SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12320-2022

BETWEEN:

DAVID DAVIES Applicant

and

DAVID GREENE Respondent

Before:

Mr G Sydenham (in the chair)
Mr R Nicholas
Mrs L McMahon-Hathway

Date of Hearing: 20 – 23 September and 12 December 2022

Appearances

Elaine Banton, counsel of 7BR Chambers, 7 Bedford Row, London WC1R 4BX instructed by Gerard Airey, solicitor of Ronald Fletcher Baker LLP, 326 Old Street, London EC1V 9DR for the Applicant.

Ben Hubble KC, counsel of 4 New Square Chambers, Lincoln's Inn, London WC2A 3RJ instructed by Ian Miller, solicitor of Kingsley Napley LLP, 20 Bonhill St, London EC2A 4DN for the Respondent.

JUDGMENT

Allegations

1. The allegations made against Mr Greene by Mr Davies were that whilst employed at Edwin Coe Solicitors LLP he:

1.1 Lied in a witness statement dated 2 November 2012 and in doing so he breached Principles 1, 2 and 6 of the SRA Principles 2011 ("the Principles").

1.2 Lied during the course of giving evidence at a court hearing on 12 December 2012 and in doing so he breached Principles 1, 2 and 6 of the Principles.

2. In misleading the Court as alleged at allegations 1.1 and 1.2 above, Mr Greene's conduct was dishonest.

3. In the alternative to dishonesty, Mr Greene's conduct, in misleading the Court as alleged at allegations 1.1 and 1.2 above, was reckless

Executive Summary

4. The Tribunal did not find that Mr Greene had deliberately and knowingly lied to the Court, or that he had misled the Court in his statement of 2 November 2012 or during the course of his oral evidence on 12 December 2012. Accordingly, the Tribunal dismissed the allegations. The Tribunal's findings can be accessed here:

- Findings

Documents

5. The Tribunal reviewed all the documents submitted by the parties, which included (but was not limited to):

- Complaint and Exhibits filed 15 March 2019
- Respondent's Answer and Exhibits dated 17 June 2022
- Applicant's Reply and additional documents dated 8 July 2022
- Applicant's witness statements and exhibits dated 12 August 2019 and 30 August 2022
- Respondent's witness statement dated 30 August 2022
- Applicant's Statements of Costs for the strike out application and the substantive hearing.

Preliminary Matters

6. Applicant's application to adduce additional evidence

6.1 Ms Banton applied to adduce additional evidence to rebut Mr Greene's assertion in his witness statement that he had never been accused of lying to a Court. It was submitted that a complaint which included an allegation that document had been forged contradicted that evidence and was relevant to the assessment of Mr Greene's credibility.

6.2 Mr Hubble KC objected to the application. The document, it was submitted contained no allegation that Mr Greene had lied to the Court, nor did it contain any allegation that Mr Greene had forged a document. Instead, it suggested that Mr Greene's client had forged documents. The evidence was of minimal probative value.

6.3 The Tribunal found that the additional evidence did not allege dishonesty against Mr Greene. The Tribunal noted that the matter had been investigated by the SRA and there had been no finding of misconduct. The Tribunal determined that there was no inconsistency between the matters contained in the documents and the assertion made by Mr Greene in his witness statement. The additional evidence was of no probative value and was not relevant to any of the issues to be determined.

6.4 Accordingly, the application to adduce additional evidence was refused.

Respondent's application to adduce an additional character reference

6.5 Mr Hubble KC applied to rely on additional character reference. The reference addressed matters that went to propensity and was a relevant matter for the Tribunal to take into account when determining the allegations. The reference had been requested on 25 August 2022, but had not been received until 20 October 2022 (the first day of the hearing).

6.6 Ms Banton objected to the admission of the additional reference. Mr Greene had already filed and served a number of character references. The additional statement was not a statement of fact as regards the issues to be determined.

6.7 The Tribunal determined that it would not be assisted by further character references in circumstances where Mr Greene had already filed and served eight such references in the proceedings.

6.8 Accordingly, the Tribunal refused the application to adduce additional character evidence.

7. Applicant's application to make closing submissions

7.1 Ms Banton applied to make closing submissions at the close of Mr Greene's case. The general position at the Tribunal was understood, namely that the Applicant made opening submissions and the Respondent made closing submissions. It was submitted that this had been a serious and lengthy matter that had been considered in a number of courts. It was reasonable, proportionate, and commensurate with the issues to allow the Applicant to make closing submissions.

7.2 Mr Hubble KC opposed the application. It was the Tribunal's standard practice to allow the Applicant to open and the Respondent to close. It was a well-established practice that existed for good reason. Far from being a case where the Applicant should be allowed to make a closing submission, it was the opposite. Mr Greene did not propose to undertake an oral opening.

7.3 The Tribunal did not consider that the nature and seriousness of the proceedings were such that it would be assisted by a closing submission from the Applicant. The matter was listed for 3 days with two witnesses providing oral evidence. The proximity of the evidence to the Tribunal's consideration of the issues was not such that the Tribunal would need to be reminded of the evidence. With regard to the serious nature of the allegations and issues to be determined, the Tribunal dealt regularly with cases involving allegations of the most serious nature, including allegations where dishonesty was alleged. The Applicant had the opportunity, at the close of the Respondent's case, to correct any errors of law or fact. The Tribunal considered that this was sufficient assistance following the close of a Respondent's case given the issues to be determined. The Tribunal found that there was no compelling reason for it to depart from its established practice.

7.4 Accordingly, the Applicant's application to provide closing submissions was refused.

Witnesses

8. The oral evidence of the witnesses is quoted or summarised below. For the avoidance of doubt, the Tribunal read all of the documents in the case and made notes of the oral evidence. The absence of any reference to particular evidence should not be taken as an indication that the Tribunal did not read, hear or consider that evidence.

9. <u>Summary of the oral evidence of David Davies – Applicant</u>

9.1 Mr Davies agreed that as at April 2008, the procedural position was that Eco-Power had liberty to make written submissions as to any liability for costs and for any directions in relation to its damages claim as per the Order of HHJ Hickinbottom. Mr Davies explained that he understood that the damages claim would be dealt with, but was unaware of the technicalities and thus did not know that any damages claim would be dealt with in a different court.

9.2 Mr Davies agreed that as at 10 June 2008 the damages claim had not been particularised. Following the refusal of the application to appeal the Order of HHJ Hickinbottom on 29 July 2008, the only matters that remained were costs and directions for any damages claim. On 24 November 2008, HHJ Hickinbottom issued an order staying the damages claim with permission to apply.

9.3 Mr Davies considered that there had been considerable communication with Mr Greene between July 2008 and November 2009 in anticipation of the damages claim. Numerous emails had referred to the damages claim.

9.4 In December 2008, Mr Davies emailed Mr Greene expressing dissatisfaction with the service. He considered that the Firm was reluctant to continue with the appeal, and expressed that he might seek alternative representation. Mr Davies accepted that in responding to that email, Mr Greene explained what was required to quantify the damages and stated that for the Firm to undertake further work it would need a payment towards the outstanding monies owed. Mr Davies agreed that Eco-Power did not pay the invoice at that stage. Nor was the invoice paid in January 2009 when it was re-sent.

9.5 Mr Davies agreed that in Mr Greene's email of 4 March 2009, he explained that the matter had been placed into a warned list. Mr Greene had explained what work would need to be undertaken as regards the damages claim. He referred to the outstanding monies due and that he was "resistant" to undertaking any further work or incurring any additional expense if the previous invoice was not cleared. Mr Davies agreed that Mr Greene's position was that he was willing to act in the damages claim, but that there needed to be an agreement as regards past and future costs.

9.6 Mr Davies accepted that in his email of 6 April 2009, Mr Greene explained that an accountant was needed to properly assess any damages. He also stated that the Firm required a payment on account to pursue the matter. Mr Davies explained that Eco-Power was unable, not unwilling to pay the invoice. There were ongoing discussions regarding payment including consideration of whether the Firm would enter into a conditional fee agreement. Whilst no agreement was reached, there were ongoing discussions.

9.10 Mr Davies explained that he considered the letter that was sent by the Firm to TfL to be evidence of the negotiations taking place as regards the damages claim.

9.11 On 16 November 2009, agreement having been reached about funding and monies received, the Firm emailed to stated that it was opening a new file for the damages claim and attaching its standard terms of business. Mr Davies noted that the email did not say that it was ending its representation for Eco-Power or state that the retainer was a personal retainer. Mr Greene did not ask Mr Davies to sign a personal guarantee. There was nothing in the email to suggest that Mr Davies was personally liable for costs.

9.12 Mr Davies was taken to an Anti-Money Laundering Due Diligence Report. Mr Davies stated that he had not seen this document before; it was not served in either the 2012 or the 2015 proceedings. The form was not dated and was contentious. Mr Davies stated that he did not believe that Mr Greene intended for the Firm to have a personal retainer with him on 16 November 2009. Mr Greene had stated that there had been no communication when the documents showed that there had been continuous communication. To perpetrate the myth of the personal retainer, Mr Greene had fabricated the gap of a year. Mr Davies was not asked whether he consented to a personal retainer and had not signed anything to that effect. At no point did Mr Greene state, whether verbally or in writing, that the Firm had ended representation for Eco-Power and had started representing Mr Davies personally. Mr Davies did not accept that representation for Eco-Power had ended.

9.13 As regards DJ Stewart's findings, Mr Davies considered that they were not credible for the Tribunal's process as DJ Stewart might not have seen all of the papers. The representation by the Firm had been for Eco-Power throughout. DJ Stewart had only found Mr Davies personally liable on the false statements of Mr Greene.

9.14 Mr Davies believed that when it became obvious in July 2011 that Eco-Power was not solvent, the Firm retrospectively tried to claim that he was personally liable for costs, and that everything thereafter was pursuant to that ruse. The Firm had been on record as acting for Eco-Power throughout.

9.15 Mr Davies believed that whoever had created the list of documents had deliberately omitted the November 2008 – November 2009 emails in order to create the false impression of a gap of a year. Such conduct was clear and deliberate.

9.16 Mr Davies explained that he had not included all of the emails; the list of documents took hours to compile. He had expected Mr Greene to be honest when giving evidence. He did not expect a prominent solicitor would give dishonest evidence. Mr Davies knew that there had been continuous communication, as had been proven by the emails and correspondence before the Tribunal. Mr Greene had been negotiating regarding the damages claim for Eco-Power. To say that he had not was a deliberate lie. Mr Davies accepted that he had not provided all of the documents, and that he had been told by the Firm what he needed to provide, and the documents the Firm was relying on. Mr Davies stated that his failure to provide the documents did not negate Mr Greene's requirement to give truthful evidence.

9.17 Mr Davies stated that he was baffled as to why Mr Greene would give dishonest evidence as regards the invoice, but that he did so "with supreme confidence" in the knowledge that DJ Stewart would find in Mr Greene's favour.

9.18 Mr Davies believed that the Judicial Review file had been examined and that the emails had been deliberately omitted from the disclosure made in the proceedings as a deliberate attempt to conceal the important emails relating to the damages negotiations.

9.19 As regards the emails contained in the damages file that related to testing, Mr Davies did not believe that those emails were on the damages file.

9.20 Mr Davies also believed that the chronology was also created to provide a false narrative as regards communications between November 2008 – November 2009. The chronology was not representative of the factual position.

9.21 Mr Davies considered that Mr Greene's evidence that he did not have the Judicial Review file was untruthful as some of the documents listed in the chronology would have been contained in that file. It was accepted that a new file for the damages claim had been opened, however it was not accepted that the Judicial Review file had been closed. Mr Greene had said that the Judicial Review file had been closed in order to perpetuate the fabricated position.

9.22 Mr Davies stated that it was implausible if not impossible for Mr Greene to forget that between November 2008 – November 2009 there had been continuous communication with Mr Davies.

10. <u>Summary of the oral evidence of David Greene – Respondent</u>

10.1 Mr Greene explained that his witness statement of 2 November 2012 had been prepared by Mr Rayment as was the normal procedure at the Firm. He was unable to say from which file Mr Rayment had obtained the information in order to draft the statement, but considered that it would have come from the damages file. There would have been documents that would have been retained on both files. He considered that the information contained in the statement was true and accurate.

10.2 When asked what he meant by "I did not hear from Mr Davies for some considerable time", Mr Greene explained that in 2009, Mr Davies wanted the Firm to write to TfL to assert his damages claim. A report in support had been prepared by Mr Davies' accountant. Mr Greene did not consider that the claim was properly drafted such that it had merit. The claim was sent as per Mr Davies' instructions and was rejected in short order by TfL. That was the only involvement the Firm had with the damages claim in 2009.

10.3 Mr Greene stood by his assertion that there had been no contact for some time; that was generally true as the Firm had not had proper instructions. It was accepted that his statement did not explicitly state that the lack of contact referred to a lack of proper instructions, substantive instructions or substantive contact regarding progressing the damages claim. Mr Greene also accepted that there had been ongoing communication during November 2008 – November 2009. It was not accepted that the statement was misleading or untrue; the statement detailed Mr Greene's understanding regarding the lack of any substantive instructions from Mr Davies.

10.4 Mr Greene did not consider that emails explaining the position and what was required in order to advance the damages claim amounted to substantive contact. Emails of that nature were providing Mr Davies with information and asking him to pay the outstanding costs due. Mr Greene explained that he was trying to help Mr Davies as to how the damages claim should be progressed if he were to pursue it, whilst also making it clear that the Firm would need to be placed in funds. The information provided by Mr Davies to send to TfL was insufficient to support the damages claim. It was not accepted that in sending the letter to TfL that Mr Davies asked the Firm to send, the Firm was pursuing the claim on Mr Davies' behalf.

10.5 Mr Greene did not accept that he was reckless in failing to review the Judicial Review file before signing his statement. The issue the court was considering was whether a personal retainer existed.

10.6 Mr Greene accepted that the Firm remained on record, but stated that further instructions could not be accepted until the Firm was placed in funds. Much of the communication between Mr Green and Mr Davies between November 2008 – November 2009 related to costs.

10.7 Mr Greene stated that he did not lie to courts; he had no reason to. His 2 November 2008 statement was a reflection of his belief at the time and his understanding that nothing substantive had happened as regards the damages claim. His intention when he signed the 2 November 2008 statement was to show that nothing substantive had happened with the damages claim. The Firm was unable to accept instructions until the outstanding fees had been settled.

10.8 Mr Greene did not accept that Mr Davies had provided continuous instructions; Mr Davies had made it absolutely clear that Eco-Power was not in the position to settle the Firm's fees.

10.9 As regards his evidence at the hearing on 12 December 2008, he intended to reflect the position that the damages claim had not been progressed. His evidence in relation to a gap of about a year reflected that it was not until 16 November 2009 that the Firm was

instructed in the damages claim. Mr Greene did not accept that there had been continuous instructions and that the retainer was then created for Mr Davies personally. He had done his best to answer the questions put to him in cross-examination using his best recollection without the Judicial Review file.

10.10 Mr Greene agreed that the covering email with the personal retainer documents did not expressly state that Mr Davies would be personally liable for any costs. He did not consider that this lacked transparency. He stated that, in hindsight, the email could have been clearer. The new retainer was sent to Mr Davies. At that time it was not the Firm's policy to have retainer letters signed by its clients.

10.11 Mr Greene accepted that if he had lied in either his witness statement or during his evidence, he would have breached the Principles. As to whether that would be the position if he had inadvertently given misleading evidence, Mr Greene considered this to be more subjective such that it would not automatically amount to a breach of the Principles. Similarly, if a solicitor had been reckless as to the honesty of his evidence, that solicitor may potentially have acted recklessly.

10.12 Mr Greene did not accept that his evidence in the proceedings before the Tribunal was different to the evidence he gave in 2009. The correspondence relied upon by Mr Davies made it absolutely plain why a new retainer was entered into with Mr Davies.

10.13 Ms Banton stated that insofar as Mr Greene had gone beyond the issue of the retainer in his evidence and asserted a lack of communication or a gap in communication, he had a duty to bring any relevant documents to the court's attention. Mr Greene repeated that he had made it plain that further instructions would not be accepted until payment had been received. As there had been no payment forthcoming, Mr Davies had not provided any instructions and the damages claim was not progressed. The contact he had with Mr Davies had not been meaningful as regards progressing the damages claim.

10.14 Mr Greene denied that he had been dishonest, reckless or that he had breached the Principles as alleged.

Findings of Fact and Law

11. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to its statutory duty, under section 6 of the Human Rights Act 1998, to act in a manner which was compatible with Mr Greene's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Dishonesty

12. The test for dishonesty was that set out in Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67 at [74] as follows:

> "When dishonesty is in question the fact-finding Tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often

> in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the factfinder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

13. When considering dishonesty the Tribunal firstly established the actual state of the Respondent's knowledge or belief as to the facts, noting that the belief did not have to be reasonable, merely that it had to be genuinely held. It then considered whether that conduct was honest or dishonest by the standards of ordinary decent people. When considering dishonesty, the Tribunal had regard to the references supplied on Mr Greene's behalf.

Integrity

14. The test for integrity was that set out in Wingate and Evans v SRA and SRA v Malins [2018] EWCA Civ 366, as per Jackson LJ:

> "Integrity is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members … [Professionals] are required to live up to their own professional standards … Integrity connotes adherence to the ethical standards of one's own profession".

Recklessness

15. The test applied by the Tribunal was that set out in R v G [2003] UKHL 50 where Lord Bingham adopted the following definition:

> "A person acts recklessly…with respect to (i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur and it is, in the circumstances known to him, unreasonable to take that risk."

16. This was adopted in the context of regulatory proceedings in Brett v SRA [2014] EWHC 2974 (Admin).

17. **Allegation 1.1 – Mr Greene lied in a witness statement dated 2 November 2012 and in doing so he breached Principles 1, 2 and 6 of the Principles.**

Allegation 1.2 – Mr Greene lied during the course of giving evidence at a court hearing on 12 December 2012 and in doing so he breached Principles 1, 2 and 6 of the Principles.

In doing so his conduct was dishonest, or in the alternative, reckless.

The Applicant's Case

17.1 The Complaint alleged that Mr Greene (and the Firm) had represented Eco-Power from March 2008 until December 2010. During that time, Mr Greene had sent correspondence on behalf of Eco-Power to a number of third parties. All invoices issued by the Firm were issued to Eco-Power and all payments were made directly by Eco-Power.

17.2 Following the failed Judicial Review, and in the knowledge that Eco-Power had no funds to pay any outstanding fees, Mr Greene then decided to make a claim against Mr Davies in person, notwithstanding that he had represented Eco-Power throughout, when there was no legitimate recourse against Mr Davies personally.

17.3 During the course of proceedings in the County Court before DJ Stewart, Mr Greene falsely claimed that representation for Eco-Power had ceased in July 2008. In order to support the false contention that representation had ended for Eco-Power in July 2008 and that Mr Davies was personally liable for any monies due on the damages claim, Mr Greene claimed that there had been a gap in representation of about a year.

17.4 In his statement dated 2 November 2008, Mr Greene stated:

> "I did not hear from Mr Davies for some considerable time. In the meantime, the invoices delivered by my firm in relation to the judicial review remained in part undischarged.
>
> On or about 16 November 2009 I spoke to Mr Davies. He asked if we would be willing to act to pursue the damages claim identified on the judicial review against [TfL] the PCO and the Energy Savings Trust. I had not been in contact with him for some time…"

17.5 A chronology was provided to the court which deliberately omitted any representation or contact for a period of about a year.

17.6 During the course of his evidence on 12 December 2008 Mr Greene stated:

> "We'd closed our file in relation to Eco-Power because you'd stopped instructing us in relation to the judicial review … We lodged an appeal against the judicial review finding and permission was refused. So that was the end of the matter as far as we were concerned. You came back to us a year or sometime later in relation to a potential damages claim".

17.7 When asked whether there was any documentary evidence showing that Mr Greene had informed Mr Davies/Eco-Power that the Eco-Power retainer had been terminated and that any further representation would be for Mr Davies and not the company, Mr Greene stated:

> "…. if there had been continuous instructions and we had been continuously instructed with Eco-Power and then we'd said, 'right, okay, from now on it's going to be you personally' that I could understand, but the fact is we had finished the Eco-Power file some time considerably earlier and, as I say in my

> statement, you approached us again I think 12 months later saying could we do a damages claim."

17.8 When it was put to Mr Greene that there had been continuous representation, there had been no gap of a year and that there had been continuous emails throughout, Mr Greene stated: "It is a break of a year."

17.9 The Complaint detailed that DJ Stewart had relied on Mr Greene's representations that there had been a break of a year, when there had been no such break. Accordingly, in his oral and written evidence, Mr Greene had deliberately misled the court.

History of the proceedings

17.10 On 21 June 2019 the Lay Application was certified by the Tribunal as showing a case to answer. On 13 August 2019, the Tribunal struck out the Lay Application on the basis that it lacked merit and amounted to a collateral attack on the judgment of DJ Stewart dated 9 February 2016. Costs of £30,000 were awarded to Mr Greene.

17.11 Mr Davies successfully appealed the Tribunal's decision to strike out the Lay Application and the order of costs was set aside.

Standard of proof

17.12 As the proceedings were issued on 21 June 2019, the appropriate standard of proof was the criminal standard and the applicable rules were the Solicitors (Disciplinary Proceedings) Rules 2007.

Background

17.13 Mr Davies' company, Eco-Power designed and developed an emission system for London taxis with the purpose of improving air quality. Mr Greene and the Firm represented Eco-Power in its challenge against TfL's withdrawal of three approvals for a London taxi emissions system.

17.14 The High Court ruled that TfL two of the withdrawals were unlawful, but upheld the third decision to withdraw approval. The unlawful withdrawals gave rise to further proceedings which continued for costs and damages.

17.15 Ms Banton submitted that the Divisional Court in its Judgment dated 12 January 2021 succinctly summed up the case:

> "The crux of the complaint is that Mr Greene misled the court in two related aspects of his evidence, in order to support [the Firm's] case that there was a new and separate retainer with Mr Davies for what was a claim by Eco-Power. The first aspect in his evidence that he had not heard from Mr Davies for about a year before the new retainer was agreed on 16 November 2009. The second is his evidence that the file had been closed on the Eco-Power judicial review, and that what Mr Davies had come back with a year or so later was a separate instruction in relation to a damages claim which was distinct from the judicial review instruction.

17.16 Having reviewed the correspondence and the witness evidence provided by Mr Greene, the Divisional Court found, at paragraph 74 of its Judgment:

> "In our judgment, it is at least arguable that the disparity between what Mr Greene said in evidence and the position revealed by the correspondence is capable of supporting a case that the former was not only misleading but deliberately so, and not such as to be explained by the product of mistaken recollection due to the passage of time. Mr Greene was personally involved in regular discussions over this period in relation to a damages claim which was part of the judicial review proceedings and was Eco-Power's claim."

17.17 The Divisional Court also found that whether or not DJ Stewart was misled was not the only potential issue for the Tribunal to consider as "a lie that does not mislead the recipient is still a lie." It was accepted that any allegation that DJ Stewart had in fact been misled by Mr Greene, was not before the Tribunal. The fact that DJ Stewart did not find that he had been misled did not mean that Mr Greene had not committed professional misconduct. Mr Greene could not rely on a finding that he had not misled the Court to equate to a finding that his evidence was honest.

17.18 Ms Banton submitted that the matter was not overly complex; it was about what had been said by Mr Greene in his written and oral evidence. That should be contrasted with the contemporaneous documentary evidence. The Tribunal, it was submitted, should focus on what was said by Mr Greene in previous proceedings, and what was now being said in these proceedings.

17.19 It was Mr Davies' case that Mr Greene had lied in his oral and written evidence and in doing so he had been dishonest (or at least reckless) and had thus breached the Principles as alleged. That this was the position was evidenced from the contemporaneous documents.

<u>Evidence of ongoing contact and instructions</u>

17.20 Ms Banton submitted that there had been continuous and regular communication between Mr Davies and Mr Greene in the period where Mr Greene had stated that there had not been contact with "for some time…". A review of the correspondence showed that Mr Greene had written to Mr Davies on 28 separate occasions, and that there were 92 instances of communication between them.

17.21 The documents demonstrated that (i) the communications related to progressing the damages claim, (ii) instructions had been continuous (iii) the Firm had represented Eco-Power throughout and (iv) Mr Greene's evidence of a gap of lack of contact was false. Ms Banton exemplified a number of the emails between Mr Davies and Mr Greene:

- On 19 September 2008 Mr DeBono of the Firm wrote to Mr Davies (copying Mr Greene in) stating: "I have spoken to the Court. The papers are waiting to be sent to a Judge, when one becomes available. Infuriating as this may be for you, there is nothing we can do to speed up the process. I will let you know when I hear anything."

- On 27 November 2008, Mr DeBono wrote to Mr Davies (copying Mr Greene and counsel in). In that email Mr DeBono analysed the Judgment of HHJ Hickinbottom. He stated, in relation to the damages claim: "To press on with it we need to update the submissions, which he will then hear. We would need to define more clearly what the damages are. I think we would need some fresh evidence that the systems work well before embarking on that course…" Ms Banton submitted that this email clearly related to the extant damages claim that was before the court.

- On 23 December 2008, Mr Greene emailed Mr Davies. That email was sent "further to our conversations of today and your emails." Mr Greene explained why he considered HHJ Hickinbottom had reached the conclusion he did. He then went on to address costs and damages specifically:

  > "I turn now to the question of damages. The Judge found that the decision to withdraw approval from the unmodified system was wrongly made … In theory therefore you should be able to recover the damages that Eco-Power suffered as a result. You would need to quantify the damages and prove them … The difficulty we have at the moment is that we do not have any idea from you what the damages are. I appreciate your view that it is impossible to quantify the loss, but in order to move forward you must try to put some figures together."

  Ms Banton submitted that this email clearly evidenced the ongoing communication regarding the damages claim.

- On 20 January 2009, Mr Greene emailed Mr Davies stated that he had been meaning to send Mr Davies "the documents relating to costs along the way"

- On 4 March 2009, Mr Greene emailed Mr Davies about the damages claim. He stated:

  > "It looks as though the Court wants to proceed quite quickly in relation to any damages claim because we have entered the warned list which means we could be called on for the hearing. I think there might be some misunderstanding about the way in which the Court is dealing with it because the only outstanding issue is whether or not the Court will deal with damages.

  Mr Greene then detailed what further information was required as regards damages. Ms Banton submitted that the suggestion by Mr Greene that there was no ongoing damages claim needed to be treated with circumspection. The contemporaneous documents evidenced the true position as regards any damages claim. Indeed, Mr Greene had referred in the email to damage to Eco-Power's reputation. That, it was submitted, clearly indicated who the client was.

- In his email of 17 March 2009, Mr Greene confirmed that the Firm was "of course willing to take the damages claim forward but we need to sort out past and future costs."

- On 6 April 2009, Mr Davies' accountant attached a letter to an email to Mr Greene regarding Eco-Power's claim for lost sales and damages. Ms Banton submitted that the letter was a further indication of the ongoing damages claim.

- In an email dated 21 May 2009 Mr Greene explained that "All that we are entitled to do now is pursue the damages for the wrongdoing. As previously, the damages have to flow from the wrongdoing. We are of course pursuing that part of the claim." Ms Banton submitted that the only logical interpretation of that correspondence was that there was an ongoing damages claim on behalf of Eco-Power that was being pursued by the Firm.

- In an email dated 28 May 2009, Mr Greene stated that he was waiting to hear from TfL. Once a response had been received he would revert. They would then "have to decide what to do. If, as predicted, they simply reject the damages offer, we would really need to draw up some detailed figures from the accountant, and discuss these with Counsel with a view to issuing an application. As you will appreciate, I will need some money on account for that exercise."

- In a letter dated 29 May 2009, Mr Greene wrote to TfL on behalf of Eco-Power. Mr Davies thanked Mr Greene for sending the letter in an email of the same date.

- In his email to Mr Davies dated 3 June 2009 Mr Greene stated:

  > "I attach a letter we have had from TfL. You will see that they deny any liability for damages. We certainly do not agree that you cannot claim damages. The court was specifically dealing with this subject … If we are to pursue this, we are going to need to instruct [counsel]. We need to sort out the costs position, both for the past and going forward. You will certainly need some funds to pursue the matter because there will be disbursements along the way."

  Ms Banton submitted that it was clear from this email that the damages claim was ongoing and that the court was seized of the damages claim.

- In his email to Mr Davies dated 8 June 2009, Mr Greene stated:

  > "We spoke last week about pursuit of the damages claim. As I said to you, pursuit of the damages claim is clearly going to incur costs including the costs of the expert and counsel. The first move would be to get the expert and counsel together in order to establish quantification and what we could prove and the way forward. You are going to consider that because you lack ready funds. I said to you that you could not leave it too long because we have these outstanding proceedings and we must decide what to do with them."

  Ms Banton submitted that the reference to pursuit of the damages claim demonstrated the Mr Greene was having regular contact with Mr Davies regarding the ongoing and extant proceedings before the court.

- On 11 November 2009, in response to an email from Mr Greene, Mr Davies confirmed that he definitely wanted to proceed with the damages claim.

- On 12 November 2009, Mr Greene emailed Mr Davies stating that it was good news about the emissions tests. Ms Banton submitted that this further evidenced that there had been ongoing communications and instructions in relation to the emissions tests as well as the damages claim.

17.22 Ms Banton submitted that the communications exemplified above provided a plethora of material which evidenced what the position was, namely that Eco-Power had continuously instructed the Firm in the period where Mr Greene suggested that there had been a gap of about a year, and that he had not heard from Mr Davies for some time. The contemporaneous documents did not tally with the evidence given by Mr Greene at the County Court in relation to there being a lack of ongoing instructions.

17.23 It was clearly not the case that Mr Davies had approached Mr Greene after a gap of about a year. Ms Banton submitted that given the volume and frequency of contact between Mr Greene and Mr Davies, the explanation that this was mistaken recollection was not credible. Such evidence was plainly untrue, deliberately dishonest or reckless, and in breach of the Principles as alleged.

17.24 Mr Greene's evidence before the Tribunal was now very different. In his witness statement, Mr Greene stated "during the period from November 2008 to November 2009, I sought to provide some assistance to Mr Davies with Eco-Power's potential claim." Such evidence was completely at odds to his written statement and oral evidence to the County Court. There was clearly no gap of a year. Mr Greene now admitted this. Ms Banton submitted that that admission alone evidenced that Mr Greene had lied on oath.

17.25 Ms Banton submitted that Mr Greene was misleading the Tribunal as to the level of communication with Mr Davies in his witness statement. He now accepted, contrary to his evidence in the County Court, that there was communication with Mr Davies. He sought to downplay the extent of his communication and involvement by stating that he had occasional input. That was not consistent with the contemporaneous documentary evidence. As detailed above, Mr Greene had emailed Mr Davies directly on 28 occasions. The entirety of the communications did not amount to 'occasional input'. There was consistent monthly ongoing communication. Further, and as detailed above, Mr Greene wrote to TfL on behalf of Eco-Power regarding the damages claim.

17.26 Mr Greene's position in his evidence before the County Court was diametrically opposed to his evidence before the Tribunal. Ms Banton submitted that insofar as Mr Greene's evidence in these proceedings conflicted with the documentary evidence and the evidence he gave in the County Court, he compounded the dishonesty evidence which formed the subject matter of these proceedings.

17.27 It was clear that Mr Greene's evidence before the County Court was at odds with the actual events. He was a senior solicitor operating at the highest level. The evidence showed that there had been regular communication and ongoing instructions. The nature of the case was such that it was not credible to suggest that Mr Greene had failed to recollect those communications in the course of his evidence before the County Court. Ordinary and decent people would consider it dishonest for a solicitor to state that there had been a gap of about a year, or that Mr Davies had not been continuously instructing the Firm, when he knew that was not the case. Accordingly, Mr Greene's conduct had been dishonest as alleged.

17.28 Principle 2 required Mr Greene to act with integrity. The SRA guidance stated "that while someone acting dishonestly can be said to be acting without integrity, the concept of integrity is wider than just acting dishonestly. This means that it is possible to behave without integrity but not necessarily being dishonest."

17.29 Ms Banton submitted that the SRA's examples where disciplinary action for a lack of integrity accord with the features of this complaint:

(i) Where there has been a wilful or reckless disregard of standards, rules, legal requirements or ethics, including an indifference to what the applicable provisions are or to the impacts or consequences of a breach.

(ii) Where the regulated firm or individual has taken unfair advantage of clients or third parties or has helped or allowed others to do so.

(iii) Where the regulated firm or individual has knowingly or recklessly caused prejudice, harm or distress to another.

(iv) Where clients or third parties have been misled or allowed to be misled (except where this is a result of simple error that the regulated firm or individual has corrected as soon as becoming aware of it).

17.30 Principle 6 required Mr Greene to uphold public trust and confidence, In Bolton v The Law Society [1994] 1 WLR 512 CA Lord Bingham, then Master of the Rolls, referred to the need to maintain public trust, which required a confidence that solicitors are people of "unquestionable integrity, probity and trustworthiness" and that, "membership of a profession brings many benefits, but that is part of the price".

17.31 Principle 1 required Mr Greene to act in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice. Mr Greene, as first and foremost an officer of the court, owed a duty to the court which may override other duties or principles. The preamble to the Principles provides that:

> "Should the Principles come into conflict, those which safeguard the wider public interest (such as the rule of law, and public confidence in a trustworthy solicitors' profession and a safe and effective market for regulated legal services) take precedence over an individual client's interests."

17.32 In Arthur J S Hall v Simons [2002]1 AC 615 HL, Lord Hoffman held at 686E:

> "Lawyers conducting litigation owe a divided loyalty. They have a duty to their clients, but they may not win by whatever means. They also owe a duty to the court and the administration of justice…Sometimes the performance of these duties to the court may annoy the client. So, it was said, the possibility of a claim for negligence might inhibit the lawyer from acting in accordance with his overriding duty to the court. That would be prejudicial to the interests of justice."

17.33 Additionally any behaviour which indicated a serious disregard for the principle that the law applies equally to all was likely to be a breach of Principle 1. A solicitor was likely to breach the obligation to uphold the proper administration of justice if they misled the court, or knowingly or recklessly allowed the court to be misled, as was germane in this case. The Lord Chief Justice held in Brett paragraph 111:

> "…misleading the court is regarded by the court and must be regarded by any disciplinary tribunal as one of the most serious offences that an advocate or litigator can commit. It is not simply a breach of a rule of a game, but a fundamental affront to a rule designed to safeguard the fairness and justice of proceedings. Such conduct will normally attract an exemplary and deterrent sentence. That is in part because our system for the administration of justice relies so heavily upon the integrity of the profession and the full discharge of the profession's duties and in part because the privilege of conducting litigation or appearing in court is granted on terms that the rules are observed not merely in their letter but in their spirit. Indeed, the reputation of the system of the administration of justice in England and Wales and the standing of the profession depends particularly upon the discharge of the duties owed to the court."

17.34 Ms Banton submitted that whilst Mr Greene's account had changed, the Mr Davies' account had remained consistent. Accordingly, it was respectfully submitted that as shown in the totality of facts, evidence and submissions, the complaint against Mr Greene was proven on all bases and should be upheld.

The Respondent's Case

17.35 Mr Hubble KC submitted that the Applicant's case alleged dishonest and/or misleading conduct in four circumstances namely:

- The List of Documents
- The witness statement of Mr Greene dated 2 November 2012
- The chronology for the hearing prepared in December 2012
- The oral evidence of Mr Greene at the hearing before DJ Stewart on 12 December 2012

The List of Documents

17.36 Disclosure was due to take place in the Fees Claim by 17 October 2012. Mr Rayment (the solicitor with conduct of the Fees Claim) wrote to the Mr Davies referring him to the Court Order of 12 September 2012 and CPR 31 and setting out what was required in a List of Documents. On 26 September 2012, Mr Davies purported to serve his List of Documents, which included only three documents. He did not disclose any of the emails from November 2008 to November 2009 upon which he now based his Complaint.

17.37 In a letter to Mr Davies dated 27 September 2012, Mr Rayment explained the disclosure requirements and enclosed the Firm's List of Documents which listed the entirety of the documents contained in the Damages Claim file.

17.38 Mr Davies asserted that Mr Greene compiled the List of Documents which contained 761 emails and "deliberately omitted any emails from the period between July 2008 and November 2009", and that Mr Greene "compiled a list of 761 emails detailing what was supposedly all communication between Edwin Coe and myself … but omitting any emails from the period July 2008 until November 2009 to qualify the claim that there had been no communication in that period and therefore confirming that representation for Eco-Power had ended in July 2008".

17.39 Elsewhere he alleged that these emails were "deliberately omitted … to create the false impression that there had been no contact, communication or representation at all during this period, and the purpose of this was to give the false impression that representation for Eco-Power had ended in July 2008, and therefore to qualify the false statement that there was a new and completely separate representation for the damages claim for Mr Davies personally."

17.40 Mr Hubble KC submitted that there could be no criticism of Mr Greene in relation to the List of Documents whether in the terms contained in the Complaint or at all as:

- The List was not prepared or signed by him.
- The List was not reviewed by Mr Greene and he played no part in disclosure in the Fees Claim.
- The List was not his "sworn evidence".
- Contrary to Mr Davies's suggestions, Mr Greene never intimated that the List of Documents contained all communication between the Firm and Mr Davies.
- Mr Davies was sent the trial bundle before it was filed at Court. He did not suggest then that it was incomplete or lacking documents relevant to the issues in that case. Nor did he seek to introduce the communications upon which he now relied.

17.41 Further, it was not apparent from the Defence filed by Mr Davies that any other documents, including documents from the Judicial Review File, would be of relevance to the Fees Claim. At no point did Mr Davies suggest that he required further documents, and in particular, there was no request for any emails from November 2008 to November 2009.

17.42 Mr Hubble KC submitted that no case of dishonesty, deliberate concealment or misleading conduct was put to Mr Greene in cross-examination regarding the list of documents. Mr Greene was taken to emails that it was suggested were from the Judicial Review File. It was submitted that there was no mystery or surprise in the new file containing some documents from the old file when those documents were relevant. There was no evidence that Mr Greene (or anyone else) had filleted any of the files in order to conceal or remove documents. Any suggestion that this was the case was fanciful. Mr Hubble KC considered that it was unsustainable for a party to litigation to allege professional misconduct against a solicitor in not disclosing communications in a List of Documents, when that party was in possession of precisely the same communications and did not disclose them either.

The 2 November 2012 witness statement

17.43 The first draft of Mr Greene's witness statement was prepared by Mr Rayment as was usual for such statements in fee recovery matters. The draft was based upon the contents of the damages claim file as well as discussions with Mr Greene. Mr Greene reviewed the draft and made changes before sending the final draft back to Mr Rayment. He was aware that the issues in the case were whether the damages claim retainer was with Eco-Power or Mr Davies personally and/or whether Mr Greene had assumed responsibility to pay the fees of that claim personally. Mr Hubble KC noted that there was no meaningful challenge to the process by which the witness statement was created. Mr Greene removed sections of the statement that he did not consider relevant to the issues to be determined. Mr Hubble KC submitted that there were no shortcomings in this process. Mr Greene had not reviewed the Judicial Review File as it was not relevant to the issues to be determined.

17.44 The allegations in relation to the witness statement related to the following passages: "I did not hear from Mr Davies for some considerable time" and "I had not been in contact with him for some time". It had been argued that those assertions were "proven to be false because the emails and letters clearly show that Mr Greene has been communicating with TfL on behalf of Eco-Power throughout the period … and written and received multiple letters to and from [TFL] on behalf of 'our client [Eco-Power]'." It was further alleged that the purpose of the false statements was "to help in creating the impression that there was a gap in representation and therefore his claim that there was new representation for me personally would be believable."

17.45 Mr Hubble KC submitted that the circumstances in which the statement was produced were relevant. As the signatory of a statement of truth on the witness statement, Mr Greene was required to be satisfied as to its veracity. The statement did not include and/or list out the communications in 2008 and 2009 as Mr Rayment had produced the draft statement by reference to the file in the damages claim only and had not consulted the Judicial Review File. Mr Greene, it was submitted, had acted reasonably in following the Firm's usual practice of the junior fee earner preparing the first draft of the witness statement and then himself approving that draft, rather than preparing the draft himself from scratch and by his own search for and review of the documents.

17.46 Further, there was nothing dishonest, misleading or otherwise amounting to professional misconduct in what was said in the statement. What was said was accurate (or, at the very least, were not inaccurate). There was no express temporal limit given for the absence of contact from Mr Davies. The references were to "some considerable time" and "some time". These could refer to a matter of weeks or months. Mr Hubble KC considered that it was notable that Mr Davies had been away and out of contact for part of October 2009, and that he had also been dealing directly with TFL. Mr Hubble KC submitted that on a sensible reading, the complained of matters reflected the general background to the events leading up to the new retainer on 16 November 2009. There had been no substantive progress on the matter as Mr Davies had not put in place funding nor had any application been made to lift the stay. The assertions made were a reasonably accurate summary of peripheral background matters. Indeed, Mr Davies did not cross examine Mr Greene in relation to these paragraphs when he gave evidence at the trial in December 2012.

17.47 The suggestion that Mr Greene had in mind the communications with Mr Davies, but that he had deliberately sought to conceal them in order to fabricate a 1 year gap so as to justify the personal retainer was, it was submitted, far-fetched and fanciful. That this was the case was plain. Mr Davies was in possession of all of the communications. Mr Greene would have known that. It was impossible to attempt to conceal communications from the recipient of those communications.

17.48 Mr Greene's evidence that he did not recall those communications at the time he was writing his statement accurately reflected his recollection at that time. No substantive work was being undertaken as a result of Eco-Power's inability to settle its bill. The statement reflected the holding pattern and lack of activity between November 2008 to November 2009. During that period, the communications dealt mainly with what was required and that further progress was dependant on Eco-Power paying its bill.

17.49 Mr Greene had not considered the Judicial Review File at the time that he considered and signed the Witness Statement. He had not had his attention drawn to the communications which were recorded on that file but for which charges were not raised. He did not recall those communications at the time that he approved and signed his statement. He believes that this is because his involvement had been limited and pro bono at a time when the damages claim was stayed and it was not clear that EP would pursue it.

17.50 Mr Davies alleged that Mr Greene's evidence that he did not consider the same when preparing his statement was "false" and that Mr Greene had not been reckless or incompetent in not reviewing those files at the time, but rather had "been more devious" as "both files must have been looked at". This, it was submitted, was a remarkable assertion for Mr Davies to advance. It was entirely reasonable for Mr Greene not to have considered the Judicial Review File when the matters in that file were not relevant to the matters to be determined by the court. The issue to be determined was whether Mr Davies had a personal retainer with the Firm. The fees related to those charged after 16 November 2009. No reference had been made by Mr Davies to the communications from November 2008 – October 2009, and he had not sought to rely on those communications as part of his disclosure. In all the circumstances, Mr Greene could not have been aware that there was any risk in his not considering the Judicial Review File.

17.51 Mr Hubble KC submitted that for the reasons stated above, the 2 November 2012 witness statement was not materially inaccurate and reflected Mr Greene's genuine belief at the time. That was plainly the belief of DJ Stewart who stated:

> "Even if these emails were before me, that does not dislodge the second agreement, the terms and conditions of which reach Mr David Davis, clearly citing he was to be the client and he was then at his election to accept those terms and conditions or to reject them.
>
> By virtue of his conduct, he decided to accept them. Nothing in these emails displaces that. All it shows is there was some dialogue. But that is a million miles away from suggesting that Mr Green had actually misled the Court. I cannot find anything in those emails that, (a) would have made any difference if they had been before me and secondly, anything in them that suggests that the

> evidence that Mr Green gave me, either in writing or in the witness box, any way shows him to be anything other than truthful and I have to say that they do not displace the primary evidence that he gave me.
>
> ….
>
> The second point is, even if they were before me, they would not have made any difference because the rock of Gibraltar in this case is, effectively, the second agreement that went out from Edwin Coe to Mr David Davis citing him to be the client and that is irrebuttable."

17.52 It was clear that DJ Stewart did not consider that he had been misled, and that he considered that Mr Greene's written evidence did not show him to be "anything other than truthful", notwithstanding the emails that demonstrated there had been contact between Mr Greene and Mr Davies between November 2008 and November 2009.

17.53 Accordingly, the allegation that Mr Greene had been dishonest, reckless or otherwise in breach of his professional obligations should be dismissed.

<u>The chronology for the hearing prepared in December 2012</u>

17.54 Mr Hubble KC submitted that Mr Greene was not taken to the chronology during the course of his cross-examination. Accordingly, any allegations in relation to the chronology fell away. In any event, Mr Greene had not prepared the chronology

17.55 Mr Davies alleged that the chronology "deliberately omitted any representation or contact for a period of about a year from July 2008 to November 2009", and that the chronology "deliberately showed a gap between July 2008 and November 2009 to perpetuate the false claim that there was no contact, communication or representation during this period."

17.56 Mr Hubble KC submitted that the Chronology was produced by Counsel from the documents in the trial bundle with which she had been provided to prepare for the trial. It included some background, procedural dates, up to and including the unsuccessful application for permission to appeal, and then commenced a new section headed "the damages claim" on 16 November 2009. The chronology was reviewed by Mr Greene but not drafted by him or formally approved by him. Accordingly, there could be no proper criticism of Mr Greene in relation to the chronology.

17.57 Further, as was commonplace, the chronology was a high-level summary of the documents in the trial bundle not an item-by-item list. There was nothing unusual, let alone misleading about it. It is entirely standard and unobjectionable.

<u>Mr Greene's oral evidence at the hearing on 12 December 2012</u>

17.58 Mr Hubble KC submitted that the cross-examination of Mr Greene at the hearing on 12 December 2012 should be considered in context, both in terms of the line of questioning and the issues to be determined at that hearing. Mr Greene was cross-examined by Mr Davies in person. As detailed above, the now relied upon communications were

not disclosed (by either side) in those proceedings, and Mr Greene had not looked at the Judicial Review File.

17.59 With the caveat that they need to be evaluated as part of the cross-examination as a whole, Mr Greene's answers which were asserted in the Complaint to be dishonest and deliberately misleading were:

- Following some questions relating to opening the damages file:

  "We'd closed our file in relation to Eco-Power because you'd stopped instructing us in relation to the judicial review …. We lodged an appeal against the judicial review finding and permission was refused. So that was the end of the matter as far as we were concerned. You came back to us a year, or some time later, in relation to a potential damages claim …I think if there had been continuous instructions and we had been continuously instructed with EP and then we'd said, right, okay from now on it's going to be you personally that I could understand, but the fact is we had finished the EP file some time considerably earlier and, as I say in my statement, you approached us again I think 12 months later saying could we do a damages claim."

- Following a question regarding the non-existence of a letter stating that the Eco-Power retainer had been terminated:

  "Well… I don't want to enter into argument [inaudible], but I think if there had been continuous instructions and we had been continuously instructed with Eco-Power and then we'd said, right, okay, from now on it's going to be you personally that I could understand, but the fact is we had finished the [EP] file some time considerably earlier and, as I say in my statement, you approached us again I think 12 months later saying could we do a damages claim.

- Following questions about there being no gap/break in representation, and there being no gap of a year:

  "It is a break of a year … What I set out in my statement … is that there was a break in representation. You came back to us in November 2009 … So we lodged a judicial review … that was heard in 2008… We lodged an application for permission [to appeal] and permission was refused in 2008. Then it was a year later or something like a year later, in November 2009 you came back to us and said would we do the damages claim."

17.60 Mr Hubble KC submitted that the case was limited to those matters. It was not open to Mr Davies to now (as he sought to do in his Reply) allege that there was any inaccuracy in Mr Greene's evidence surrounding the closure of the Judicial Review Proceedings File. The Tribunal should not consider any allegations which fell outside the ambit of the Complaint as contained in the March and June 2019 letters.

17.61 Mr Greene strongly disputed that his answers were either dishonest, misleading and/or given recklessly as to their truth. He was doing his best to answer the questions accurately, to the best of his recollection and the best of his knowledge. He had not recalled the communications and his residual involvement in the period Autumn 2008

to November 2009 (and had not been shown those communications to remind him). In any event, he would not have considered those communications relevant to the issues between the parties.

17.62 Mr Hubble KC submitted that the questioning style from Mr Davies (as a litigant in person) was difficult for Mr Greene to respond to. In particular, the questions were often unfocussed, were not made by reference to contemporaneous documentation in the bundle and were repetitive and argumentative. Mr Greene was frequently interrupted whilst giving his answers.

17.63 Mr Greene was not taken to any of the now relied upon communications. Indeed, they were not in the bundle. Mr Davies did not specifically raise any question taking issue with the contents of paragraphs 9 and 10 of the Witness Statement and the answers regarding the "gap" or "break" emerged during the course of Mr Greene's answer to other questions.

17.64 Mr Greene made it clear during his cross-examination that he did not have the Judicial Review file. His evidence on the matters that formed the basis of the complaint was therefore from his best recollection.

17.65 Mr Hubble KC submitted that Mr Greene's answers were accurate (or, at the very least, were not inaccurate). Considered in the context of the transcript of Mr Greene's evidence as a whole, the answers he gave about the "gap" and/or "break" were in relation to a "break in representation" or "instructions", rather than any absolute assertion that there was no communication at all between him and Mr Davies. It was clear that Mr Davies had not provided continuous instructions. Whilst there had been contact with Mr Greene, there had been no instructions. The damages claim was stayed and Mr Davies had provided no monies, nor had the outstanding bill been paid. Mr Hubble KC submitted that if the damages claim was being actively pursued and the retainer had then been changed, the position might be different. However, that was not the case.

17.66 It was reasonable for Mr Greene to state that the Eco-Power file had closed in July 2008; the Judicial Review ended on 29 July 2008. The only remaining matter was a potential damages claim. This would require an application to lift the stay and a fresh claim in a different venue. Mr Hubble KC submitted that the refusal of permission to appeal ended the judicial review aspect. The bill in relation to the Judicial Review file was rendered on 30 September 2008.

17.67 With regards to Mr Greene's assertion that Mr Davies approached him "I think 12 months later saying could we do a damages claim", that statement was accurate (or not materially inaccurate). Mr Davies had communicated with Mr Greene on a number of occasions stating that he wanted to pursue the damages claim, but he had still not paid the costs due on the Judicial Review file. It was not until November 2009 that any further monies were received.

17.68 Mr Davies considered that Mr Greene's statement as regards matters being different had there been continuous instructions was significant. Mr Hubble KC submitted that it was clear that there had not been continuous instructions from Mr Davies between November 2008 – November 2009. Whilst it was accepted that there was contact, it

was not accepted that the contact amounted to instructions. It was submitted that Mr Greene was making the point that if the damages claim was being actively pursued and the retainer was swapped from Eco-Power to Mr Davies, then Mr Davies may have a legitimate complaint. That was not the case. The damages claim was not being actively pursued. Mr Greene accepted that the covering letter attaching the retainer for Mr Davies personally could have been clearer as to Mr Davies' personal liability under the retainer.

17.69 Mr Hubble KC submitted that there had been a break of about a year, as Mr Greene stated in his evidence. Nothing material occurred between November 2008 – November 2009 to advance the potential damages claim. The most that had happened was communication with TFL regarding the potential damages claim. Mr Greene had sent correspondence to TFL at Mr Davies' insistence. TFL robustly rejected any suggestion of liability for damages.

17.70 Further, the Firm remaining on the record and together with the communications between November 2008 – November 2009 did not undermine Mr Greene's evidence regarding the gap of about a year. Nor was that evidence undermined by Mr Greene not expressly qualifying his answers by making it clear that it was a gap in "representation" or "instructions". Mr Greene was correct (or at the very least not incorrect) to maintain that there had not been continuous instructions during 2008/2009; that evidence in fact reflected the reality that during this period: (i) there was no fee arrangement in place to progress anything, (ii) the possible damages claim was stayed so nothing was happening procedurally and (iii) consequently, the communications at that time were rather stop start and circular.

17.71 Mr Hubble KC submitted that there was no reason to conclude that Mr Greene was not giving his evidence to the best of his recollection in circumstances where he had not been referred to documents that Mr Davies had in his possession but had not filed and served. There was nothing sinister in the evidence given. DJ Stewart considered that Mr Greene's oral and written evidence was honest.

17.72 It was submitted that Mr Davies' case of a "grand deceit" was not credible. It had been suggested to Mr Greene during cross-examination that his motive for lying was to support the Firm's claim against Mr Davies for its fees. However, Mr Greene did not need to create a gap of a year to support that claim. Additionally, DJ Stewart found that the communications now relied upon would have made no difference to his decision, as they were not material to whether or not Mr Davies had entered into a personal retainer with the Firm.

17.73 Mr Hubble KC submitted that it was completely illogical and irrational for Mr Greene to decide to conceal emails that did not impact on the result but which in any event Mr Davies knew about and had in his possession. Further, and in any event, the cross-examination of Mr Greene took an unexpected turn, and Mr Greene did the best that he could to answer questions without the benefit of having read the Judicial Review file, or being pointed to the relevant documents.

17.74 His answers, it was submitted were honestly given and did not amount to a breach of the Principles.

17.75 Mr Hubble KC reminded the Tribunal that in his 2012 Judgment, DJ Stewart confirmed that the key issue was whether Mr Davies had entered into a personal retainer. In his 2016 Judgment, DJ Stewart was robust in his findings that Mr Greene had not been dishonest in his oral or written evidence.

The Tribunal's Findings

17.76 The Tribunal found that the contemporaneous documents showed, without doubt, that a new retainer had been entered into and a new file had been opened. Mr Davies knew that a new file had been opened in relation to the damages claim in November 2009. On 26 November 2009, Mr Davies emailed Mr Greene stating:

> "I have forwarded the email below in which you said 'we are not looking for anything for our own costs' in order to proceed. This was followed by an email with your terms of business stating that you were opening a new file for the damages".

17.77 In his email dated 4 May 2010, Mr Davies referred to the email of 16 November 2009 in which he was informed that a new file was being opened for the damages claim. He stated, in reference to the 16 November 2009 email "In this email you say that a new file has been opened for the damages claim. There is no mention of the previous outstanding amount having to be cleared before proceeding."

17.78 The Tribunal found that Mr Davies had plainly received the email dated 16 November 2009, in which Mr Greene stated that a new file was being opened and attaching the Firm's Terms of Business. The Tribunal thus did not accept Mr Davies' evidence that the opening of a new file for the damages claim a later fabrication in order to impose a personal retainer to recover costs, when it was discovered that Eco-Power was insolvent and would be unable to satisfy any liability for fees.

17.79 It was Mr Greene's case that he gave his written and oral evidence in the County Court without having reviewed the Judicial Review file. Mr Davies did not accept that this was a true statement of the position. He referred to documents that he considered could only have come from the Judicial Review file. The Tribunal found that there was no evidence that those documents were contained solely on the Judicial Review file and had been specifically selected (with other documents being specifically and deliberately omitted) from the Judicial Review file to support the County Court claim.

17.80 Mr Davies had not produced any of the now relied upon communications in the County Court proceedings. That this was the position was commented upon by DJ Stewart who stated in his 2016 decision:

> "In any event, all of this evidence was available on computers, either by Mr David Davis producing it or Edwin Coe producing it. They were their own documents and all of this could have been put before the Court much earlier than September 2015 when this second claim form … was issued. They could have been produced at the trial. They were not."

17.81 The Tribunal did not accept Mr Davies' evidence that he did not consider that the emails would need to be produced as he had expected Mr Greene to tell the truth. Mr Greene's position as regards communications was plain from his 2 November 2012 witness statement. In the letter to Mr Davies of 27 September 2012, Mr Davies was advised that he would need to disclose "all and any relevant documents between the parties relating to any of the matters in issue in the proceedings". The failing to produce the documents was a failing on both sides. As DJ Stewart noted, both parties could have produced the documents; both parties failed to do so.

17.82 Mr Greene stated that he neither prepared nor reviewed the List of Documents. The Tribunal found that Mr Davies had provided no evidence to show that Mr Greene had created or reviewed the List of Documents. On the contrary, during the course of cross-examination, Mr Davies accepted that he had no evidence that Mr Greene had prepared the List of Documents, or that he was directly involved in its production.

17.83 As detailed, Mr Davies was in possession of the documents now relied upon, but not produced during the County Court proceedings. In those circumstances, it was not accepted that Mr Greene had deliberately concealed them; documents could not be concealed from someone who was already in possession of them.

17.84 Having determined that there was no evidence to support the contention that Mr Greene had prepared the List of Documents, or that documents were selectively disclosed, the Tribunal found that Mr Greene had not deliberately omitted the communications in order to "create the false impression that there had been no contact, communication or representation at all" between November 2008 – November 2009, so as to support the false impression that the Eco-Power file had closed and a new damages file had been opened.

17.85 Accordingly, the Tribunal found that Mr Greene had not misconducted himself as regards the List of Documents.

17.86 At the close of cross-examination, Ms Banton put to Mr Greene that in failing to disclose documents in the County Court proceedings, he had acted in breach of the Principles. The Tribunal found that such an allegation was not open to Mr Davies as it was not contained in his Complaint to the Tribunal. Additionally, at the outset of the proceedings, Ms Banton had stated that the allegations Mr Greene faced were that he had lied in his witness statement dated 2 November 2009, and that he had lied during the course of his evidence on 12 December 2009. Accordingly, in circumstances where the allegation of failing to disclose documents was impermissible, the Tribunal did not consider that allegation.

17.87 The Tribunal considered the communications relied upon by Mr Davies and whether they demonstrated that he had lied in his oral and written evidence as alleged. It was plain that there had been ongoing contact throughout the period in which it was said that Mr Davies had not been in contact for some time and that there was a gap of about a year. The Tribunal thus found that his evidence to that effect was inaccurate.

17.88 It was Mr Davies' case that the inaccurate evidence was given so as to fabricate a break in representation/instructions in order to support the personal retainer. The Tribunal had been taken to a number of emails which, it was submitted, proved that this was the

case. It was Mr Greene's case that during between November 2008 – November 2009, there had been communications but that instructions were not being accepted due to the non-payment of the outstanding invoice. Further, there were no ongoing proceedings at that time.

17.89 A summary of the proceedings was as follows:

- On 2 April 2008, Eco-Power began Judicial Review Proceedings
- On 22 April 2008, HHJ Hickinbottom dismissed the claim
- On 29 July 2008, Eco-Power was denied permission to appeal HHJ Hickinbottom's decision
- On 28 November 2008, the damages claim was stayed, with leave to apply to lift the stay
- On 4 December 2009, the matter was listed for a hearing and the stay was continued by consent
- On 15 January 2010 an application to lift the stay was filed together with Particulars of Claim
- On 21 May 2010, the damages claim was considered and struck out. Permission to appeal was refused

17.90 The Tribunal noted that as regards any proceedings, the damages claim had been stayed, during the period where Mr Greene had said there was a one year gap, but when there were ongoing and continuous communications between Mr Davies and Mr Greene. When considering the communications, the Tribunal remained cognisant of the fact that the damages claim had been stayed.

17.91 The Tribunal considered the communications with care. It found that there was no substantive work being undertaken during from November 2008 until the new retainer on 16 November 2009. Whilst there had been many discussions about what was necessary in order to pursue the damages claim, no work in order to progress that claim had happened. The general tenor of the communications was about what was required, however, it was clear that substantive work would not be undertaken due to the outstanding fees. The Tribunal exemplified some of the emails it had been referred to:

- Ms Banton had submitted that the email of 27 November 2008 from Mr DeBono to Mr Davies clearly related to the extant damages claim before the court. The Tribunal determined that the email related to what was required if the damages claim were to proceed. At that stage, the damages claim had already been stayed.
- The email of 23 December 2008 in which Mr Greene dealt with the Judgment of HHJ Hickinbottom was evidence of discussion as regards any claim for damages and what would be required in order to pursue that claim. However, in order to do so Mr Greene stated "If we are to do further work I am going to need a payment towards the outstanding account".

- In the 4 March 2009 email, which was relied upon as evidence that the damages claim was ongoing, and that Mr Greene was receiving instructions, Mr Greene explained that he thought the court was mistaken in placing the matter in the warned list, as the only outstanding question was whether or not the court would deal with damages. Mr Greene stated that he was "resistant to undertaking further work and incurring further expense ..." if the outstanding fees were not paid. The Tribunal could not be sure that the reference to further work was a reference to anything other than the work previously undertaken and billed for, but not yet paid. The Tribunal inferred that it related to the work detailed in the unpaid bill, as there had been no charge for anything done in the period when Mr Greene stated that there had been no contact.

- The 28 May 2009 email evidenced that there were no ongoing proceedings. Mr Greene stated that if, as he expected (and as was the case) TfL rejected the damages figure, detailed figures from the accountant would be required. They would then have to "discuss these with Counsel with a view to issuing an application." (Tribunal's emphasis).

- In the email of 3 June 2009, Mr Greene stated, as regards the damages claim "if we are to pursue this"

- The email of 8 June 2009 was relied upon by Mr Davies to show that the reference to 'pursuit of the damages claim' evidenced that the claim was ongoing. The Tribunal considered that on a proper construction of that email it did not support Mr Davies' case as suggested. The email referred to the "first move" being to establish quantification. The Tribunal found that the email did not evidence ongoing instructions and representation, but explained what was needed in order to pursue any damages claim.

- As regards the 12 November 2009 email, the Tribunal did not accept that Mr Greene having stated that the news relating to the emissions test was good, meant that he had been continuously instructed in that regard. The Tribunal noted that in that email, Mr Greene had urged Mr Davies to 'make payment immediately' as they had to "get a move on to deal with the hearing". He repeated that the urgent need for Mr Davies to "deal with the money immediately."

- As regards the letter sent by Mr Greene on behalf of Eco-Power to TfL, it was explained that this was sent at the insistence of Mr Davies, in circumstances where Mr Greene did not consider that the letter would be effective. The claim for damages was robustly denied by TfL. When he stated in his email of 21 May 2009, that the claim was being pursued, he had in mind that a response was awaited from TfL. The Tribunal accepted that evidence in circumstances where at the material time, the damages claim was stayed and no application to lift the stay had been made.

17.92 As detailed above, the Tribunal found that Mr Greene's evidence was clearly and demonstrably inaccurate. The Tribunal noted that Mr Greene he did not consider Mr Davies to be providing instructions, nor did he consider that he was representing Mr Davies due to the non-payment of the 30 September 2008 invoice. It was as a result of the ongoing non-payment that the new retainer was entered into. The Tribunal found

it to be wholly dissatisfactory that Mr Greene did not make it expressly clear to Mr Davies that the new retainer imposed personal liability. It was also wholly dissatisfactory that Mr Greene did not make it explicitly clear that as a result of non-payment, the Firm was terminating Eco-Power's retainer.

17.93 The Tribunal whilst finding that Mr Greene's evidence at the County Court was inaccurate, did not find that it reflected anything other than his genuine belief at the time. It was accepted that Mr Greene had not reviewed the Judicial Review file, and that he considered the Judicial Review file to have been at an end when permission to appeal HHJ Hickinbottom's decision was refused.

17.94 As detailed, the Tribunal did not find that the giving of inaccurate evidence meant that such evidence was deliberately inaccurate. Indeed, during the course of cross-examination, Mr Davies had stated that he had never seen the Anti-Money Laundering Due Diligence Report, before and that it had not been served in either the 2012 or the 2015 proceedings. In fact, it was an exhibit to Mr Greene's 2012 witness statement. The evidence from Mr Davies was therefore inaccurate. The Tribunal considered that he was genuinely mistaken in his evidence on that point.

17.95 Mr Greene had made it plain in his evidence before the County Court, that he was giving evidence in the absence of the Judicial Review file and from his best recollection. He did not have the Judicial Review file, had not reviewed the Judicial Review file, and was not taken by Mr Davies to the now relied upon communications. It had been suggested that Mr Greene had failed in his obligations by failing to review the Judicial Review file. The Tribunal did not accept that assertion. The issues to be determined in the County Court was whether or not a new retainer had been entered into which placed a personal liability of Mr Davies. The documents in that regard were on the damages file. The Tribunal thus found that there was nothing improper in Mr Greene not reviewing a file that was not relevant to the issues to be determined.

17.96 The Tribunal did not find that Mr Greene had intended to mislead the Court, nor had he actually done so. His inaccurate evidence, the Tribunal found, was inadvertent. The Tribunal did not consider that the evidence Mr Greene gave before the Tribunal was significantly different to that given in the County Court. Having been asked to answer the Complaint, Mr Greene had clarified what he meant by a gap of a year and the break in instructions. That evidence had not been given at the County Court as it was not relevant to the determination of the issue before that Court.

17.97 The case had been brought against Mr Greene on the basis that he had lied to the County Court in his oral and written evidence. The Tribunal determined that once it was established that he had not lied (or been reckless as to the evidence given) the allegations fell away. It followed that having found that Mr Greene had not lied when giving his evidence, the Tribunal did not find him to have been dishonest, reckless or to have been in breach of the Principles as alleged.

17.98 As regards the allegation that Mr Greene had been dishonest in the preparation of the chronology, Ms Banton accepted that this had not been put to Mr Greene during cross-examination. The Tribunal noted that the Chronology was not prepared by Mr Greene. Nor did it purport to list all steps and communications in the matter. Mr Davies had failed to provide any evidence to show that Mr Greene had acted improperly regarding

the Chronology. Accordingly, the Tribunal found that there was no misconduct on Mr Greene's part.

17.99 The Tribunal did not accept that Mr Greene's conduct amounted to professional misconduct as alleged. Accordingly, the Tribunal found all allegations not proved.

Costs

18. Ms Banton applied for the costs of the strike out hearing dated 13 August 2019, and the costs of the substantive hearing. It was submitted that the proceedings, having been certified, had not been unreasonably brought. There was a case to answer and the bringing of the proceedings were in the public interest. It was noted that Mr Davies' costs were reasonable, and lower than what would have been claimed by the Solicitors Regulation Authority had it brought the proceedings. The proceedings, having been reasonably brought, should not be subject to any adverse costs order. The Tribunal should also take into account that Mr Davies, as a litigant in person, had personally funded the cost of the proceedings.

19. Mr Hubble KC submitted that having been successful, Mr Greene should not be ordered to pay any costs. Mr Greene was not seeking the costs of the hearing. Accordingly, the appropriate order should be no order for costs. The Tribunal was referred to Paragraph 72 of its Guidance Note on Sanctions (10th Edition – June 2022) which quoted Mr Justice Nicol's decision in Broomhead v SRA [2014] EWHC 2772 Admin:

> "42. However, while the priority of bringing charges is a good reason why the SRA should not have to pay the solicitor's costs, it does not follow that the solicitor who had successfully defended himself against those charges should have to pay the SRA's costs. Of course there may be something about the way the solicitor has conducted the proceedings or behaved in other ways which justify a different conclusion. Even if the charges were properly brought it seems to me that in the normal case the SRA should have to shoulder its own costs where it has not been able to persuade the Tribunal that its case is made out. I do not see that this would constitute an unreasonable disincentive to take appropriate regulatory action."

20. The Tribunal determined that the proceedings had been properly brought, and that the costs claimed by Mr Davies for both the strike out application and the substantive hearing were reasonable. However, Mr Davies had not been successful in the prosecution. There was nothing about the way Mr Greene had conducted the proceedings, or otherwise behaved, which would justify the Tribunal making an order for cost against him when he had successfully defended the proceedings.

21. Ms Banton had submitted that Mr Davies should be treated in the same way that the SRA would be treated as regards costs. The decision in Broomhead made it clear that when the SRA had not been successful in its prosecution, in the normal case it should have to shoulder its own costs.

22. The Tribunal did not find that Mr Davies, having unsuccessfully brought the proceedings, should be subject to an adverse costs order as there had been no application by Mr Greene for his costs. It did not follow that having not been made

subject to an adverse costs order that Mr Davies was thus entitled to his costs of either the strike out application or the substantive hearing.

23. Accordingly, and given that Mr Greene had made no application for costs, the Tribunal determined that the appropriate course was to make no order for costs.

Statement of Full Order

24. The Tribunal Ordered that the allegations against Respondent, DAVID GREENE, solicitor, be DISMISSED and it further Ordered that there be no Order for costs.

DATED this 21st day of December 2022
On behalf of the Tribunal

G Sydenham
Chair