SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12349-2022

BETWEEN:

ANDREW FULTON First Applicant
CAROLINE FULTON Second Applicant

and

KEITH FLAVELL Respondent

Before:

Mr P Lewis (in the chair)
Mrs L Boyce
Mr G Gracey

Dates of Hearing: 3-5 July 2023, 7 August 2023

Appearances

The First Applicant represented himself and the Second Applicant, who did not attend the hearing.

Nicholas Bacon KC, barrister of 4 New Square Chambers, instructed by Leverets for the Respondent.

JUDGMENT

Allegations

The Allegations against Mr Flavell, as amended during the course of the hearing, were in respect of the period July 2014 to January 2019. They were that:

1. The Respondent, Keith Flavell, breached Principles 2, 3 and/or 6 of the SRA Principles 2011 in that during the conveyancing between July and December 2014 of the residential property [address redacted] **("No.1")** of which his younger brother Jeremy Flavell ['JF'] and sister-in-law Sarah Flavell ['SF'] were then the owners and vendors, he:

    a. encouraged Jeremy to lie about the history of complaints and disputes with the owners of the neighbouring property **("No.2")**;
    b. made suggestions for responses in the relevant sections of the Sellers Property Information Form ("SPIF") which he knew to be false and misleading, intending that Jeremy and Sarah would adopt those suggestions in the final version of the SPIF sent to the purchasers;
    c. deliberately refrained from making his conveyancing colleague aware of the history of complaints, disputes and associated correspondence with No.2 which both he and also his firm's Head of Disputes knew about, thereby causing or allowing the purchasers of No.1 to be misled about those matters; and/or
    d. permitted his firm, Harold Benjamin, to continue to act in the transaction despite knowing that the purchasers were being misled.

2. Further, Keith Flavell breached Principle 7 of the SRA Principles 2011 and/or failed to achieve Outcome 10.6 of the SRA Code of Conduct 2011 by not dealing with the SRA in an open and cooperative manner. In late 2017 the SRA made inquiries of Harold Benjamin in relation to the purchasers' complaints about the inaccurate and incomplete information in the SPIF. In response to those inquiries Keith Flavell caused Harold Benjamin to deny on his behalf any involvement in the conveyancing transaction or in the "*day to day running of the file or transaction*". This was untrue given that he had personally drafted the false and misleading responses in the SPIF which, as he will have known, were the focus of the complaint. Moreover, despite complaint having also been made to the SRA about Keith Flavell's lack of independence (a breach of SRA Principle 3), he failed to explain to the SRA that he had a financial interest in the transaction through having lent thousands of pounds to his brother which were repaid to him out of the sale proceeds.

3. Yet further, in the course of and the purchasers' civil claim against Harold Benjamin between October 2017 and January 2019, Keith Flavell breached SRA Principles 1, 2 and/or 6 and/or failed to achieve Outcomes 5.1 and 5.4 by:

    a. falsely denying his earlier dishonesty during the conveyancing of No.1; and/or
    b. falsely asserting that he had no motive for such dishonesty when he in fact had a financial interest in the sale and received a share of its proceeds;

4. It was alleged that Keith Flavell was dishonest in relation to the above breaches of the SRA Principles and the failure to achieve mandatory Outcomes, albeit that dishonesty was not a requirement in order to establish such breaches and failures."

Executive Summary

5. Mr Flavell was the Manging Partner at Harold Benjamin solicitors. He was the brother of JF who, together with JF's wife SF, instructed Harold Benjamin to handle the sale of his property, No 1. The purchasers of No 1 were Mr and Mrs Fulton.

6. At the outset of the transaction, JF asked Mr Flavell for advice on how to complete the SPIF. There was a history of disputes and complaints involving No 1 and No 2. Mr Flavell made suggestions which he wrote on the SPIF, which included a partial account of one of the areas of dispute and made no mention of the other two areas of contention.

7. Mr and Mrs Fulton duly purchased No 1 and subsequently encountered difficulties with the neighbours and owners of No 2.

8. Mr and Mrs Fulton's case was that Mr Flavell had encouraged JF to lie about the history of complaints and disputes and had made suggestions on the SPIF which he knew to be false and misleading. Their case was further that he had withheld information and correspondence from his conveyancing colleagues and had allowed the firm to continue to act despite Mr Flavell knowing that the Fultons were being misled. Mr Flavell denied the Allegations. The Tribunal found them proved.

9. As a result of the problems encountered by the Fultons, the matter was referred to the SRA and became the subject of civil litigation against Harold Benjamin. The latter was settled for £385,000. Mr and Mrs Fulton's case was that Mr Flavell had caused or allowed the SRA to be misled as to his own role in the transaction and his financial interest in it. The financial interest related to a loan of £5,000 made by Mr Flavell to JF, which was likely to be repaid upon sale of the property. Mr Flavell again denied the Allegations. The Tribunal found it partially proved, to the extent that the SRA had not been given the correct information about his role, albeit it did not find that the part of the Allegations relating to the financial interest proved. The Tribunal did not find that Mr Flavell's actions were motivated by the £5,000 loan, rather a desire to help his brother.

10. In relation to the civil litigation, Mr Flavell had denied dishonesty in those pleadings. The Fultons case was that in doing so Mr Flavell had again been dishonest. This was denied by Mr Flavell and found proved by the Tribunal.

11. The Tribunal heard oral evidence from Mr Flavell, Ms Vincent and Mr Parikh. It also took account of Mr Flavell's good character.

Sanction

12. The Tribunal ordered that Mr Flavell be struck off the Roll and it further ordered that he pay the Applicants' costs fixed in the sum of £29,750.

Documents

13. The Tribunal considered all the documents in the case, which were included in an agreed electronic bundle. All the evidence and submissions before the Tribunal were considered but is referred to below only in so far as it is relevant to the Tribunal's findings and reasons.

Preliminary Matters

14. Anonymity

14.1 The parties invited the Tribunal to anonymise the neighbours and to refer to the addresses involved as "No 1 and No 2". The parties did not seek a formal direction during the hearing but had agreed between themselves that this was an appropriate way forward.

The Tribunal's Decision

14.2 The starting point was the principle of open justice, as emphasised in Lu v SRA [2022] EWHC 1729 (Admin). The requirement for open justice in this case meant that it was imperative that anyone following the hearing could understand the case against Mr Flavell and his response to it. The fact that the context of the Allegations arose out of a neighbour dispute was what was relevant, not the actual name of the neighbour or the addresses of the properties. The neighbours were not witnesses or parties in these proceedings. There was no infringement on open justice by referring to them as "the neighbour(s)" or by referring to the addresses in the manner proposed.

14.3 The Tribunal made a direction to that effect in relation to this written Judgment as a proportionate measure to reflect their privacy.

15. Material served pursuant to witness summons

15.1 Pursuant to a witness summons dated 9 June 2023 issued by the High Court, Ms Vincent attended the Tribunal on day one with the documents specified in the witness summons on a USB stick. On agreement with the parties, the electronic material was secured by the Tribunal.

15.2 Harold Benjamin's counsel, Mr Phipps, did not attend on the first day of the hearing, but did so on the second day. His role is dealt with separately below.

Applicant's Submissions

15.3 Mr Fulton invited the Tribunal to direct the material be made available to the parties. The USB stick contained emails, which would be reviewed overnight. Only at that stage would the impact, if any, on the proceedings be known.

15.4 Mr Fulton told the Tribunal that no point appeared to have been taken by Harold Benjamin in relation to legal professional privilege (LPP) attaching to these emails. If they had such an objection, the place to have raised it was in the High Court, which they had not.

Respondent's Submissions

15.5 Mr Bacon was provided with a copy of the summons. He told the Tribunal that Mr Flavell had no role or input into any position that may be taken by Harold Benjamin and that it was a matter for the Tribunal if it wished to deal with this issue without hearing from them. Mr Bacon criticised the process of disclosure that Mr Fulton had adopted. He accused Mr Fulton of "getting behind" orders made by the Tribunal in relation to disclosure by going to the High Court. Mr Bacon submitted that he was concerned that one consequence of the contents of the USB stick being disclosed to the parties was that there may be further orders for disclosure. Mr Bacon told the Tribunal that he opposed any suggestion that the hearing would be disrupted by this "side-show".

15.6 Mr Fulton responded that he had no intention of derailing the hearing and would do everything in his power to assimilate the information overnight.

The Tribunal's Decision

15.7 The Tribunal noted that the High Court had ordered the material be disclosed to the Tribunal. This order had been complied with. The Tribunal took the view that the purpose of such an order was so that the material could be available to the parties. It therefore directed that the contents of USB be uploaded to CaseLines and made available to the parties and the Tribunal. The Tribunal's administrative team gave effect to this direction and the material was duly disclosed. There were no further directions sought arising out of that disclosure.

16. Harold Benjamin's Barrister

16.1 Charles Phipps, barrister of 4 New Square, attended the Tribunal on the second day of the hearing. He was instructed by Harold Benjamin. He explained that his role was relevant to the evidence of Ms Vincent and Mr Parikh. Mr Phipps was concerned that questions or answers may stray into areas of LPP, either attaching to the firm or to the firm's insurers, in relation to the civil litigation that Mr and Mrs Fulton had brought against Harold Benjamin. He subsequently clarified that it was the firm's privilege he was seeking to protect.

16.2 There was no objection to Mr Phipps being present. In the event, Mr Phipps did not need to make any interventions during the hearing.

17. Absence of Mrs Fulton

17.1 Mr Fulton attended the Tribunal for the entirety of the hearing and presented the case on behalf of himself and Mrs Fulton. Mrs Fulton did not attend.

17.2 Although Mr Bacon initially indicated that he would make an application for Mrs Fulton's part of the case to be dismissed due to her non-attendance. On further reflection, Mr Bacon confirmed that no application was made.

17.3 The Tribunal noted that in the application dated 26 June 2020, Mrs Fulton consented to the first Applicant acting on her behalf.

17.4 The Tribunal therefore saw no procedural irregularity.

18. The presentation of the Applicant's case

18.1 Mr Fulton informed the Tribunal that no witnesses were to be called on behalf of the Applicants. He would open his case by reference to the exhibits and would make submissions. Mr Bacon took issue with this, on the basis that he would not have the opportunity to cross-examine Mr or Mrs Fulton.

Respondent's Submissions

18.2 Mr Bacon suggested that a deponent in proceedings should swear to the truth of their statement and formally adduce the exhibits. At one stage Mr Bacon appeared to submit that in the absence of Mr Fulton giving evidence, the Rule 12 and exhibits were inadmissible. Mr Bacon did not pursue that point and did not seek any formal ruling from the Tribunal. Mr Bacon's settled position was that the documents were admissible and that it went to the question of what weight should be attached to them.

Applicant's Submissions

18.3 Mr Fulton told the Tribunal that he was not aware of any point on which he could usefully give evidence. He had signed a statement of truth and his case was based on the contents of the exhibited documents and on inferences to be drawn from those documents. Mr Fulton had not been privy to conversations between Mr Flavell and JF and so could not give probative evidence. If Mr Bacon took issue with the inferences invited by Mr Fulton, that was a matter for submissions. Mr Fulton told the Tribunal that there had been no challenge to the authenticity of the documents relied on. He further told the Tribunal that if Mr Bacon could identify facts on which he wished to cross-examine on, then he would consent to be cross-examined.

The Tribunal's Conclusion

18.4 The Tribunal was not required to make a ruling, but nonetheless turned its mind to the issue, it having been raised.

18.5 In cases brought by the SRA, the author of the Rule 12 Statement would not ordinarily be cross-examined. There was no reason to approach a Lay Application any differently. Further, to take the example of a conviction case, in which the case against a Respondent was that they had committed professional misconduct by reason of conviction of a criminal offence, the SRA would rely on documentary evidence in the form of a Memorandum of Conviction. The SRA would not be required to call the court clerk, for example.

18.6 In this case, Mr Fulton's case was based on inferences he invited the Tribunal to draw from documentary evidence. These were attached to a Rule 12 Statement bearing a statement of truth. As Mr Fulton had noted, the authenticity of those documents had not been questioned. It was therefore not a procedural irregularity to proceed in the way proposed by Mr Fulton. It was for the Applicants to decide how to present their case, provided it was done in a procedurally appropriate way. The Tribunal had the burden

of proof in mind at all times and would decide what weight to attach to the evidence once all the evidence had been called and submissions made by both parties.

19. Application to amend the Rule 12 Statement

19.1 On the third day of the hearing, once the evidence had concluded, Mr Fulton applied to amend the Rule 12 Statement. The application fell in two parts. One part was to delete certain parts of the Rule 12 Statement containing matters that were no longer pursued within Allegations 2 and 3. This was not opposed. The second part was to add text to the Rule 12. This was opposed. The submissions on this point are summarised below. The summary is a generalised one, as the second part of the application was ultimately refused and so the detailed matters that Mr Fulton sought to add to the Rule 12 Statement do not need to be rehearsed.

Applicant's Submissions

19.2 Mr Fulton told the Tribunal that in relation to Allegation 2, at the time the Rule 12 had been drafted, the Applicants had not seen Harold Benjamin's email to the SRA. The pleading had been based on what SRA had reported to the Applicants. That email had been provided at the start of this hearing, and some of the proposed amendments reflected the way the case had been put to the witnesses. Mr Fulton submitted that this was therefore an update to the position so that the pleadings did not appear out of date.

19.3 Some of the amendments sought to reflect documents received by the Applicants after the Rule 12 was drafted in 2020 and to ensure it reflected that, rather than simply relying on what was reported to the Applicants by the SRA. The additional documents were those produced pursuant to a successful application for a witness summons in October 2022. Mr Fulton submitted that it would be "absurd" to be kept to his original pleadings in those circumstances.

19.4 Other amendments were described as "tidying up" exercises or fleshing out, rather than expanding the scope, of some of the Allegations.

Respondent's Submissions

19.5 Mr Bacon told the Tribunal that the application had come as a "real surprise" and had "derailed" the proceedings on the morning that he was due to make his closing submissions. Mr Bacon submitted that Mr Fulton was "seeking to deploy new arguments after the evidence" and he described that as unacceptable.

19.6 Mr Bacon submitted that the disputed amendments sought were derived from material in Mr Fulton's possession since October 2022. Even if material had been within the documents disclosed on the first day of the hearing, Mr Fulton could have accepted the Tribunal's offer to delay closing his case if he required more time. Mr Bacons submitted that the reason Mr Fulton had not done so was because there was no "smoking gun".

19.7 Mr Bacon submitted that the proposed amendments included new pleadings and effectively a new allegation. Mr Flavell had known the case he had to meet and it was unfair to now present two very general allegations in place of the one he had met.

19.8 Mr Bacon reminded the Tribunal of the overriding objective and the interests of justice. He submitted that there was no proper basis at this late stage to allow any additions to the Allegations and he invited the Tribunal to refuse the application to amend, save for the unopposed deletions.

The Tribunal's Decision

19.9 The Tribunal considered the unopposed amendments initially. Mr Fulton had told the Tribunal that having reflected on his case and had decided to withdraw some aspects of his case in light of the evidence. This was an entirely proper course of action for him to take. This was of assistance to the Tribunal in narrowing the issues and was not opposed by Mr Bacon. The Tribunal gave leave for those amendments to be made in the interests of justice.

19.10 In respect of the remainder of the substantive amendments, the Tribunal considered each and every proposed amendment on its merits. In reaching its decision it had regard to the interests of justice and the overriding objective. These included, but were not limited to the proportionality of the amendments; the time at which some of the material has been available to Mr Fulton and the ability of Mr Favell to challenge the Allegations.

19.11 At the point of determining this application, the Tribunal had not begun to consider its findings on the evidence presented to it. The case for Mr Flavell had not closed. However, the Tribunal concluded that it was sufficiently familiar with the factual matrix and the Allegations as set out so as to be able to determine the Allegations on the material before it and to do so with regard to the wider public interest and fairness to Mr Flavell.

19.12 The addition of any pleading that Mr Flavell might have wanted to or sought to respond to was something that the Tribunal did not consider to be in the interests of justice. Mr Flavell had given detailed evidence both in writing and orally in which he had clearly set out his defence to the Allegations pleaded in the Rule 12 statement. The Tribunal was concerned that if the application was granted then there was a possibility that Mr Flavell would either seek to be recalled to give further evidence, or that he would choose not to for fear of derailing the proceedings. Neither scenario was desirable.

19.13 Many of the amendments sought by Mr Fulton related to material in his possession since October 2022. Those amendments could have been sought at a much earlier stage. Insofar as they arose out of material served on the first day of the hearing, Mr Fulton had been at liberty to seek more time to consider his case in light of the contents of that material and had not done so.

19.14 In all the circumstances, the Tribunal did not consider it consistent with the overriding objective to allow the opposed amendments. This part of the application was refused.

19.15 The parties assisted the Tribunal in providing an agreed amended Rule 12 statement reflecting this ruling, which included some grammatical tidying up following the removal of certain sections.

Factual Background

20. Mr Flavell was admitted to the roll of solicitors in 1983. From 2002 to 1 January 2019, he was the Managing Partner of Harold Benjamin, Hill House 67-71 Lowlands Road, Harrow, Middlesex HA1 3EQ. From 1 January 2019 Mr Flavell stepped down as Managing Partner but continued to work for Harold Benjamin as a consultant for a period of time thereafter.

The Property

21. The property at the centre of this matter was part of a large Victorian house that had been divided into individual properties in the 1970s. No 1 and No 2 properties were those relevant to this case. No.1 was accessed via a driveway owned by No.2, over which No.1 had a right of way, with the costs of driveway maintenance apportioned in the title documents.

22. There were services and drainage shared between Nos. 1 and 2, including a shared sewage treatment unit ("the Klargester"), with costs again apportioned. There were various boundaries in the grounds and allocation of responsibility for the hedges and fences.

The history of disputes up to 2014

23. In February 2011, Jeremy and Sarah Flavell ("JF" and "SF") purchased No.1. Harold Benjamin acted for them on the transaction. Not long after moving into No.1, JF and SF began to encounter such problems with the owners of No.2 ("the neighbours"). The areas of dispute included;

- Issues to do with the hedge;
- Issues to do with driveway access;
- Issues to do with the Klargester.

24. In the course of the disputes, a letter from the neighbours to JF and SF dated 7 November 2012, which they passed to Mr Flavell, who drafted a response.

25. The 7 November 2012 letter to JF and SF contained the following relevant passages:

> "We grant limited access (there are conditions, not that you have ever acknowledged or obeyed them) to [No 1] and in return you are responsible for 50% of the cost of maintaining the drive. I do not need your permission or approval to do anything on my land and have better use of my time than jumping to another one of your problems, such as getting quotes. Whether you like it or not, this is the legal position. I point out that I have never asked you for a penny over and above the balance of 1/3" of the Klargester maintenance costs, as we own 1/3 of it and so we believe have been maintaining the historical status quo. Clearly you should have received legal advice to this effect when you brought the property (we did!)."

> "Since you have chosen to be so unreasonable, let me advise you of one of my other concerns. You and your visitors are not fully observing the 5MPH speed

limit for the limited access to your house, please have the good manners to do so or I will be forced to investigate one or more of a number of solutions:

1) Use of an enforcement contractor and associated fines
2) Legal review of access rights
3) Installation of further speed inhibiting devices
4) Installation of manual gate /s"

"Not sure what is driving your need to keep discussing this Issue, it seems penny pinching and foolish behaviour on your part, given your only current means of access to your house is over my drive!"

26. On 11 December 2012, Mr Flavell sent a draft response to JF and SF for them to send to the neighbours if they considered it acceptable. That letter contained the following relevant passages:

"We write following your letter dated 7th November having delayed in our response as we were taken aback by the vitriolic way in which that letter was written.

We do not believe anything is to be gained by becoming personally abusive and all we have sought to do is to understand and meet our legal obligations under the terms of the various rights and reservations to which our property is subject. Contrary to your suggestion that we have not read the title to our property, it is because we have read and considered these documents that we have sought to put into effect that which is contained within the title to our property."

"You state in the third paragraph of your letter that you "grant limited access" and that is subject to conditions, So that we are clear, please could you set out what you mean by "limited access" and refer us to the documents in our respective titles where this access is limited and the conditions that are set out so that we may consider the same."

"We find it very hard to understand why, in the second paragraph of the second page of your letter, you say that we have "chosen to be unreasonable", Why is it unreasonable simply to put into affect the rights and obligations as set out in the title documents to our respective properties? Clearly, this correspondence is an example of how it is possible to misunderstand what has gone on before and to be bound in some form of historical agreement to which new purchasers of either property would not have been either party to such agreement nor be fully understanding of the commitments and obligations to it. Surely it must be right that if the legal obligation in respect of which we both have rights and burdens are set out in the documentation, then that is the basis upon which one should operate going forward. This is all that we are seeking to do. Why you consider that to be unreasonable we simply do not know. You allege that we and our visitors are not fully observant of the "5mph speed limit". Perhaps you would refer us to the documentation and the relevant clauses therein where you are able to impose a speed limit. We will continue to use the accessway to our property under the terms and obligations which are set out in the documentation

> and at all times act reasonably in the use of such driveway taking due concern of our neighbours when using the driveway."

27. In January 2013 there was disagreement about the cost of emptying the Klargester. In response to a request by JF and SF for payment towards this from the neighbours, the following was written by the neighbours:

> "Reference above:
> No idea why you are still referring to any monies owed on servicing the Klargester, As already made quite dear in our previous correspondence, the inflated (electricity charge is assumed above manufacturers claims on consumption) sum of £201.00 has been deducted from the monies you owe us for the driveway. There is no outstanding balance, other than the difference which you owe us and which for now I have no interest in requesting.
>
> Frankly this latest note from you is bemusing, why you continue to be so annoying over a straightforward matter is unclear. We will not be entering into any further comment on the matter."

28. On 22 August 2013 Police were called to the properties following an altercation between SF and the neighbour relating to the hedge. The neighbour was briefly arrested and then de-arrested. JF and SF took legal advice from Mr Mahoney at Harold Benjamin in relation to the hedge dispute in September 2013.

29. On 16 October 2013 the neighbours sent a letter to JF and SF, containing the following relevant passages:

> "I am very sorry that your foolish and ill-advised behaviour continues. You have clearly not received any such legal advice, as any Junior legal clerk can presumably read plain English. The Deed amendments pertaining to the boundaries between our properties, their ownership and responsibilities for maintenance are quite clear. They were handed to you by the police, who themselves were quite clear that you had committed criminal damage to our hedge. Although we agreed not to press for criminal charges that day, be advised any such future behaviour will resulting in the authorities been called."
>
> "Regarding apology, we were thinking the same thing, amazing that you haven't apologised for purposely cutting our hedge yet again, without the courtesy to talk to us. You knew perfectly well what you were doing and were clearly ready for and expectant of our reaction. What would you have done had the shoe been on the other foot? We will not be entering into any further discussion on this matter, any action against us will be defended using the appropriate legal means. If you still have issue you will need to rectify this using your own legal action and not by attacking our property. If you stop behaving with such arrogance and rudeness, ignoring our rights under the property deeds, then I'm sure we can have a more harmonious and neighbourly relationship. We hope you have the good sense to reflect on this and that no further criminal or civil action is required to protect our rights."

30. JF and SF decided to take legal action against the neighbours. On 22 October 2013 at 20.52 SF emailed Mr Flavell as follows:

> "Keith
> Jez [JF] asked me to email you to confirm that we would like to proceed legally with the hedge situation and [the neighbours]. Also, just a reminder about the Klargester, We are coming up to a 3rd year for the Klargester to be emptied. As yet we have not written to [the neighbours] to request payment, but you will remember that the past 2 years he has refused to pay his share. He feels the cost should be offset with the drive maintenance costs. We have asked that the 2 be dealt with separately, and on him presenting quotes / receipts are happy to contribute our share of the drive costs. So far, as far as we can tell, he has done nothing to maintain the drive other than buy a few bags of gravel from Wicks.
>
> Do we need to deal with both issues together?
>
> Regards, Sarah"

31. Mr Flavell replied to this email the same evening at 20.59 as follows;

> "Thanks yes I think we will do them both together
> X"

32. On 23 October 2013 Mr Flavell acknowledged the instructions to commence proceedings and arranged for Mr Mahony to send out a draft engagement letter, in the meantime advising JF and SF to "ignore" the neighbours.

33. JF and SF subsequently decided to sell No 1 instead, and so the proceedings were not pursued.

<u>The sale of No 1 to Mr and Mrs Fulton</u>

34. JF and SF agreed to sell No 1 to Mr and Mrs Fulton on 7 July 2014. The same day at 18.46, JF sent an email to Mr Flavell and to their brother as follows:

> "See below FYI both and let's hope the recent planning events highlighted to you Stuart on Friday last week when we spoke together, do not impact at this stage when searches carried out and the issues of historical neighbourly disputes become possibly known also!!! Fingers crossed.
>
> I have attached the planning correspondence Sarah received in the post at home for your perusal and information from Mole Valley, which I have as advised, put forward to obtain advice from two senior and respected planning consultants with whom I have worked with over the last 20years at Savills. I will keep you posted on progress such hopefully you might receive one day return on your loans!!"

35. The reference to "loans" related to a £5,000 loan made by Mr Flavell to JF previously, as well as a loan made to the third brother.

36. On 30 July 2014, JF sent Mr Flavell an email with attachments. The email included the following passage:

> "It includes the completed 'Property Information Report' document, together with referenced document's previously provided by yourselves. These attached referenced documents, are extracts only and therefore a brief element of detailed information which I have extracted from your original qualified contract report prepared prior to my purchase of the property. It includes certain historical facts which have not altered, and further to your advice, would wish to forward to the purchaser directly to assist. I also have responded to queries raised in the questionnaire document, which are requiring additional updated information following our subsequent purchase in 2011. I trust hopefully all provides you with sufficient clarity on all aspects at this stage. I would however as I have referred to in over marked parts, of the attached document, be grateful for additional advice in communication with you Keith, on a couple of matters of pertinence I have raised, when you are free."

37. One of the attachments was the SPIF. This is an industry standard form completed by sellers in residential conveyancing transactions. The purpose is to provide information to the buyers. JF had indicated the sections on which he sought advice by use of a circled asterisk. Section 2 of the SPIF is headed 'Disputes and complaints'. Question 2.1 reads:

> 'Have there been any disputes or complaints regarding this property or a property nearby? If Yes, please give details'. JF had ticked both the 'Yes' and 'No' box. In the box below this question JF had written as follows;
>
> "As you are aware Keith, with respect to trimming of party boundary hedge and to disclose as necessary pertinent details in respect of driveway (shared) + Klargester (shared) cost agreements verbally deemed appositely!

38. Question 2.2 reads:

> 'Is the seller aware of anything which might lead to a dispute about the property or a property nearby? If Yes, please give details'. JF had not ticked either 'Yes' or 'No'. in the box below this question he had written as follows;'
>
> "As noted above. Discuss and agree with Keith accordingly".

39. Questions 2.1 and 2.2 were among those that had a circled asterisk next to them.

40. Mr Flavell wrote the following on the next draft of the SPIF under Question 2.1, next to which he had ticked the 'Yes' box:

> "The Sellers [sic] gardener inadvertently trimmed the neighbours [sic] hedge which caused the neighbour to complain to the Seller".

41. The 'No' box next to Question 2.2 had been ticked.

42. The front page of the SPIF contained Mr Flavell's email address and reference.

43. The wording and answers written by Mr Flavell into the draft SPIF was adopted without amendment into the final, signed SPIF dated 14 August 2014. This had been emailed to JF by Ms Shah, the solicitor handling the conveyancing and returned to her the next day by JF, with Mr Flavell copied in.

44. The sale of No 1 completed on 1 December 2014.

Complaint to Harold Benjamin and civil litigation matters

45. From May 2016 onwards, Mr and Mrs Fulton began to have difficulties with the neighbours. This resulted in them making enquiries, initially of JF and SF and then of Harold Benjamin.

46. On 6 January 2017 JF replied to Mr Fulton, having sought advice from Harold Benjamin. This advice had included input from Mr Flavell. In that letter, the following relevant passage read as follows:

> "3. The Property Information Form does not require subjective opinions on neighbours but only disputes. You were informed of the dispute over the hedge with [the neighbour] and the further enquiries raised by your solicitors were (i)when the complaint was received, (il) how it was resolved and (iii) whether any further complaint has ever been received. The replies to these enquiries were provided by my solicitors on 10 September 2014 and no further queries were raised. As previously advised, the incident was a misunderstanding and was resolved."

47. On 2 March 2017, Mr Fulton emailed Mr Flavell enclosing a working draft of particulars of claim in respect of a contemplated action against JF. In that letter the following relevant passage read as follows:

> "In those circumstances, you will understand why I have to ask you whether you knew the truth in relation to any of the alleged misrepresentations. If, for example, you had been told in a fraternal capacity about Jeremy and Sarah's issues their issues with the ghastly neighbour [the neighbour] then you and your firm will obviously be fixed with that knowledge when you later came to act as solicitors on the conveyancing.

48. In any event, it is important that I establish the position and I therefore look forward to your prompt response."

49. On 29 September 2017 Mr and Mrs Fulton issued proceedings against Harold Benjamin.

50. The "Re-Re-Amended" particulars of claim dated 15 November 2018 contained the following relevant pleadings:

> "17. In further support of there having been a conspiratorial agreement between Keith and Jeremy Flavell to misrepresent and conceal the neighbour issues, the Fultons rely upon:

> 17.1 the fact that Keith Flavell was not even a property lawyer and yet it was he rather than Ms Shah who offered to assist and did assist Jeremy on the completion of the SPIF: he did so because his objective was not to ensure that Harold Benjamin provided the best expert advice it could offer on how the SPIF should properly be completed but rather to assist and encourage the Flavells improperly to conceal the truth from the Fultons;
>
> 17.2 the absence of any attendance note or other contemporaneous record of the conversation(s) between Keith and Jeremy Flavell as to how the SPIF should be completed, which any solicitor acting honestly would have produced, given the financial importance and, to put it at its lowest, the delicacy of the issue;
>
> 17.3 Keith Flavell's personal financial interest in assisting his brother to achieve a sale and quickly and at a good price, having lent money to Jeremy Flavell which he hoped to be repaid from the proceeds of, or otherwise by reason of, the sale of the Property to the Fultons;
>
> 17.4 Keith Flavell's attempts falsely to deny any such motive in Part 18 Responses dated 17 September, 25 September and 24 October 2018."

51. The "Re-Amended Defence" contained the response to this as follows:

> "43. As to Paragraph 17 it is denied that there was any conspiratorial agreement between Keith Flavell and Jeremy Flavell to mispresent and conceal the neighbour issues. Whilst it is admitted that (a) Keith Flavell was not a property lawyer, (b) he did not make an attendance note of his discussion with his brother, (c) Keith had made an informal loan of £5,000 to Jeremy Flavell without any terms or conditions as to repayment, the matters and inferences relied upon in the sub-paragraphs to Paragraph 17 are denied. For the avoidance of doubt:
>
> 43.1. Keith Flavell was not customarily a note-taker when discussing matters with family and friends and the failure of a solicitor to produce an attendance note is not of itself dishonest.
>
> 43.2. The repayment of the £5,000 loan was not of financial importance to Keith Flavell and he was not motivated by the prospect of repayment if the transaction went through. He had no motive whatsoever for the transaction to go through.
>
> 43.3. It is denied that Keith Flavell falsely denied any motive in any Part 18 Responses."

52. The Re-Amended Defence was signed by Mr Flavell on behalf of Harold Benjamin.

53. The civil claim against Harold Benjamin was settled, with Harold Benjamin paying Mr and Mrs Fulton £385,000.

The SRA enquiries

54. Following a complaint to the SRA made by Mr and Mrs Fulton, the SRA made contact with Harold Benjamin by email on 1 November 2017. This email contained four questions as follows:

> "Please could you provide the firm's response on the following
> 1. Who was the person with in the firm with day to day responsibility for the conveyancing matter?
> 2. What involvement did Mr Flavell have with the matter? Please note the email contact on the SPIF and comment.
> 3. Following the firm representing the vendors in a neighbour dispute what further information was provided to support the position put forward in the SPIF and enquiries?
> 4. Any further comments on the neighbour dispute resolution".

55. On 7 November 2017, Marina Vincent responded to this email as follows:

> "1. Milli Shah (MS), who a property solicitor with the firm.
>
> 2. To assist in getting the transaction underway, Keith Flavell (KF) arranged for a conveyancing file to be opened for his brother and sister-in-law Jeremy and Sarah Flavell's (J&SF) sale, and sent the SPIF form to them, pending allocating the file to one of our property solicitors. Our case management system automatically gives the file the reference of the fee earner who opens it, hence why his reference appears on it. However it was shortly made clear that MS was dealing with the file as can be seen from Mr and Mrs Fulton's solicitors letter of 22/7/2014 - see attached.
>
> J&SF asked KF for his assistance in completing the SPIF form. During 2012 and 2013 J&SF had been in discussion and correspondence with their neighbours, the [neighbours], regarding the costs of maintenance of a shared driveway and a shared Klargester septic tank. Neither we nor J&SF considered this a dispute. KF had, in a personal capacity as a relative, advised them on some of the correspondence, and assisted in drafting one letter from J&SF to the [neighbours]. After it had occurred he was also aware of a one-off incident (the hedge incident) regarding J&SF cutting a hedge belonging to the [neighbours], to which the [neighbours] objected strongly. KF advised his brother to apologise. J&SF asked for KF's assistance in answering questions on the SPIF and KF confirmed the above issues must be disclosed, and assisted in drafting responses to the relevant questions on the form. Replies to further enquiries on these issues were responded to by J&SF direct to MS, and not with assistance from KF.
>
> J&SF contacted KF direct if they could not get hold of MS or felt that they could chase the matter better by contacting their relative. Otherwise, KF had no involvement in the conveyancing transaction, and no involvement in the day to day running of the file or transaction.

> 3. The firm did not represent the vendors in a neighbour dispute. KF in his personal capacity drafted one letter for J&SF, from them to the [neighbours] and spoke to J&SF in a personal capacity. No file was ever opened by KF. J&SF sought some advice regarding the issues above, and their rights regarding the hedge, before the hedge incident occurred. KF asked a solicitor in our Dispute Resolution team to assist J&SF, Mr Jon Mahony (JM). JM gave some initial advice regarding rights and liabilities under the title. After the hedge incident, J&SF initially said they wanted to take the matter further, and JM sent a client care letter inviting instructions. However, J&SF did not instruct JM further and no file was opened and the firm were never instructed in any dispute.
>
> 4. After the client care letter referred to in 3. above, JM received no further contact from J&SF and KF was not asked for further assistance. As we have indicated above, the hedge incident was a one off, and not ongoing. There was no ongoing "neighbour dispute" and the costs of the driveway/Klargester were dealt with by an arrangement between the [neighbours] and J&SF."

56. On 20 November 2017 the SRA informed Harold Benjamin that it would not be investigating that matter further at that time.

Witnesses

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

58. <u>The Respondent</u>

58.1 Mr Flavell confirmed that his witness statement was true to the best of his knowledge and belief. He relied on this as his evidence in chief.

58.2 In cross-examination, Mr Flavell denied that JF had asked him for advice about how to fill in the SPIF. Mr Flavell told the Tribunal that JF had asked him what should be said on the SPIF regarding the hedge dispute, but that this request had not included the Klargester or the drive-way issues. Mr Flavell told the Tribunal that this request took place during a telephone conversation.

58.3 Mr Flavell confirmed that he had not given any copies of the correspondence about the neighbour disputes to his conveyancing colleagues. Mr Fulton asked Mr Flavell whether he thought he ought to have told his conveyancing colleagues that the Firm was in possession of correspondence that ought to be disclosed to the buyers. Mr Flavell told the Tribunal that the duty was on JF and SF.

58.4 Mr Fulton took Mr Flavell to the letter dated 7 November 2012 from the neighbours to JF and SF and asked him why JF and SF had sent it to him. Mr Flavell told the Tribunal that they wanted advice as to the true legal position. Mr Flavell had agreed to help. He

agreed that he had rebutted the various false assertions made in the letter as "that is what lawyers do". He described JF as a "very difficult person" and said that he (Mr Flavell) was trying not to infame matters further, hence the reference in the letter of 11 December 2012 to resuming good neighbourly relations.

58.5 Mr Fulton asked Mr Flavell why this correspondence was not made available to the buyers or to Ms Shah, who was handling the conveyancing. Mr Flavell told the Tribunal that it was not the duty of someone not involved in the conveyancing transaction and he was not the solicitor with conduct of the matter.

58.6 Mr Fulton put to Mr Flavell that because it was the neighbours view that JF and SF had not complied with the conditions, that he would have anticipated that this issue would crop up again in the future. Mr Flavell denied anticipating this and denied that he had been told that the neighbour was "notorious". Mr Flavell told the Tribunal that he had believed that if the neighbours were writing in the terms they had, this was because of how JF had behaved.

58.7 In relation to the SPIF, Mr Flavell told the Tribunal that he denied the words he wrote were a suggestion or recommendation. He stated that he had "started to use some words" and that it was incomplete. He told the Tribunal that at the time he drafted the language, he had "no idea either way" if the words written would be relied on. Mr Fulton asked Mr Flavell if he had treated JF like any other client, as he had told the SRA. Mr Flavell said he had treated JF like his brother, not a client, but the advice was what he would have given to any client.

58.8 Mr Fulton asked Mr Flavell if he was familiar with the concept of a "half-truth" – Mr Flavell confirmed that he was. Mr Fulton put to him that the answers written into the SPIF by Mr Flavell, if unamended or corrected, would be a misleading half-truth. Mr Flavell agreed it would be a half-truth but did not accept it would be misleading.

58.9 In relation to the Klargester, Mr Fulton took Mr Flavell to his Answer in these proceedings, where Mr Flavell had stated as follows:

> "10
> I would not know whether the issue regarding the Klargester was resolved or not as I was not a party to all of the correspondence and Sarah Flavell confirmed to the Applicants' solicitors that they did not believe they had sent correspondence to me. I do not recall if I was involved in any further correspondence concerning the Klargester until Jeremy raised it at the time of him selling [No 1] in 2014 and when I asked him specifically why he had put that in his SPIF form in handwriting he said that there was no problem with the Klargester and the issues surrounding it had been resolved."

58.10 Mr Fulton pointed out that this paragraph indicated that there had been a conversation about the Klargester. Mr Flavell replied that when he had formulated that response it would have been based on all the documents. His evidence before the Tribunal was that he did not recollect a conversation about the Klargester. Mr Fulton referred to the January 2013 issues and put to Mr Flavell that it was clear from this that the neighbours view had not changed. Mr Favell agreed. Mr Fulton asked Mr Flavell if this suggested that it was a lingering issue. Mr Flavell told the Tribunal that he had no recollection of

receiving this and so it never crossed his mind. As far as he was concerned it was resolved.

58.11 Mr Fulton referred to McMeekin v Long 2002 WL 32092847 and put to Mr Flavell that in light of the importance of disclosing neighbour disputes, this ought to have been disclosed. Mr Flavell replied "not by me" and reiterated his lack of involvement in the matter. When Mr Fulton referred back to the SPIF, Mr Flavell said that he had been asked for advice and he had put words on the form.

58.12 Mr Flavell confirmed that he was aware of the incident with the hedge in 2013. He told the Tribunal that he recalled being on the telephone to SF and hearing an incident in the background that sounded quite heated. SF had been concerned about how JF would react when he got home. Mr Flavell did not recall telling SF to call the Police or of being told that the neighbour had been arrested. Mr Flavell confirmed that following the hedge incident, he involved Mr Mahoney, who was Head of Disputes at Harold Benjamin.

58.13 Mr Fulton took Mr Flavell to an email dated 17 October 2013 which had been sent to Mr Flavell from SF concerning the hedge dispute. Mr Flavell did not recall receiving the email. He told the Tribunal that 2013 was a very difficult year for him and he was trying not to be involved in this matter. He described JF and SF as a "bloody nuisance". Mr Fulton asked Mr Flavell why he had not shown this email to Ms Shah. Mr Flavell replied that he did not recall having the email, that it was not his job as he was not involved in the conveyancing process and he wanted nothing to do with JF and SF. Mr Flavell accepted that he had not advised JF and SF to find another Firm.

58.14 Mr Fulton put two further emails to Mr Flavell dated 16 October and 20 October 2013. Mr Flavell did not recall receiving these emails, noting that they were sent 10 years ago. Mr Fulton put to Mr Flavell that he was lying about this and that he had a clear recollection. Mr Flavell denied this.

58.15 Mr Fulton put to Mr Flavell that he knew that mentioning the involvement of the Police would prevent the sale from going ahead. Mr Flavell told the Tribunal that he was sure it would have done, but referred to his previous answers as to knowledge.

58.16 Mr Fulton took Mr Flavell to his email to SF dated 22 October 2013 in which he had said "I think we will do them both together", in answer to a query about the proposed litigation between JF and SF and the neighbours. Mr Fulton asked him who "we" referred to. Mr Flavell replied that it was poor language used late at night 10 years ago. He stated that it was typical of JF and SF to complain but not actually take any action. Mr Flavell wanted it out of his inbox. Mr Fulton put it to Mr Flavell that he had accepted an instruction to commence litigation. Mr Flavell told the Tribunal that he had not thought that JF and SF were serious about it and nothing had come of it.

58.17 Mr Fulton put to Mr Flavell that he was motivated to see the sale go through. Mr Flavell denied this. Mr Fulton suggested that in circumstances where JF was "on his knees" and where a way out was to sell the property, Mr Flavell had been motivated to see him sell as this would get JF off his back. Mr Flavell denied this. Mr Flavell accepted that JF was under financial pressures and wanted to sell.

58.18 Mr Fulton took Mr Flavell to the email of 7 July 2014 and asked if he recalled receiving it. Mr Flavell said he did so "vaguely". Mr Fulton put to Mr Flavell that the only way the property would have sold was if the truth was not revealed. Mr Flavell denied this. Mr Fulton asked Mr Flavell if he and his other brother had agreed to go for a quick sale. Mr Flavell told the Tribunal that this issue was not top of his list as he was dealing with family health issues at the time and was spending time out of the country.

58.19 Mr Fulton took Mr Flavell to an email dated 9 July 2014, sent to Mr Fulton by the estate agent, which contained the following passage:

> "I also wanted to inform you that Jeremy has informed me that his brother, Keith Flavel, will be acting as his solicitor. Keith is a partner at Harold Benjamin Solicitors in Middlesex."

58.20 Mr Flavell agreed that JF had said this, but told the Tribunal that it was "nonsense". Mr Flavell denied that he had been the matter partner. Mr Fulton took Mr Flavell to the metadata of the file opening processes. Mr Flavell agreed that it appeared that Ms Hansen had put his name in both the 'partner' and 'fee earner' box initially, before changing the 'fee earner' box to Ms Shah. The 'partner' box had not been changed throughout the life of the file. Mr Flavell maintained he had no involvement in this process and was not supervising Ms Shah – this was done by Mr Parikh. Mr Fulton put to Mr Flavell that he had been lying when he denied being the matter partner. Mr Flavell denied this.

58.21 Mr Fulton referred to an email from Mr Flavell to the estate agents dated 28 November 2014 regarding the completion of the sale. Mr Flavell told the Tribunal that JF was probably pestering him and he wanted it off his desk. Mr Fulton referred to an email dated 1 December 2014 from JF to Mr Flavell which began:

> "Keith
> As discussed earlier, many thanks for all of your and Milli's help and assistance with regards to process of [No 1] sale and achieving the completion today."

58.22 Mr Fulton asked Mr Flavell what JF was thanking him for. Mr Flavell told the Tribunal that JF was thanking him for his help with the "generality of him selling the property". Mr Flavell accepted that he had involvement post-completion.

58.23 Mr Flavell denied lacking integrity and denied acting dishonestly. He denied that he knew that false information had been given to the buyers.

58.24 In relation to the correspondence with the SRA, Mr Fulton asked Mr Flavell if he had seen or approved Ms Vincent's email to the SRA dated 7 November 2017. Mr Flavell stated that he had not. He accepted that it was likely that it had been drafted on instructions he had provided as to the factual background. Mr Fulton put to Mr Flavell that it was misleading for the SRA not to have been told that he had been entered as the partner. Mr Flavell denied this. Mr Flavell denied any deliberate strategy to mislead the SRA when Harold Benjamin had stated that they had not considered there to be disputes with the neighbours. Mr Fulton put to Mr Flavell that he had sought to minimise his involvement and had encouraged Ms Vincent to give a misleading impression to the SRA. Mr Flavell denied this. He further denied that he had sought to withhold his

financial interest in the sale and stated that he was not concerned if the loans to JF had come to light.

59. Marina Vincent

59.1 Ms Vincent confirmed that her statement was true to the best of her knowledge and belief. She further confirmed that she considered her email to the SRA of 7 November 2017 to be entirely truthful. Mr Fulton asked Ms Vincent why she had not told the SRA that Mr Flavell had been designated the matter partner by the case management system. Ms Vincent told the Tribunal that she had made it clear that Ms Shah had been dealing with the matter and that it had not occurred to her to say that the system had designated Mr Flavell as the matter partner. The supervising partner was Mr Parikh – the case management system was inaccurate. Ms Vincent accepted that there was nothing on the file showing Mr Parikh's involvement but explained that this was because Ms Shah was experienced and did not require supervision from anyone.

59.2 Ms Vincent told the Tribunal that she had not looked at the ledger card and had not looked at the post-completion matters when she was reviewing the file. Mr Fulton asked Ms Vincent if Mr Flavell had encouraged her to tell the SRA that he had not been involved in the conveyancing and the day to day running of the file. Ms Vincent said he had not.

59.3 Mr Fulton put to Ms Vincent that it was misleading to tell the SRA that there had been no disputes when the head of disputes, Mr Mahoney, had sent out an engagement letter to JF and SF in 2013. Ms Vincent told the Tribunal that it was not misleading on the instructions they had at the time the SPIF was completed. If it was misleading it was not deliberately so. Ms Vincent denied that Mr Flavell had given misleading information to her.

60. Vijay Parikh

60.1 Mr Parikh confirmed that his witness statements were true to the best of his knowledge and belief.

60.2 Mr Parikh told the Tribunal that he stood by his assessment that Mr Flavell had done nothing wrong. Mr Fulton put to him that he knew perfectly well that Mr Flavell had let himself down and fallen short of his obligations. Mr Parikh replied that he stood by his statement and that it was a matter for the Tribunal to decide.

Findings of Fact and Law

61. The Applicant was required by Rule 5 of The Solicitors (Disciplinary Proceedings) Rules 2019 to prove the allegations to the standard applicable in civil proceedings (on the balance of probabilities). All references in this judgement apply that standard. 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 Flavell's rights to a fair trial 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.

62. **Allegation 1**

Applicant's Submissions

62.1 Mr Fulton made submissions on the alleged breaches of the Principles, before turning to the facts. These submissions were contained in his Skelton Argument and in oral submissions to the Tribunal and are summarised below.

62.2 Mr Fulton submitted that the case against Mr Flavell was simple. As a result of Mr Flavell's knowledge of highly material facts, he had been under a professional duty to ensure that if the firm was to act on the sale, then the purchasers would not be misled about those facts. Mr Fulton submitted that individually and cumulatively, Mr Flavell's duties of integrity, independence and maintaining public trust in the provision of legal services required him to insist upon proper disclosure of the known neighbour history. Mr Fulton submitted that Mr Flavell had fallen short of these ethical standards.

62.3 Mr Fulton submitted that Mr Flavell had suggested answers on the SPIF which he knew to be incomplete and misleading.

62.4 Mr Fulton submitted that Mr Flavell's actions lacked integrity. He referred to Wingate and Evans v SRA and SRA v Malins [2018] EWCA Civ 366. He submitted that "there is not a shred of evidence of him [Mr Flavell] having made that clear to anyone else, least of all the Applicants who relied upon the contents of a form which bore KF's name and partner reference on its front page" that the SPIF was incomplete.

62.5 Mr Fulton noted that Mr Flavell had been copied to emails which attached the final version of the SPIF and would have seen that that nothing had been added to his suggestions. Mr Fulton submitted that the argument by Mr Flavell that it was up to JF/SF to disclose the truth of the matter was a misunderstanding of his own duties.

62.6 Mr Fulton invited the Tribunal to infer that not telling Ms Shah of the disputes and complaints was a calculated strategy to ensure that the person tasked with conduct of the matter did not have this knowledge of those matters.

62.7 Mr Fulton made submissions on the concept of a "half-truth" and referred to Smith New Court Securities v Citibank [1997] AC 254. Mr Fulton submitted that the description of hedge incident was an example of this. It was true that the neighbour had complained about the hedge being trimmed, but it was "profoundly and grossly misleading" as it was the coming to a head of an ongoing dispute. Mr Fulton submitted that the answer on the SPIF did not begin to capture full drama of that incident or follow up correspondence. It had the effect of reassuring the vendor and was a deceitful half-truth. Mr Fulton submitted that a statement can be literally true but also be misleading and deceitful due to omission of related facts or material.

62.8 Mr Fulton made submissions as to the importance of SPIFs in general. He referred the Tribunal to McMeekin v Long [2002] WL 32092847 and Doe v Skegg [2006] EWHC 3746 (Ch) in this regard.

62.9 Mr Fulton further submitted that there was a duty of honesty on Mr Flavell. He could not continue to act where there was a danger that the other party was in danger of being misled. He referred the Tribunal to Frank Houlgate v Biggart Baillie [2012] P.N.L.R. 2 at [31] which stated:

> "31 For present purposes, the more important part of the passage quoted above is that in which, having said that, once he becomes aware of some fact pointing to there having been a fraud committed on the other party to the transaction, the solicitor should refuse to act further in that transaction, Lord Drummond Young suggests that: "In some cases the duty may go further, and require that the solicitor disclose the fraud to the other party". I am persuaded that this is correct, at least where the solicitors have, albeit innocently, played a part in the perpetration of the fraud. The policy considerations which militate against the imposition of a duty of care owed personally by a solicitor (as opposed to his principal) to the other party to the transaction to take reasonable care as to the accuracy of information given to that other party, do not come into play in these altered circumstances. In Primosso Holdings Ltd v Alpers [2006]2 N.Z.L.R. 455, to which Lord Drummond Young referred in [14] of his Opinion, the New Zealand Court of Appeal, though they ultimately did not have to decide the point, expressed their reluctance to accept the proposition that a solicitor acting for a client in a transaction was under a duty of care to the other party "to take reasonable steps to be satisfied that the client is not using the solicitor to facilitate the deceit of such other party." I agree with that view. But, as Lord Drummond Young pointed out, the Court of Appeal in that case allowed proceedings to be brought in deceit. That supported the proposition that although a solicitor acting for his client does not normally owe a duty of care to the other party to the transaction, he does owe him a duty of honesty."

62.10 Mr Fulton submitted that Houlgate was authority for the submission that continuing to act where purchasers were being misled was objectively dishonest. Mr Fulton submitted this was a complete answer to the submission by Mr Flavell that he did not owe such a duty.

62.11 In relation to dishonesty, Mr Fulton relied on the test set out in Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67.

62.12 Turning to Mr Fulton's submission as to the facts, Mr Fulton described the correspondence from the neighbours in 2012 as "strikingly hostile and abusive". Mr Fulton submitted that the reply to the correspondence drafted by Mr Flavell was at odds with his case that the issues were caused by JF's behaviour. Mr Fulton told the Tribunal that this was precisely the sort of information that any purchaser would want to know about. He submitted that any prospective purchaser would be "horrified" to read this correspondence. However there had been no mention of this in the SPIF. Mr Fulton noted that the 2012 incident did not involve the hedge. He submitted that by the end of 2013 the other disputes were sufficiently serious to be included in the contemplated litigation. Mr Fulton referred to the Particulars of Claim in the Applicants' civil claim against the neighbours and submitted that the Applicants had had to address the same issues as Mr Flavell had had to address on behalf of JF/SF.

62.13 Mr Fulton submitted that Mr Flavell's position was "utterly hopeless" even without the issue of the Police attending the hedge incident in 2013, having regard to the Klargester and driveway issues. In respect of the Klargester, there was no evidence of that issue having been resolved.

Respondent's Submissions

62.14 Mr Bacon's submissions were contained in his skeleton argument and in his oral submissions in closing. They are summarised below.

62.15 Mr Bacon largely did not take issue with the law as set out by Mr Fulton. In relation to Doe v Skegg, Mr Bacon submitted that this was relevant to what a seller was required to disclose in a SPIF and so that was applicable to JF. It was of no relevance to the position of a solicitor informally helping his brother at the very outset of the transaction.

62.16 Mr Bacon submitted that this was an unusual case, in that the Applicants had not given evidence and so had not been subject to the scrutiny they might have been. He invited the Tribunal to give due weight to the Applicant's case.

62.17 Mr Bacon submitted that as a litigant in person, Mr Fulton had allowed "passionate beliefs" to "distort an objective apprehension of the facts". Mr Bacon submitted that Mr Fulton had lost perspective and objectivity.

62.18 Mr Bacon noted that Mr Fulton had denied pursing the case as some sort of vendetta, but submitted that this was not how it felt to Mr Flavell. He suggested that Mr Fulton had become consumed by "conspiracy theories" involving lawyers and clients deliberately preparing misleading information about the history of neighbour disputes. Mr Bacon submitted that such theories had not been proved.

62.19 Mr Bacon submitted that Mr Flavell had been subject to sustained and aggressive questioning from Mr Fulton. Mr Flavell was a decent, honest and fair person who was "plainly suffering from the onslaught" over the last decade. Mr Bacon submitted that Mr Flavell had been an honest witness who had given fair answers to questions put to him.

62.20 Mr Bacon submitted that there was never aby proper basis for the allegation to have been brought that Mr Flavell had encouraged JF to lie. There was no evidence of any encouragement on the part of Mr Flavell to JF to lie, either directly or indirectly. Mr Bacon submitted that 'encourage' meant "positively persuading someone to do something". There was no evidence of any such agreement. The suggestions on the SPIF were just that – it was not a mandate to use the words at all. The "scribbled" words were for JF/SF to consider. It was a working document.

62.21 After that, Mr Flavell had no further role in the conveyancing, which was handled by Ms Shah. Mr Bacon submitted that the suggestion that Mr Flavell had facilitated a fraud was "complete nonsense". Mr Bacon reminded the Tribunal that Mr Flavell had denied any financial pressure to act as alleged.

62.22 Mr Bacon invited the Tribunal to look at the SPIF suggestions in its proper context. Mr Flavell had not been advising a client on how to complete the form. He knew the draft would go to a conveyancing solicitor and supervising partner and he had no idea what the final version would look like. The contents of what he did write were not known to be false based on his knowledge at the time. Mr Bacon submitted that Mr Fulton had sought to overlay Mr Flavell's actual knowledge with matters that came to light subsequently. Mr Flavell had not been involved in any of the enquiries that followed. He had been "irritatingly" copied into emails from JF sometimes, but had not responded to them. Mr Bacons submitted that if Mr Flavell was a fraudster, he would be "all over the form" and involved in the whole transaction. He submitted that the case as pleaded made no sense. Mr Flavell had been a solicitor for 30 years and lying would have been ruinous to him. Mr Flavell had got himself into this position because he was trying to help.

62.23 Mr Bacon denied that the words that were incomplete on the form were misleading or amounting to a half-truth. Mr Flavell had accepted the wording was "clumsy" but it was not his intention that they would end up in the final version. Mr Bacon reminded the Tribunal that the email referring to disputes dated 7 July 2014 was left on the file, which he submitted was inconsistent with the actions of a fraudster.

62.24 Mr Bacon submitted that there had been no lack of independence on the part of Mr Flavell. He had acted completely appropriately by handing over conduct of the matter to Ms Shah and having no further role. Mr Bacon submitted that this was a mark of integrity, not lack of it.

62.25 In conclusion, Mr Bacon submitted that Mr Flavell had not had carriage of the SPIF, had not seen it when it was sent, did not have day to day conduct of the progression of the matter, was not the supervising partner and was not involved the responses to enquiries. Mr Bacon submitted that the Tribunal should dismiss this Allegation for lack of evidence.

The Tribunal's Findings

Allegation 1(b)

62.26 The Tribunal began by considering Allegation 1(b), on this basis that this was more narrowly drafted than 1(a). The allegation of 'encouragement to lie' was predicated on a finding in connection with the SPIF. It was therefore logical to determine if the allegation relating to the SPIF was made out, before moving on to the question of encouragement to lie.

62.27 The Tribunal found it helpful to identify what might amount to "suggestions" in this context. It was not in dispute that Mr Flavell had written on the form. What was in dispute was whether what he wrote amounted to suggestions to JF and SF and, if so, whether he knew them to be false and misleading.

62.28 In defining the term "suggestion", the Tribunal decided that a suggestion in this context connoted an intention or recommendation that the words written would be used in the final form. There would be no other purpose in writing words on the form unless it was

intended that those asking for advice considered adopting those words in the final version.

62.29 In this case, JF and SF had asked Mr Flavell, in terms, for advice in how to complete the SPIF as set out in his email of 30 July 2014. Having been asked for advice in how to answer the highlighted questions on the SPIF, the only plausible explanation was that Mr Flavell was responding to that request for advice by giving advice in the form of suggestion(s). The Tribunal therefore rejected Mr Flavell's evidence that he had no intention that this would be relied on by JF and SF. The whole purpose of the advice sought by JF and SF was so that they could rely on it. Their request for advice had to be viewed in the context of the sentiments expressed in the email of 7 July 2014.

62.30 The next question was whether what Mr Flavell wrote on the SPIF was false and misleading.

62.31 In the 'Instructions to Seller' notes on the SPIF, the importance of accurate answers is clearly referred to. There was no ambiguity about what was required, as was clear from Astill J in McMeekin v Long.

> "The Seller's Property Information Form could not be expressed in clearer language. It is not a lawyer's form, but one which is designed for everyone to be able to understand. There could be no confusion or misunderstanding about either the question, "Do you know of any disputes about this or any neighbouring property?" and, "Have you received any complaints about anything you have or have not done as owners?"

62.32 Question 2.1 read (emphasis added) "Have there been any disputes or complaints regarding this property or a property nearby? If Yes, please give details". This was a broadly worded question and one which, in this case, clearly called for disclosure of the hedge issue, the driveway issue and the Klargester issue. It was plain from the correspondence between JF/SF and the neighbours that, at the very least, these were complaints about each other's attitude towards these matters. The correspondence had been ill-tempered and hostile. The hedge issue had led to the Police being called and the neighbour being briefly arrested and the issues taken together had formed the basis of planned litigation against the neighbours. It was irrelevant who was to blame in each of these disputes – the fact is they fell squarely within the definition of "disputes and complaints" that the SPIF asked about. It was also irrelevant that they were not ongoing – the question on the SPIF was not limited to current disputes or complaints and indeed referred to there having "been" such issues – clearly indicating the past tense.

62.33 Question 2.2 asked for details of anything that might lead to a dispute about the property. It was clear that, there having been disputes which had not been resolved in anything approaching a permanent way, there was an obvious risk that at least one of them might flare up in the future. Even if, as Mr Flavell had suggested, JF/SF had been the antagonists in the previous disputes, it did not follow that this was a proper basis for answering 'No'. The core of the disputes was not about the conduct of the protagonists but about matters that had the potential to be ongoing issues – as indeed happened. There was always going to be a need to reach agreement over all these areas of dispute as they related to issues of access to the properties and essential services.

62.34 The reference to the hedge in the SPIF disclosed only a fraction of the extent of that dispute and there was no reference to the driveway or Klargester issues. In circumstances where full transparency was required, to answer questions in such a selective and incomplete way was not only misleading but made the answers themselves false. The result of answering in this way created a false impression as to the existence, nature and extent of any previous issues and as to the potential (or lack of it) in relation to future disputes.

62.35 Mr Flavell himself had agreed in his evidence that the wording he used amounted to a half-truth, but he denied it was misleading or false. The concept of a half-truth was dealt with in Smith New Court Securities v Citibank by Lord Steyn;.

> "It has rightly been said that a cocktail of truth, falsity and evasion is a more powerful instrument of deception that undiluted falsehood."

62.36 The Tribunal was satisfied on the balance of probabilities that the answers suggested on the SPIF to Questions 2.1 and 2.1 were false and misleading.

62.37 The next question was whether Mr Flavell knew at the time he made those suggestions that they were false and misleading.

62.38 The Tribunal had seen numerous emails passing between Mr Flavell and JF/SF which would have given him detailed knowledge of the disputes and certainly knowledge of their existence. On 11 December 2012 Mr Flavell had drafted a response to the neighbours for use by JF/SF in response to the neighbours' letter of 7 November 2012. This was just over 18 months before the existence of the SPIF. That correspondence had referred to the Klargester and the driveway disputes.

62.39 On 22 October 2013, the email to Mr Flavell had referred to the Klargester issues and the other two matters in the context of contemplated litigation. Mr Flavell had clearly seen that email as he replied to it. This was less than a year before the existence of the SPIF.

62.40 The Tribunal took into account that Mr Flavell was dealing with deeply distressing issues in his personal life that, understandably, occupied much of his time. There was, however, no suggestion from anyone that Mr Flavell had been unable to discharge his professional duties in all other aspects of his work to a high standard.

62.41 On 7 July 2014 Mr Flavell had received the email from JF in which the existence of disputes was referred to in terms; "…and the issues of historical neighbourly disputes become possibly known also!!! Fingers crossed." This was approximately three weeks before he was asked by JF to give him advice, on 30 July 2014. The Tribunal found that it was inconceivable that Mr Flavell could not have been aware of those disputes when he made the suggestions on the SPIF.

62.42 Mr Flavell's own evidence on this point was contradictory. In his Answer, Mr Flavell stated that JF had told him that the issue of the Klargester had been resolved. This in itself was evidence that Mr Flavell knew that there had been a dispute about the Klargester. In his oral evidence to the Tribunal, Mr Flavell said he did not recall a conversation about the Klargester. More generally, Mr Flavell's defence was, at times,

that he did not consider there to be anything wrong with the words he had written on the form, while also seeking to advance the argument that he had no intention that they would be relied upon. He also emphasised that the responsibility lay with JF/SF and not with him.

62.43 The Tribunal was satisfied on the balance of probabilities, based on the contemporaneous documentation, that Mr Flavell was aware, at the time he made the suggestions, that those suggestions were false and misleading. As found at the start of the Tribunal's consideration of this Allegation, the intention of providing the false and misleading suggestions was that they would be relied on by JF/SF in the sale. The context for this was clearly provided by the email of 7 July 2014 and 30 July 2014.

62.44 The Tribunal found the factual basis of Allegation 1(b) proved on the balance of probabilities.

Allegation 1(a)

62.45 The Tribunal having made the finding it had in relation to Allegation 1(b), it returned to 1(a). The Tribunal found it necessary to define the terms "suggestions" in this context. The Tribunal defined this as acts or omissions that give indication that a course of conduct is acceptable or suggested.

62.46 The next question was whether Mr Flavell had encouraged JF to lie about the history of complaints or disputes. The Tribunal's analysis set out in relation to 1(b) is not repeated. It was sufficient to summarise the position as being that Mr Flavell had been asked for advice about the completion of the SPIF and he provided that advice. As the Tribunal had found, it was intended that the suggestions would be relied upon as otherwise there was no point in providing them. The Tribunal had found that the suggestions were false and misleading and Mr Flavell knew them to be so at the time he made them. It followed that Mr Flavell had encouraged JF to lie as he had knowingly provided false and misleading suggestions with the intention that JF adopted them. If JF adopted them, as he did, then this would involve providing false and misleading information to the purchasers. The Tribunal found that a statement which was knowingly 'false and misleading' was synonymous with a 'lie'. The Tribunal was satisfied on the balance of probabilities that Mr Flavell had encouraged JF to lie on the basis that he had done an act (made suggestions) that indicated that a course of conduct (adopting those suggestions) was acceptable.

62.47 The Tribunal found Allegation 1(a) proved on the balance of probabilities.

Allegation 1(c)

62.48 The conveyancing was primarily handled by Ms Shah. The first question for the Tribunal was whether Mr Flavell and made his colleagues aware of the history of complaints and disputes and the associated correspondence. It was clear that he had not done so. No witnesses gave evidence that Ms Shah had been made aware. Mr Flavell had given evidence in which he had confirmed that he had not given this material to his conveyancing colleagues, telling the Tribunal that, in his view, the duty to do so lay with JF/SF. This demonstrated that not only had he not provided the information and material to Ms Shah, but that it was a conscious decision.

62.49 The next question was whether Mr Flavell's failure to make his conveyancing colleagues aware of the disputes and correspondence was deliberate. As noted above, Mr Flavell had taken the view, according to him, that it was the responsibility of JF/SF to provide this information to Ms Shah. The Tribunal also had regard to the context in which this failure took place, which was the email of 7 July 2014 and his actions in relation to the SPIF as detailed in Allegations 1(a) and (b). Mr Flavell had been copied into a number of emails throughout the conveyancing process and so would have known that his conveyancing colleagues remained unaware of these matters. Had the omission been inadvertent then Mr Flavell had a number of opportunities to correct the position. The Tribunal was satisfied on the balance of probabilities that Mr Flavell had taken a conscious and deliberate decision not to bring these issues and the associated correspondence to his conveyancing colleagues' attention.

62.50 Mr and Mrs Fulton had clearly been misled: this was reflected in the settlement for a significant sum in the civil proceedings against Harold Benjamin. Mr Flavell had clearly caused them to be misled as the deliberate failure to disclose the information and material to his conveyancing colleagues inevitably meant that the Fultons were given misleading information.

62.51 The Tribunal found the factual basis of Allegation 1(c) proved on the balance of probabilities.

Allegation 1(d)

62.52 Mr Flavell was the Managing Partner of Harold Benjamin at the material time. It was open to him at any stage to have said to his conveyancing colleagues that the firm should cease acting for JF/SF. The firm continued to act throughout the conveyancing process.

62.53 The Tribunal had already made findings about Mr Flavell's role in the SPIF, the encouragement to lie and the non-disclosure of the disputes and correspondence to his conveyancing colleagues. In each case, the Tribunal and found Mr Flavell's actions to be deliberate. It followed that Mr Flavell had known the Fultons were being misled and had permitted Harold Benjamin to continue to act, in that knowledge.

62.54 The Tribunal found the factual basis of Allegation 1(d) proved on the balance of probabilities.

62.55 Having made its factual findings in relation to the four limbs of Allegation 1, the Tribunal considered the alleged breaches of the Principles and dishonesty.

Principle 2

62.56 In determining whether Mr Flavell had lacked integrity, the Tribunal applied the test set out in Wingate and Evans v SRA and SRA v Malins [2018] EWCA Civ 366. At [100] Jackson LJ had stated:

> "Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. To take one example, a solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead. Such a professional person is

expected to be even more scrupulous about accuracy than a member of the general public in daily discourse".

62.57 At [101] some examples were given:

> "101
> The duty to act with integrity applies not only to what professional persons say, but also to what they do. It is possible to give many illustrations of what constitutes acting without integrity. For example, in the case of solicitors:
>
> (i) A sole practice giving the appearance of being a partnership and F deliberately flouting the conduct rules: the Emeana case [2014] ACD 14.
>
> (ii) Recklessly, but not dishonestly, allowing a court to be misled: the Brett case [2015] PNLR 2.
>
> (iii) Subordinating the interests of the clients to the solicitors' own financial interests: the Chan case [2015] EWHC 2659 (Admin).
>
> (iv) Making improper payments out of the client account: the Scott case G [2016] EWHC 1256 (Admin),
>
> (v) Allowing the firm to become involved in conveyancing transactions which bear the hallmarks of mortgage fraud (the Newell-Austin case [2017] Med LR 194.
> (vi) Making false representations on behalf of the client: the Williams case [2017] EWHC 1478 (Admin)."

62.58 The requirement for scrupulous accuracy was clearly engaged in this case. Mr Flavell had not just failed to be scrupulously accurate, he had encouraged JF and SF to lie and had made suggestions to them which involved making false and misleading representations to the Fultons. Mr Flavell had further allowed his firm to continue to act in the transaction, knowing that he had deliberately not disclosed the disputes to his conveyancing colleagues and knowing that the Fultons were being misled. Mr Flavell had done this because he knew that the sale may not have gone through if the Fultons knew the full picture of this historic disputes.

62.59 The Tribunal accepted evidence relating to Mr Flavell's character. The Tribunal did not doubt that, in general, Mr Flavell was someone of integrity and honesty. He was clearly a valued and respected colleague who had done much for the firm and, in his personal capacity, for the community. Regrettably, however, in this instance Mr Flavell had succumbed to the urge to help his brother achieve the sale of a property that was causing considerable angst within the family and annoyance to Mr Flavell. The Tribunal did not find that Mr Flavell was motivated by the anticipated repayment of the £5,000 loan, or any other financial consideration related to him personally. There was no evidence that Mr Flavell was in financial distress himself. Mr Flavell gave evidence that the sum involved was not significant given his income and other resources at the time. Mr Flavell repeatedly told the Tribunal that he found JF to be a nuisance, but that he still felt some fraternal obligation to help JF. The desire to see the sale go through, with all the help that would bring to JF, was the significant factor and it led Mr Flavell to act

in a way that was out of character for him, but nevertheless lacked integrity. The Tribunal found this to be a clear example of a serious lack of integrity and it found the breach of Principle 2 proved on the balance of probabilities.

Principle 3

62.60 Mr Flavell's independence in this matter was clearly compromised by his relationship with his brother and his desire to help him out. In acting as he did, Mr Flavell had departed from his duties of objectivity and independence. He ought to have either ensured that there was transparency with the Fultons (or any other purchasers) or he ought to have arranged for Harold Benjamin to cease acting for JF/SF. Instead, he engaged on the course of conduct set out in the Tribunal's factual findings above. The Tribunal found the breach of Principle 3 proved.

Principle 6

62.61 The Tribunal's findings above were such that it was inevitable that the trust the public placed in Mr Flavell and in the provision of legal services was diminished by his conduct. The public would not expect a solicitor to help his brother in a sale by encouraging him to lie and by taking actions to back that lie up. The Tribunal found the breach of Principle 6 proved on the balance of probabilities.

Dishonesty

62.62 The Tribunal moved on to consider the allegation of dishonesty as it related to Allegation 1.

62.63 The test for considering the question of dishonesty was that set out in Ivey at [74] as follows:

> "the test of dishonesty is as set out by Lord Nicholls in Royal Brunei Airlines Sdn Bhd v Tan and by Lord Hoffmann in Barlow Clowes: ….. 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 knowledgeable 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."

62.64 The Tribunal applied the test in Ivey and in doing so, when considering the issue of dishonesty adopted the following approach:

- Firstly, the Tribunal established the actual state of Mr Flavell's knowledge or belief as to the facts at the time of the events in question, noting that the belief did not have to be reasonable, merely that it had to be genuinely held.

- Secondly, once that was established, the Tribunal then considered whether that conduct was honest or dishonest by the standards of ordinary decent people.

62.65 The Tribunal had made a number of findings as to Mr Flavell's state of knowledge in its reasoning in relation to Allegations 1(a)-(d) above. Those are not repeated here.

62.66 In summary, Mr Flavell had known of the complaints and disputes, he knew that JF and SF were keen to sell and that they were keen for the history of complaints and disputes not to get in the way of that. Mr Flavell was aware that his suggestions on the SPIF were false and misleading and that he had encouraged JF to lie to the purchasers. What then followed was consistent with that intention. Mr Flavell knew that if he disclosed the disputes and associated correspondence to his conveyancing colleagues, they would be under a professional duty to either disclose the same to the purchasers or withdraw. Either of those outcomes would jeopardise the sale, something that Mr Flavell would have been aware of. In his evidence he had not disagreed with the suggestion that disclosure of those matters would have potentially undermined the chances of the property selling. Mr Flavell was therefore aware that Harold Benjamin was continuing to act in the knowledge that the purchasers were being misled.

62.67 The Tribunal was satisfied on the balance of probabilities that Mr Flavell's actions in each of the particularised stages under Allegation 1 would be considered dishonest by the standards of ordinary decent people. The Tribunal therefore found the allegation of dishonesty proved.

63. **Allegation 2**

Applicant's Submissions

63.1 Mr Fulton submitted that Mr Flavell had been the matter partner and this was something that was not made clear to the SRA. Further, the SRA were not made aware of the pressure on JF to sell the property. Mr Fulton took the Tribunal to the relevant correspondence, which is set out above, in the factual background. Mr Fulton had also put his case clearly in his cross-examination of the witnesses.

Respondent's Submissions

63.2 Mr Bacon invited the Tribunal to accept the evidence of Ms Vincent, which he submitted was compelling and had not been contradicted. Mr Bacon submitted that her evidence had been so compelling that Mr Fulton had withdrawn a "large part of his case" at the conclusion of the evidence. This was a reference to the application to amend the Rule 12 Statement. Despite this, Mr Bacon submitted that Mr Fulton had maintained his position that Mr Flavell had caused Harold Benjamin to deny his involvement in the matter. Mr Bacon submitted this was not credible and that the Allegation ought to be dismissed.

63.3 In relation to the financial interest, Mr Bacon told the Tribunal that the ledgers were provided to the SRA and so this would have been clear to it. Mr Bacon submitted that the idea that Mr Flavell had a financial interest was overstating the fact that he had lent some money to JF.

The Tribunal's findings

63.4 This Allegation was in two parts. The first related to causing Harold Benjamin to deny any involvement in the transaction or in day to day running of the file or transaction. The second related to Mr Flavell failing to tell the SRA that he had a financial interest in the transaction.

63.5 The Tribunal began by defining the terms "any involvement" and "day to day running" in this context. There was no doubt that the firm's case management system recorded Mr Flavell as the matter partner. Although great emphasis was placed on this by Mr Fulton, in reality this was not significant. Case management systems are not infallible and rely on someone entering the data correctly and then making changes when circumstances required. The Tribunal accepted the evidence from Ms Vincent that Ms Shah had conduct of the matter and she was supervised by Mr Parikh. However, the Tribunal did find that Mr Flavell had involvement in the matter. His involvement was he had introduced JF and SF as clients to the firm. He had forwarded correspondence from JF/SF from time to time to his colleagues and he had become involved in the SPIF form in the way the Tribunal had found in relation to Allegation 1. Finally, he had been involved in deal with post-completion matters.

63.6 The Tribunal did not find that this level of involvement rose to the level of "day to day" running of the file or transaction.

63.7 The next question for the Tribunal was whether Mr Flavell had caused Harold Benjamin to deny his involvement in the transaction. The relevant correspondence between the firm and the SRA is set out above under the factual background. The firm gave information as to some of Mr Flavell's involvement, but not the full extent or nature of it. Mr Flavell had told the Tribunal in his evidence that the response to the SRA prepared by Ms Vincent was likely drafted based on instructions taken from him as to the factual background. This was logical as that would be a usual step to take in such circumstances. The nature of the involvement in the SPIF was not as described in the response to the SRA. Ms Vincent could only have got that account of matters from Mr Flavell. In reality the extent of Mr Flavell's involvement in the SPIF was as found by the Tribunal in relation to Allegations 1. The Tribunal was satisfied on the balance of probabilities that Mr Flavell had caused the firm to deny the full extent of his involvement in the conveyancing transaction. The Tribunal found this element of Allegation 2 proved.

63.8 The Tribunal considered the next question of whether Mr Flavell had a financial interest in the transaction. The Tribunal noted that Mr Flavell was owed £5,000 that he had lent to JF. The loan was not formally contingent on the sale, although JF had indicated that the monies would be repaid once the sale took place. To that extent, Mr Flavell did have a financial interest in the sale, though as noted under Allegation 1 when considering Principle 2, this was not the motivating factor behind Mr Flavell's conduct.

63.9 The Tribunal found that Mr Flavell had not been asked a question about any financial interest by the SRA and nor had Harold Benjamin. The Tribunal was therefore not satisfied on the balance of probabilities that Mr Flavell was under a duty to explain about the £5,000 to the SRA. The Tribunal found this element of Allegation 2 not proved.

63.10 The Tribunal moved on to consider the breaches of Principle 7, Outcome 10.6 and the allegation of dishonesty in relation to the element of Allegation 2 that had been proved.

Principle 7 and Outcome 10.6

63.11 The Tribunal found these to have been breached based on its factual findings set out above.

Dishonesty

63.12 The Tribunal again applied the Ivey test in considering this allegation. In considering Mr Flavell's state of knowledge as to the nature and extent of his involvement in the conveyancing transaction, this is largely covered by the Tribunal's findings in relation to Allegations 1. Mr Flavell knew of the extent of his involvement when he provided Ms Vincent with the factual information she needed in order to respond to the SRA. He was also aware of the reason that she was asking for that information, namely a response to his regulator. Mr Flavell would have known the importance of full co-operation with the SRA as being a key part of his duties as a solicitor.

63.13 The Tribunal was satisfied on the balance of probabilities that Mr Flavell's conduct in this regard would be considered dishonest by the standards of ordinary decent people, and it found this allegation proved.

Allegation 3

Applicant's Submissions

63.14 Mr Fulton submitted that Harold Benjamin had taken a stance in the civil litigation in responses signed by Mr Flavell. Mr Fulton accepted that Allegation 3 was parasitic on findings made in relation to Allegation 1.

63.15 Mr Fulton took the Tribunal to the relevant pleadings, which are set out above, in the factual background. Mr Fulton had also put his case clearly in his cross-examination of the witnesses.

Respondent's Submissions

63.16 Mr Bacon agreed that this Allegation was parasitic on Allegation 1, but he questioned the legitimacy of a "prosecutor trying to tag on a limb when it adds nothing".

63.17 Mr Bacon submitted that Mr Flavell's evidence on this point was never tested. The civil litigation had been abandoned or settled depending on who's perspective was adopted. In any event it was not pursued to trial and there were no findings by a Court. Mr Bacon questioned if it was in the public interest to pursue the matter.

The Tribunal's Findings

Allegation 3(a)

63.18 This Allegation was predicated on the Tribunal having made findings of dishonesty in relation to Allegation 1. In the civil proceedings, Mr Flavell had denied he was dishonest in relation to the SPIF. The Tribunal had found that he had been dishonest in relation to the SPIF and it therefore followed that his denial of that dishonesty was untrue. The test for dishonesty was ultimately an objective one, the knowledge and belief as to the facts being a subjective assessment. The Tribunal had found, however, that Mr Flavell knew that he was making false and misleading suggestions as part of an encouragement to lie to the purchasers of No 1. It followed from that finding that Mr Flavell had known he was acting dishonesty and that, when he denied that dishonesty, he did so knowing that denial to be false. The Tribunal found the factual basis of Allegation 3(a) proved on the balance of probabilities.

Allegation 3(b)

63.19 There were two aspects to this Allegation. There was the denial of a motive for dishonesty, which the Tribunal took to be the original dishonesty in completing the SPIF, and there was reference to what the alleged motive was – namely financial. Mr Flavell had clearly denied that he had a motive to be dishonest. The Tribunal had already found that Mr Flavell did have a motive to be dishonest, but that it was not a financial one.

63.20 To that extent, Mr Flavell's denial of a motive was false. The motive for denying dishonesty in the civil proceedings was in order to conceal his original dishonesty in relation to the SPIF.

63.21 The Tribunal found Allegation 3(b) proved on the balance of probabilities to that extent.

63.22 The Tribunal moved on to consider the breaches of Principles 1, 2 and 6, Outcomes 5.1 and 5.4 and the allegation of dishonesty in relation to the element of Allegation 3 that had been proved.

Principle 1

63.23 The denials of dishonesty had been made in formal pleadings in the context of civil proceedings. The documents, which contained a statement of truth, had been signed and/or approved by Mr Flavell personally in his capacity as Managing Partner at the time. The Tribunal was satisfied on the balance of probabilities that this represented a breach of the requirement to uphold the rule of law and the administration of justice and the breach of Principle 1 was therefore proved.

Principles 2 and 6

63.24 It clearly followed from the Tribunal's findings that Mr Flavell had lacked integrity in making false denials in the course of civil litigation. Further, this would inevitably undermine the trust the public placed in Mr Flavell and in the profession. The Tribunal found the breaches of Principles 2 and 6 proved.

Outcome 5.1

63.25 This Outcome was proved on the basis of the Tribunal's findings as set out above. The signing of the pleadings was clearly designed to mislead the Court as they were signed in the context of ongoing litigation which could have resulted in contested hearing.

Outcome 5.4

63.26 This Outcome referred specifically to contempt of Court. This Tribunal gave this outcome a particular, narrower meaning, which tended to involve a specific obligation to the Court, often set out in a specific order. No such order had been made in this case. In those circumstances the Tribunal was not satisfied on the balance of probabilities that the breach of Outcome 5.4 was proved.

Dishonesty

63.27 The Tribunal had analysed Mr Flavell's state of knowledge extensively when considering Allegation 1. There was no need to repeat that analysis here. It was sufficient to conclude that the Tribunal found that Mr Flavell was aware of his own dishonesty at the time he denied it. That would clearly be considered dishonest by the standards of ordinary decent people and so this part of the allegation was proved on the balance of probabilities.

Previous Disciplinary Matters

64. There were no previous findings at the Tribunal.

Mitigation

65. Mr Bacon told the Tribunal that the Tribunal's findings had come as a "real shock" to Mr Flavell, who was in despair. Mr Bacon told the Tribunal that he recognised the seriousness of the findings.

66. Mr Bacon submitted that it was clear from the evidence how Mr Flavell had got himself into a "pickle". He was not driven by any intention to line his pockets of offender, quite the contrary. Mr Bacon invited the Tribunal to draw a distinction between this and a case where a solicitor was motivated by personal gain.

67. Mr Bacon referred the Tribunal to Mr Flavell's Answer in which he had expressed his genuine sorrow for the situation the Fultons had found themselves in. That said, the way the case had been brought had created a heavy burden. Mr Bacon submitted that the aggressiveness in correspondence had had an effect on Mr Flavell.

68. Mr Flavell's wife and daughter had been seriously ill and Mr Flavell's own mental health had suffered. He had stood down early from Harold Bemjamin to ensure the firm was not impacted – a firm he had done much for and loved dearly. Socially, Mr Flavell had become more reclusive.

69. Mr Flavell had done much charity work and this was reflected in the character references already noted above. Mr Flavell was not a dishonest man but one of real integrity. In one short moment he had caused himself to be before the Tribunal.

70. Mr Bacon submitted that there were exceptional circumstances in this matter and invited the Tribunal to impose a sanction that was the "least punitive" as possible and should not, therefore, involve a strike-off. Mr Bacon submitted that in this exceptional case, justice does not demand the usual consequences**.**

Sanction

71. The Tribunal had regard to the Guidance Note on Sanctions (June 2022). The Tribunal assessed the seriousness of the misconduct by considering Mr Flavell's culpability, the level of harm caused together with any aggravating or mitigating factors.

72. In considering culpability, the Tribunal had found Mr Flavell's motivation for the misconduct in relation Allegation 1 was to assist his brother in selling the property. The Tribunal had accepted that his motivation was not financial. The dishonesty in relation to the SRA and in the civil litigation was motivated by a desire to protect himself.

73. The misconduct was planned. This was not a 'spur of the moment' incident. Had it been so, there were ample opportunities for Mr Flavell to have changed course. He had not done so and had instead taken active steps to perpetuate and conceal his dishonesty.

74. Mr Flavell had direct responsibility for his actions. He was a vastly experienced solicitor who was in the role of Managing Partner at the material times. Mr Flavell's misconduct included misleading the regulator.

75. The Tribunal concluded that there was a high level of culpability.

76. In assessing the harm caused, the Tribunal recognised that there had been a significant impact on the Fultons' enjoyment of their property. The extent of the harm was reflected in the large settlement reached with Harold Benjamin. This harm was entirely foreseeable, indeed the whole reason behind concealing the disputes and complaints was that purchasers may be put off buying the property and finding themselves in the same position as JF/SF.

77. Mr Flavell's actions also had a negative impact on the firm, which had faced civil proceedings as a result of what had taken place.

78. The harm caused to the reputation of the profession by Mr Flavell's actions was significant. The public would not expect solicitors to encourage family members to lie and make suggestions as to how to do so.

79. The misconduct was aggravated by Mr Flavell's dishonesty, though this aspect had already been analysed in relation to harm and culpability and was not further applied as an additional factor, to avoid duplicity.

80. The misconduct continued over a period of time, starting with the SPIF and continuing through to the SRA correspondence and the civil litigation. There were distinct occasions of misconduct that were repeated and clearly deliberate. The misconduct included concealment and Mr Flavell knew that he was in material breach of his obligations, as evidenced by that concealment.

81. The Tribunal was unable to identify any mitigating factors other than personal mitigation. Mr Flavell had not shown insight, though he had expressed sorrow to the Fultons for the situation they ended up in.

82. The misconduct was so serious that a Reprimand, Fine or Restriction Order would not be a sufficient sanction to protect the public or the reputation of the profession. Coulson J in Solicitors Regulation Authority v Sharma [2010] EWHC 2022 Admin observed:

> "34. there is harm to the public every time a solicitor behaves dishonestly. It is in the public interest to ensure that, as it was put in Bolton, a solicitor can be "trusted to the ends of the earth"."

83. The Tribunal noted that the usual sanction where misconduct included dishonesty would be a strike-off and the Tribunal had regard to Sharma. The circumstances in which such a sanction was not imposed were exceptional, described in Sharma as "a small residual category where striking off will be a disproportionate sentence in all the circumstances ...".

84. In Solicitors Regulation Authority v James [2018] EWHC 3058 (Admin) at [101], Flaux LJ set out the basis of which question of exceptional circumstances was assessed:

> "First, although it is well-established that what may amount to exceptional circumstances is in no sense prescribed and depends upon the various factors and circumstances of each individual case, it is clear from the decisions in Sharma, Imran and Shaw, that the most significant factor carrying most weight and which must therefore be the primary focus in the evaluation is the nature and extent of the dishonesty, in other words the exceptional circumstances must relate in some way to the dishonesty."

85. The Tribunal considered whether the circumstances in this case were exceptional, having regard to James. The Tribunal had regard to the character references and to Mr Flavell's own personal circumstances at the time of the misconduct, in particular illness in his family. If the Tribunal had been dealing with a momentary loss of judgment, which was swiftly owned up to and corrected then those factors may well have amounted to exceptional circumstances. However, Mr Flavell had continued to take steps that involved planning and had opportunities to for reflection, for example in the pleadings in civil litigation. Those documents would have been drafted and re-drafted, at each stage giving Mr Flavell an opportunity to come clean and admit what had happened. Similarly, during the conveyancing process at any point up to exchange of contracts or completion, Mr Flavell could have informed his conveyancing colleagues about the history of disputes. While the Tribunal accepted that Mr Flavell would not have acted this way had JF not been his brother, the prolonged, wide-ranging and planned nature of the misconduct meant that the circumstances were not within the "small residual category" of cases where a strike off could be avoided.

86. The only appropriate sanction was that Mr Flavell be struck off the Roll.

Costs

Application for costs submissions to be heard in private

87. Mr Fulton indicated that he had an application for costs that he wished to make but that he would seek to have that application heard in private. He was content, however, to make the privacy application in public.

88. Mr Fulton told the Tribunal that he recognised that the starting point was open justice. However, Mr Fulton's starting point was that he should never have been required to bring this case as, in his view, the SRA ought to have done so. He described himself as a "reluctant prosecutor".

89. Mr Fulton submitted that had the SRA brought the case against Mr Flavell, it would be the SRA seeking costs and not Mr Fulton. Mr Fulton did not wish to reveal his source of income or his actual income and, if the SRA had brought the case, there would have been no question of him having to do so. Mr Fulton told the Tribunal that his engagement with Mr Flavell had nothing to do with what he did for a living. Mr Fulton submitted that hearing the application in private would not be a significant derogation from the principle of open justice.

90. Mr Bacon told the Tribunal that he was neutral on this application.

The Tribunal's Decision

91. The Tribunal had regard to the criteria under Rule 35, namely exceptional hardship or exceptional prejudice and Mr Fulton's Article 8 rights. The Tribunal kept in mind that the starting point was open justice.

92. Mr Fulton's description of the situation had the SRA brought the case against Mr Flavell was correct. The Tribunal made no comment on the SRA's decision not to bring proceedings or take over Mr Fulton's application as the Tribunal was independent of the SRA and it would not be appropriate to do so. Nevertheless, the reality was that had the SRA brought the case, Mr Fulton would not have been required to disclose his personal financial arrangements in order to support a claim for costs made by the SRA against Mr Flavell. In circumstances where the Allegations had been proved almost entirely, the Tribunal considered it would be an unjustified breach of Mr Fulton's Article 8 rights to require him to have to decide between making a costs application and disclosing his personal financial details or not making one in order to keep them confidential.

93. Further, the public interest in costs applications was usually based on the premise that where costs were reduced or not awarded, the profession would be picking up the costs of the prosecution of the case. That was not the case here and so that was a further factor that the Tribunal took into account.

94. The circumstances of the bringing of the case were exceptional and the Tribunal was therefore satisfied that it was in the interests of justice to hear Mr Fulton's application in private.

Mr Fulton's Application for Costs

95. [REDACTED]

96. [REDACTED]

97. [REDACTED]

98. [REDACTED]

99. [REDACTED]

100. [REDACTED]

101. The Chair asked Mr Fulton which limb of [8] he was inviting the Tribunal to adopt. Mr Fulton submitted that he could prove the loss and so he proceeded under [8(i)]. [8(ii)] related to the figure of £19 per hour which applied where losses could not be proved.

Respondent's Submissions

102. Mr Bacon did not take issue with the principle of costs following the event and accepted that the Tribunal had jurisdiction to award costs. Mr Bacon submitted that where loss could be proved then the CPR provided for a litigant in person to recover costs for time reasonably spent at no more than two-thirds of what a solicitor would recover. If the loss could not be proved then it was the £19 per hour rate.

103. Mr Bacon submitted that Mr Fulton had not proved financial loss. No statement of costs had been produced and Mr Bacon submitted that the idea the Tribunal should make an order for costs where there was no schedule of hours spent was "extraordinary". In Spencer the Court had a record of time spent. Mr Bacon submitted that the absence of a schedule was fatal to his costs claim.

104. Mr Bacon submitted that the Note on Costs did not take matters far and did not reveal financial loss caused by this case.

105. [REDACTED]

106. Therefore, the Tribunal was in the realm of £19 per hour for work reasonably undertaken. Mr Bacon did not deny that Mr Fulton had spent some time on the case but he had not been able to prove financial loss.

The Tribunal's Decision

107. The Tribunal noted that it had the power to make any costs order it deemed fit. In this case the Tribunal noted that as a litigant in person, the burden was on Mr Fulton to prove his loss. The Tribunal began by deciding whether or not he had discharged that

burden. Mr Fulton had not produced the volume or nature of material that had been available in Spencer.

108. [REDACTED]

109. The Tribunal therefore proceeded on the basis set out in [8(ii)] of Spencer. The guideline rate in the CPR was £19 per hour. The Tribunal was not bound by the CPR rates and it did not consider that £19 per hour was an appropriate figure. Mr Fulton had presented the case with considerable skill, which had been of assistance to the Tribunal. This in turn reduced the potential hearing length and the cost which might have been occurred to the Tribunal and respondent.

The Tribunal therefore decided to uplift the £19 figure to £175. This figure was reached by reference to the 'Grade C' fee earner rate referred to in Mr Flavell's schedule of costs. A Grade C fee earner in akin to the role of paralegal.

110. The Tribunal then considered the question of "time reasonably spent" by Mr Fulton. There was no doubt that Mr Fulton had prepared extensively as this was clear from the written pleadings and the way in which the case had been presented. Mr Fulton had estimated approximately 200 hours but without a detailed note of how he arrived at that figure. The Tribunal reduced this by approximately 15% to reflect the fact that the figures provided were estimates. 170 hours at £175 per hour came to £29,750.00.

111. The Tribunal considered Mr Flavell's means and saw nothing that justified a reduction on account of ability to pay. The Tribunal therefore ordered that Mr Flavell pay the Applicants' costs fixed in that sum.

Statement of Full Order

112. The Tribunal ORDERS that the Respondent, Keith Flavell, solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that he do pay the costs to the Applicants, fixed in the sum of £29,750.00.

Dated this 6th day of September 2023
On behalf of the Tribunal

JUDGMENT FILED WITH THE PARTIES
06 SEPT 2023

P Lewis

P Lewis
Chair