. Mr Hinkel said that he was an individual, of limited means, acting on his own account, and the Respondents' costs were inordinately vast, unreasonable, and disproportionate.

The Tribunal's Decision on Costs

46. The Tribunal noted that Mr Hinkel was a Lay Applicant, and that he had not submitted any information relating to his means as he had been required to do if he wished his means to be taken into account. Moreover, he was not a person who was unfamiliar with or unaware of court proceedings based on the evidence before the Panel, and of the risk that he would be ordered to pay costs should matters not go in his favour. Indeed the risk that he might be ordered to meet the Respondents' costs had been raised with Mr Hinkel at an earlier hearing, when the Tribunal invited him to consider whether he wished to ask the SRA to take over his prosecution, as the SRA would have protection against being ordered to pay the Respondents costs, which protection was not available to him.

47. Mr Hinkel had brought the case and the Respondents to the Tribunal. This had been an active decision on his part, in the knowledge that he would have a duty to prosecute his case in a fair and even-handed way. Despite his assertion to the contrary, the prosecution of this case was not something which Mr Hinkel had been forced to do.

48. His vigorous pursuit of the case, notwithstanding the earlier refusal of certification and the unsuccessful appeals against that decision, had caused the costs which flowed from the mistaken certification of his allegations. The Tribunal had found that the Certifying Decision would not, in all likelihood, have been made if Mr Hinkel had been open about the earlier 2019 Application.

49. It was therefore appropriate for him to bear the costs of the case.

50. As to the quantum of those costs, the Tribunal noted that the two costs schedules prepared by the Respondents were sparse in detail and, other than the matters set out by Mr Coleman in oral submissions, there was limited supporting information available to the Tribunal which it could analyse and dissect.

51. Nevertheless, for the reasons identified by Mr Coleman, the Tribunal considered it was best placed to summarily assess the appropriate level of costs, and it would do so. Putting the matter over for a detailed assessment would serve only to delay the finality sought by the Respondents and potentially increase the costs for which the Applicant would be liable by adding to them the costs of the detailed assessment.

52. The Tribunal considered the costs sought to be high and found that there was some merit in the contention that there had been no need for the presence of the entire Clyde & Co team throughout the hearing. The Tribunal therefore considered that there should be a reduction in the sum sought for the application.

53. In terms of summary assessment, the Tribunal considered that the costs of the application should be awarded in the sum of £106,000.00 (a reduction of £40,639.25) which appeared a reasonable and proportionate sum for a two-day case in which no witness evidence was called, and which was based largely upon prepared, written submissions, albeit that the issues addressed were complex and those submissions were extensive.

54. As to the costs of the proceedings (excluding the present application) the Respondents claimed a total of £247,670.00. With regard to this sum the Tribunal made similar observations regarding the lack of detail in the costs schedule, and commented that, notwithstanding the issues in this case, including difficult areas of law, the Respondents' legal team could have been more streamlined. Whilst the Respondents were entitled to take a belt and braces approach to their representation, they were not entitled to expect the Applicant to pay for that approach. Nevertheless, the Tribunal noted the prolixity of the allegations pursued by the Applicant, and his statements in support of them, and the number of applications that had been pursued by the Applicant since the certification of a case to answer, resulting in a number of hearings prior to the current one, all of which will have increased the costs incurred by the Respondents.

55. The Tribunal was prepared to allow three quarters of the claimed amount, and assessed the sum to be paid by the Applicant at £185,000.00.

56. Therefore, the total costs ordered to be paid by Mr Hinkel would be £291,000.00.

57. **Statement of Full Order**

1. Following an application made by the Respondents, MATTHEW HOOTON and ERIN GHEISSARI (Nee ROSE), solicitors of Simmons & Simmons LLP, City Point, 1 Ropemaker Street, London, EC2Y 9SS for revocation of a case certified by the Tribunal on 21 July 2022 as showing a case for them to answer, the Tribunal made the following Orders:

    1.1 The certification decision in respect of each Respondent is hereby revoked.

    1.2 There being no extant Rule 12 proceedings following revocation, certification of the supplementary allegation made under Rule 14 of The Solicitors (Disciplinary Proceedings) Rules 2019 is likewise revoked.

And it Ordered that all proceedings against the Respondents, MATTHEW HOOTON and ERIN GHEISSARI (Nee ROSE) be dismissed.

2. The Tribunal further Ordered that the Applicant, Mr David Hinkel, do pay the Respondents' costs incidental to the dismissed proceedings fixed in the total sum of £291,000.00.

Epilogue

59. As this decision represents a final and terminatory judgment any appeal is to the Administrative Court, King's Bench Division of the High Court.

Dated this 18th day of January 2023
On behalf of the Tribunal

A Horne
Chair

JUDGMENT SERVED ON THE PARTIES
18 JAN 2023