SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11941-2019

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

SOLICITOR Z Respondent

Before:

Ms A. Horne (in the chair)
Mr R. Nicholas
Mr S. Howe

Date of Hearing:
14, 15, 20 November 2019, 16-19, 31 March, 9, 22, 29 April 2020

Appearances

Richard Coleman QC and Philip Ahlquist both of Fountain Court Chambers, Fountain Court, Temple, London EC4Y 9DH instructed by Daniel Purcell, solicitor of Capsticks LLP, St George's Road, Wimbledon, London SW19 4DR for the Applicant.

Timothy Dutton QC and Marianne Butler both of Fountain Court Chambers, Fountain Court, Temple, London EC4Y 9DH instructed by Michael Stacey, solicitor of Russell Cooke, 8 Bedford Row, London WC1R 4BX for the Respondent.

MEMORANDUM OF APPLICATIONS FOR SUMMARY DISMISSAL & STAY FOR ABUSE OF PROCESS

Preliminary Matter

1. The application to dismiss was determined by the Tribunal on 31 March 2020. At that stage, Mr Dutton QC had addressed the Tribunal in respect of both the application to dismiss and the application to stay. Mr Coleman QC had replied to the application to dismiss but not the application to stay. The parties agreed that it was appropriate for the Tribunal to consider the dismissal application in isolation.

2. The Tribunal was conscious that an application to judicially review the decision as regards summary dismissal could be made. In order to try to ensure that the parties were in possession of its reasons with sufficient time to make any application, and on the assumption that the time for the judicial review ran from the date of the announcement of the decision, the Tribunal considered that it was appropriate to produce two separate memoranda as regards the separate applications. These have been amalgamated into this document.

Background

3. On 27 September 2019, the Tribunal received an application for an order from the Respondent. In that application, the Respondent applied (i) for the proceedings to be summarily dismissed or (ii) in the alternative, for the proceedings to be stayed as an abuse of process.

4. The Legal Framework on an Application for Summary Dismissal

4.1 Mr Dutton QC submitted (and Mr Coleman QC agreed) that the Tribunal had power, pursuant to Rule 21 of the Solicitors (Disciplinary Proceedings) Rules 2007 ("SDPR") to regulate its own procedure. This included the power to dismiss or strike out proceedings. The Tribunal was referred to the test in R v Galbraith [1981] 1WLR 1039, in which it was stated:-

> "If there is no evidence that the crime alleged has been committed by the Defendant there is no difficulty, the Judge will stop the case. The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness, because it is inconsistent with other evidence. Where the Judge concludes that the Prosecution case, taken at its highest, is such that a Jury properly directed could not properly convict on it, it is his duty on a submission being made to stop the case. Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses reliability or other matters which are generally speaking within the province of the Jury and where on one possible view of the facts there is evidence on which the Jury could properly come to a conclusion the Defendant is guilty the judge should allow the matter to be tried by the Jury."

4.2 Mr Coleman QC suggested that the Tribunal might find the principles applied in the civil courts pursuant to rule 24 of the Civil Procedure Rules ("CPR") helpful. In such an application it had to be demonstrated that the claimant had no real prospect of success on the claim and that there was no other compelling reason why the case should be disposed of at trial. The Tribunal was referred to the principles as

summarised by Lewison J. in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15]:-

> "i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: Swain v Hillman [2001] 2 All ER 91;
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> ii) A realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]
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> iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman
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> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]
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> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No.5) [2001] EWCA Civ 350;
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> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] F.S.R. 3;
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> vii) On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be..."

4.3 Mr Dutton QC submitted that the correct test on an application for summary disposal (which reflected Galbraith) was "whether on the allegations made in the rule 4 statement there was a case for the solicitors to answer" as per the decision of Waller LJ in Law Society v Adcock [2007] 1 WLR 1096.

4.4 Further, whether it was the criminal test (i.e. whether the case was properly arguable) or the civil standard (must have a real prospect of success) made no difference; the Applicant's case was not properly arguable, had no real prospects of success, was doomed to fail and was hopeless on its merits.

The Tribunal's Decision

4.5 The Tribunal noted that the position agreed by the parties in their initial written submissions was that Galbraith was the appropriate test. The Tribunal did not consider that the approach taken in civil courts was the approach that should be taken in the instant matter. The Tribunal was not bound by the CPR. The Tribunal considered that the appropriate test to use was that of Galbraith, as has been applied in Adcock and in other applications for summary dismissal before the Tribunal.

5. Application for Summary Dismissal

The Respondent's Submissions

5.1 Mr Dutton QC submitted that the Respondent faced two allegations. Those allegations were put on three different bases as regards the Respondent's mental state: what he allegedly knew, or suspected, or what he ought to have known.

5.2 The Allegations referred to three potential steps that it is said that Persons A and/or B might have taken subsequent to the Agreements, namely making a complaint to law enforcement authorities; co-operating with criminal proceedings; and seeking medical treatment (collectively the "Specified Steps").

5.3 The Applicant's Primary Case, it was submitted, was that the Respondent knew, suspected, or ought to have known that the Settlement Agreements could prevent the Specified Steps. Alternatively, its Secondary Case was that the Respondent knew, suspected or ought to have known that the Settlement Agreements could deter the Specified Steps.

5.4 Mr Dutton QC submitted that in considering the application for summary dismissal, there were a number of factual matters that were common ground between the parties:-

- The Respondent had never previously acted for X or for Company Y.
- The Respondent was told that the allegations against X, made by Person B were untrue; [REDACTED].
- The incident had taken place some weeks before the Respondent was instructed.

- The Applicant did not allege that the agreements entered into by Persons A and B were other than on an independently advised and voluntary basis.

- The Firm S legal team were heavily involved in negotiations, including the clauses concerning confidentiality.

- Persons A and B's legal fees were not dissimilar to the legal fees charged by the Respondent's Firm.

- Both Persons A and B, and their solicitors, certified that Persons A and B had been advised as to the terms of the agreements, including their lawful effect and their rights under the agreements.

- The Applicant had abandoned its case that it was the Respondent who proposed the terms that were the subject of criticism by the Applicant.

- It was no longer suggested that the Respondent had admitted that the criticised terms were different and substantially more stringent than those ordinarily imposed.

- Only Person B had made an allegation of sexual assault against X. (The Rule 5 Statement mistakenly stated that Person A had also made such an allegation when that was not the case).

The Construction of the Agreements

5.5 The basic principles of construction were well known and not disputed; construction of the Agreements was a matter to be objectively arrived at by reference to the facts known to the parties at the time.

5.6 In Schuler v Wickman Machine Tools [1974] AC 235 a complex contract provided a right to terminate if conditions were not satisfied, and various relatively modest provisions were described as conditions. It was argued that there was an entitlement to terminate the contract if any of the conditions were breached as they were to be treated as fundamental terms of the contract. Lord Reid, in indicating the approach to construction, stated:-

> "The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, but if they do intend it, the more necessary it is that they shall make that intention abundantly clear."

5.7 It was the SRA's case that prohibiting, or deterring or restricting the Specified Steps would be an unreasonable result. Thus, the SRA had to contend that it was abundantly clear that that was what clause 6 provided.

5.8 Great Estates Group Ltd v Digby [2011] EWCA Civ 1120 provided that:-

> "If a contract is capable of being read in two ways, one of which will involve a contravention of statute and the other not, that is a powerful reason for reading the contract in a sense which is compliant with the statute."

5.9 As regards public policy and construction, as per Simon Brown LJ in Lancashire County Council v Municipal Mutual Insurance [1997] QB 897:-

> "The only way in which public policy can properly be invoked in the construction of a contract is under the rule *'Ut res magis valeat quam perat*'[1]. If the words are susceptible of two meanings, one of which would validate the particular clause or contract, and the other render it void or ineffective, then the former interpretation should be applied, even though it might otherwise, looking merely at the words and their contexts, be less appropriate. The question therefore is whether the council's construction renders this policy in certain circumstances void or ineffective."

5.10 On the basis of the SRA's pleaded case, the Tribunal was in a position to construe the Agreements. It was important that the Agreements be construed as regards the summary dismissal application.

5.11 The test of meaning was objective; what would the Agreement mean to the objective bystander armed with the facts available to the parties at the time. The Tribunal was referred to paragraph 13-048 of Chitty on Contracts:-

> "The court is concerned both to identify the 'objective meaning of the language which the parties have chosen' and to ascertain what a reasonable person would have understood the parties to have meant. It can thus be seen that the courts are not concerned to identify the subjective understandings of the parties to the contract or the meaning which they subjectively ascribe to the term in dispute, and such evidence is, therefore, inadmissible. Thus the agreement must be interpreted objectively; see Investors Compensation Scheme v West Bromwich Building Society. Lord Hoffmann said:-
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> > "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all of the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract"."

5.12 Accordingly, the Clause could not be construed subjectively. The Respondent's knowledge was only relevant to the question of professional misconduct. The objective facts relied on by the Applicant were that: (i) the Respondent was instructed in respect of complaints by Persons A and B of unfair constructive dismissal and by B against X of sexual harassment, and (ii) the Respondent was aware, prior to the conclusion of the Agreements, that Person B had made an allegation that Person X had committed a serious sexual criminal offence against her, and it was an allegation

[1] It is better for a thing to have effect than to be made void.

that had given rise to the dispute in respect of which he was retained. The fact that the construction of the Agreements being contended for by the Applicant was clear from the Rule 5 Statement. The pleaded fact was of the allegation made by Person B. There were therefore no facts relevant to construction that were not already available to the Tribunal. Accordingly, in circumstances in which the Applicant's case was predicated entirely on the construction of the Agreements, and in which it was the Respondent's case that the Applicant's construction was wrong or, at a minimum, the Agreement was open to several interpretations, the Agreements should be construed by the Tribunal. There was nothing that remained in terms of facts that could assist with construction.

The Specified Steps

5.13 The case advanced by the Applicant was that, whilst the confidentiality terms in the Agreement could not in fact have prevented Persons A and B from taking the Specified Steps (because such terms would not have been enforceable as a matter of public policy), as properly construed the Agreements could nonetheless have prevented Persons A and B from taking those steps and accordingly that the Respondent "must have" realised as such, or ought to have done.

5.14 Alternatively, even if, properly construed, the Agreements in fact permitted such steps to be taken, and even though the Respondent was aware that Persons A and B had been advised as to the effect of the Agreements by Firm S's Legal Team, the Respondent must (or should) have realised that A and B could nonetheless have been deterred from taking them. Mr Dutton QC submitted that the Agreements permitted the Specified Steps, it was difficult to see any deterrence, or what the Respondent's responsibility for the alleged potential deterrence was or why the Respondent must or should have recognised a potentially deterrent effect or from what that deterrent effect was alleged to have arisen.

5.15 *Making a complaint to law enforcement authorities*

5.15.1 As the Applicant relied solely upon the terms of the Agreements, the construction of the Agreements was determinative of the Allegations. If Clause 6 of the Agreement had two potential meanings, it should be construed so as to accord with public policy. That meant that Clause 6 should be read as permitting Persons A and/or B to make a report to the police. The Applicant's case was that Clause 6 clearly prohibited the reporting of a serious criminal offence to the police. Mr Dutton QC submitted that such a contention was wholly without merit and unadvanceable.

5.15.2 Clause 6 of the Agreement stated:-

> "You acknowledge that during your employment you learned (i) confidential and/or proprietary information about the Company, its business plans or methods of operations including, but not limited to, trade secrets, customer lists, pricing policies and other information which would be commercially valuable to a third party which is not in the public domain, and (ii) confidential, private and/or non-public information about the Released Parties, including, without limitation,

[Person X and another] and their immediate family members, close personal friends and/or close business associates, (6(i) and (ii) together with the terms of this Agreement, the existence thereof and the related allegations made by you with respect to you or any other person at the date hereof referred to collectively as "Confidential Information").

You hereby agree:-

(a) to keep in confidence and not to disclose to, or use for the benefit of, any third party (including yourself), any Confidential Information without the prior written consent of [Person X and another]. Without limiting the generality of the foregoing, (i) you shall not disclose the terms of this Agreement or the existence thereof, except to comply or to obtain compliance with this Agreement or to your respective legal, financial or tax advisors (all of whom must first agree in writing to execute a confidentiality agreement in a form satisfactory to the Company in the form of paragraph 6) and (ii) you shall not disclose any Confidential Information except to any entity if required by legal process (for the avoidance of doubt any pleading or other step in a civil action that has been commenced by you shall not constitute legal process for the purpose of this clause), but you will first, in the case of any civil legal process and where reasonably practicable in the case of any criminal legal process, give not less than forty eight (48) hours prior written notice to the Company through [the Respondent] before making any such disclosure and if any disclosure is made you will use all reasonable endeavours to limit the scope of the disclosure as far as possible. You agree to provide reasonable assistance to the Company and its legal advisers if it elects to contest such legal process. In the event that the Company does not contest such legal process or the challenge is not successful, you may make disclosure to your legal advisors (who must first agree in writing to be execute a confidentiality agreement in a form satisfactory to the Company in the form of paragraph 6) but you will use all reasonable endeavours to limit the scope of the disclosure to your legal advisors as far as possible. You also agree that in submitting your tax returns in which the payment in this Agreement is reported you will comply with the procedure in Schedule 4;

(b) not to issue, cause, or to the extent within your control, permit to be issued or cooperate with the issuance of any article, book, treatment, script, magazine, newspaper, programme, computer interest (e.g. internet, website etc.), film, television or radio broadcast, memorandum, release, interview, publicity or statement, whether oral or written, of any kind, to any individual, the public, the press or media including. without limitation, any entertainment company, film company,

producer, director, publisher, television, cable or radio company or station, interviewer, correspondent, author and/or writer, or any other media (now or hereafter existing), which in any way concerns your employment by the Company, your separation from employment, any Confidential Information, the terms of this Agreement, or its negotiation or any allegations relating thereto, the Company generally and/or any related matter;

(c) that the provisions of this paragraph are not in any way limited by paragraph 7 below and that all of your obligations under this Agreement apply in relation to any person to whom you have previously made a disclosure;

(d) in the event that you require treatment from an appropriate medical practitioner in connection with the conduct alleged by you that led to the termination of your employment, the Company agrees that any disclosure by you in the course of receiving such treatment shall not be a breach of clause 6 or any other provision contained in this Agreement provided that:-

(i) you will use all reasonable endeavours not to disclose the name of any Released Party during the course of receiving treatment;

(ii) the medical practitioner from whom you receive treatment shall be appropriately qualified and shall be a member of a recognised medical body, the rules of which prohibit disclosure by its members of any information provided by a patient;

(iii) prior to the commencement of the treatment, you will obtain the medical practitioner's written confirmation in the form of a confidentiality agreement satisfactory to the Company in the form of paragraph 6 that any information provided to him/her by you is subject to an absolute duty of confidentiality; and

(iv) in the event that the medical practitioner discloses any information provided to him/her you will take such steps as the Company may require including but not limited to the commencement of proceedings at the Company's expense to prevent any further disclosures and to recover damages which shall be paid to the Company from the medical practitioner, and if you fail to take such steps then the disclosure by the medical practitioner shall be treated as a disclosure by you.

> You may, however, accurately discuss (i) the fact that you were employed by the Company, and (ii) the nature of the work in general terms you performed at the Company other than Confidential Information."

5.15.3 It was not accepted that Clause 6, and the definition of Confidential Information contained therein, prohibited reporting a crime (if there was one) to the police or other law enforcement agency. There was no reference in the definition of Confidential Information to a serious criminal offence. Accordingly, there was no prohibition on the reporting of a serious criminal offence to the authorities. In order for the Applicant to advance the argument that there was such a prohibition, the phrase "the related allegations made by you with respect to you or any other person at the date hereof" must include a serious sexual offence and must include the reporting of such an allegation to the police. There was not, and could not be, any confidentiality in the report of a serious criminal offence to the police. Accordingly, any Court asked to construe Clause 6 would find that as a criminal offence cannot be the subject of confidentiality, Clause 6 did not prohibit the reporting of a criminal offence to the authorities. The Applicant accepted that there was no confidence in iniquity.

5.15.4 The principle of there being no confidence in iniquity was qualified by Lord Goff in Attorney General v Guardian Newspapers in 1990 ("the Spycatcher Case)" in which it was held that the iniquity principle had limitations in that the complaint as to iniquity must have a credible foundation.

5.15.5 The Respondent (and Firm S) knew that Person B had made an allegation. Mr Dutton QC submitted that it was perfectly proper and open to them to preserve confidentiality in that allegation in respect of communications concerning that allegation, but if and insofar as the allegation was credible, and Persons B and/or A wished to report that to the police, then there would be no confidence, if the allegation were of a serious criminal offence, in the reporting of that to the police.

5.15.6 Applying the Rule in Schuler, Clause 6(a)(ii) was a prohibition on divulging Confidential Information as defined in Clause 6. As a matter of proper construction, this did not include the reporting of a serious criminal offence to the authorities.

5.15.7 In addition to its argument that Clause 6(a) captured a report to the police, the Applicant also argued that "legal process" was limited to compulsion such as may arise in the form of a subpoena or court order. As a voluntary complaint to the police was not required by legal process, the failure to make an exception in the general prohibition on the disclosure of Confidential Information for complaints to the police indicated that disclosure for that purpose was prohibited. That rendered Clause 6 unenforceable. Mr Dutton QC submitted that such an approach was flawed as if that were to render the clause unenforceable, a Court would not give it that meaning. A Court would construe "legal process" so as to ensure it extended to voluntary disclosure to the authorities.

5.15.8 The Applicant further contended that as the allegation was one of a serious criminal offence, the Respondent was bound to qualify the opening of Clause 6 so as to make it expressly clear that a report to the authorities was permissible. Mr Dutton QC submitted that all confidentiality provisions were subject to two public policy considerations: (i) the public policy in keeping information confidential; and (ii) the public policy in the interests of reporting criminal offences. Lawyers both now, and in 1998, did not generally enter into detailed carve outs allowing for voluntary reports to the authorities, as a general confidentiality provision, such as that contained in Clause 6(a) did not prohibit the making of a report to the authorities.

5.15.9 The Applicant, it was contended, sought to reverse, the principle in Schuler. The General Prohibition constituted standard wording consistent with the wording used in published precedents at the time. The adoption of standard confidentiality wording did not make it clear that the intention of the parties had been to include preventing disclosure of Confidential Information to the police. Rather, considering the matter objectively, the General Prohibition was directed towards preventing the misuse of confidential information. Reflecting that intention, standard blanket wording was adopted and the point about complaining to the police was not addressed expressly.

5.15.10 There was obvious scope for legitimate debate about the meaning of "if required by legal process" and whether it precluded a voluntary complaint to the police or not. Even if it were to be construed as synonymous with "as required by law", it was arguable that a voluntary disclosure would fall within the 'public policy' defence so long as that disclosure could have been compellable.

5.15.11 Further, the failure in Clause 6(a)(ii) to refer to criminal proceedings evidenced that the parties were not seeking to prevent complaints to the police. The clarification, it was submitted, appeared to have been included to prevent the manufacturing of a "legal process" such as commencing a civil action which would require disclosure of Confidential Information. This closed off a potential loophole in the drafting. Any such strategy as regards criminal proceedings would have been contrary public policy and unenforceable. The parties deliberately did not go that far. Accordingly, Persons A and/or B were able to make a report to the police even if doing so could be construed as commencing criminal proceedings requiring the disclosure of Confidential Information.

5.15.12 Mr Dutton QC submitted that, correctly construed, the Agreements did not prevent Persons A and/or B from making a complaint to the police or other law enforcement authorities.

5.16 *Co-operating with Criminal Proceedings*

5.16.1 Clause 6 required Persons A and B to "use all reasonable endeavours to limit the scope of the disclosure as far as possible" and "where reasonably practicable" to give 48 hours' notice to Company Y before making such disclosure. Mr Dutton QC submitted that that requirement was not contrary to

public policy, nor was it improper. Further, the requirement for notice to be provided was itself subject to reasonable practicability. The Applicant contended that the requirement of prior notice to Company Y was a further aspect evidencing that Clause 6 was contrary to public policy as it would prevent or hinder Persons A/B from cooperation with the authorities. Mr Dutton QC submitted that such a contention was not properly advanceable as:-

- A report to the police was not encompassed within the definition of "Confidential Information" when the clause was properly construed.

- An agreement providing that Persons A and B were not to co-operate with the authorities would, in all likelihood, be unenforceable as a matter of public policy.

- Had a prohibition on co-operation with the authorities been intended, such an intention needed to be made abundantly clear (as per Schuler). The parties did not do so. On the contrary, the parties deliberately elected to adopt the language of "reasonableness" in these provisions. Properly construed, clause 6(a)(ii) did no more than: (i) require A and B to use reasonable endeavours to disclose only that which they were required to disclose pursuant to the legal process, and not to go beyond it so as to disclose irrelevant Confidential Information; (ii) only to give Company Y (not X, the individual who was being accused) advance notice of disclosure, where such notice was reasonably practicable, which would not be the case where giving that notice would amount to inappropriate tipping off. Additionally, "tipping off" was a red-herring. It principally applied in relation to the Proceeds of Crime Act 2002, and potential money laundering. Person X already knew that he was being accused by Person B of conduct which amounted to a potential crime. A legitimate concern (and one which was properly reflected in clause 6(a)(ii)) would have been to ensure that, if there were criminal legal process, the risk of the disclosure of irrelevant confidential information, such as details of his marital or family life, would be properly managed.

- The requirement of provision of 48 hours' notice was so as to enable Company Y, (not Person X), to take part in a process of disclosure. This did not hinder Persons A and/or B in the process of disclosure. This related to third party disclosure and the necessity of the involvement of Company Y to protect its confidential information. This was not unusual. The CPS and other prosecuting authorities regularly applied for orders for disclosure involving third parties. The context was important. Persons A and B were personal assistants to Person X. They learned substantial amounts of confidential information in that capacity, as the Agreement records. There would have been no reason at all for them to divulge any such information to the police, and there would have been every reason for Company Y to have engaged with the CPS or the police as to the scope of any appropriate disclosure.

- The requirement was only so far as was reasonably practicable. That was not a prohibition. If the police were to say that Person B should not be in contact with Person X, it would not be reasonably practical in those circumstances for notification to be given under 6(a)(ii).

5.16.2 Mr Dutton QC submitted that, correctly construed, the Agreements did not prevent Persons A and/or B from co-operating with the police or other law enforcement authorities.

5.17 *Seeking Medical Treatment*

5.17.1 The SRA's case was that clause 6(d) could prevent Persons A and B from seeking medical treatment in respect of health issues arising from Person X's alleged conduct in respect of A and B. That construction, it was submitted, was perverse. Correctly construed, clause 6(d) provided for the exact opposite. It was an express permission for Persons A and B to obtain medical treatment from a qualified medical practitioner, and if they so desired, to discuss Confidential Information with such a practitioner. Clauses 6(d)(i) – (iv) did not prevent Persons A and B from obtaining medical treatment or advice. Those sub-clauses sought to protect the Confidential Information.

5.17.2 Clause 6 (d) was specifically worded so as to allow treatment but to give Person X and Company Y protection in relation to disclosures made to medical practitioners. Those hypothetical practitioners would not be parties to the Agreements and may not have had a positive duty of confidentiality depending on their area of practice.

5.17.3 Mr Dutton QC submitted that, in any event, all regulated medical practitioners in the UK were bound by duties of confidence. The sole argument remaining to the Applicant, was that the requirement that the medical practitioner should hold any information provided to him or her, subject to an absolute duty of confidentiality, went further than a simple duty of confidentiality. That was a debatable proposition. However, the fact that the medical practitioner would be bound by an absolute duty of confidence did not inhibit the provision of treatment to Persons A or B, had either of them ever wished to seek it. The medical practitioner would have been required, as a matter of law in any event, but under this Agreement to have provided absolute confidentiality, so far as regards any Confidential Information, as defined by the terms of the Agreement, as provided to him or her. This did not prohibit the seeking of medical advice; it ensured that Confidential Information could be discussed with the medical practitioner, with the medical practitioner being required to keep such information confidential.

5.17.4 The SRA's Secondary Case was that clause 6(d) might have made it harder for Persons A or B to obtain medical treatment than if the clause were not included. That argument could not succeed as:-

- Clause 6(d) as properly construed, required the relevant practitioner to be bound by a duty of confidence. That was no more than a statement of the law in the UK for regulated medical practitioners. Ensuring that a

practitioner is bound by a duty of confidentiality does not make it less likely that they would offer treatment.

- Had the clause not been included at all, there would have been a standard confidentiality provision with no carve-out for medical treatment.

Position of Firm S and counsel for Persons A and B

5.18 In the event that the SRA's construction of the Agreements was correct, the solicitors for Persons A and B had negotiated the Agreements, and certified that Persons A and B had been advised as to the meaning and effect of the Agreements, including as to the rights of Persons A and B under them. The Applicant could only succeed if it could prove, to the criminal standard, that its construction of the Agreements was correct and that (i) any reasonable solicitor would have so construed the Agreements and (ii) the Respondent, in failing so to do, was so unreasonable as to be manifestly incompetent such that it amounted to professional misconduct. The Applicant, it was submitted, could not succeed on (i) and (ii), even if it could show that its construction was correct, as:-

- There could be no suggestion that Firm S and the legal team advising Persons A and B were anything other than competent and reputable.

- Firm S certified that Persons A and B had been advised as to the effect of the Agreements and their rights under them. It was wholly improbable that a reputable lawyer would provide a certification in circumstances where that lawyer regarded the Agreement as improper.

- The letter to Firm S from the Applicant of 13 May 2019 made it clear that Firm S's construction of the Agreements was aligned with that of the Respondent, namely that Firm S did not consider that the Agreements prevented or deterred Persons A and B from taking any of the Specified Steps. Nor did Firm S consider that the Agreements were unenforceable.

5.19 The Applicant had not alleged misconduct against Firm S, notwithstanding that it was Firm S that had advised Persons A and B. Mr Dutton QC submitted that it was contradictory for the Applicant to conclude that Firm S had not committed serious misconduct whilst simultaneously alleging that the Respondent had.

5.20 The Applicant, it was submitted, had failed to show how the Respondent was said to have breached his duty to the Court. The Applicant had also failed to show, in circumstances where Firm S considered that the Respondent had acted with propriety, how he had failed to act with integrity.

The Respondent's Duties

5.21 The Rule 5 Statement alleged that:-

> "As an experienced solicitor who was aware of the terms of the Settlement Agreements and of the allegation made by Person B, the Respondent must have known or suspected that the terms of the Settlement Agreements could

> prevent or deter Person A or Person B from making a complaint to the police or other law enforcement authority regarding the serious sexual criminal assault that Person B alleged Person X had committed".

5.22 It was the Respondent's position that he did not consider that the effect of the Settlement Agreements was to prevent or deter Persons A and B from taking the Specified Steps. In order for the Applicant's case to succeed, it would have to prove that any reasonably competent solicitor would have known or suspected as such.

5.23 Equally, in respect of the Applicant's Secondary Case, to succeed the Applicant would have to prove not only that any reasonably competent solicitor would have so realised, but that his failure so to realise was so far outside reasonable bounds as to constitute manifest incompetence such that it constituted professional misconduct. That was a high threshold. As per Jackson LJ in Wingate and Evans v SRA [2018] 1 W.L.R 3969 at [106] considering Principle 6 of the Solicitors Regulation Authority Code of Conduct 2011 (the successor to Rule 1(d) of the Solicitors' Practice Rules 1990 alleged in this case):-

> "It is important not to characterise run of the mill professional negligence as manifest incompetence. All professional people are human and will from time to time make slips which a court would characterise as negligent. Fortunately, no loss results from most such slips. But acts of manifest incompetence engaging the Principles of professional conduct are of a different order".

5.24 The Applicant had not pleaded that the Respondent was manifestly incompetent. Nor had it described what the Respondent should have done. Mr Dutton QC submitted that as a result of the above, three consequences flowed:

5.25 As the Agreements, correctly construed, did not prevent Persons A or B from taking the Specified Steps, that was the end of the Primary Case (it being absurd to suggest that the Respondent must have, or ought to have realised that a contract had an effect that it did not in fact have).

5.26 Regardless of the correct construction, the relevant clauses in the Agreements were susceptible to alternative reasonable interpretations, including being read so as to permit Persons A and B to take the Specified Steps. That was equally the end of the Primary Case as:-

(i) It could not be said that any reasonably competent solicitor would have thought that the Agreements could prevent A and B from taking the Specified Steps, and accordingly there would be no basis for saying that the Respondent must have realised that they could. A reasonably competent solicitor could adopt the alternative reasonable interpretation. The Respondent's interpretation of the Agreements was shared by Firm S's Legal Team.

(ii) Even if any reasonably competent solicitor would have considered that the Agreements could prevent A and B from taking the Specified Steps (and so the Respondent's failure so to realise could properly be classed as negligent), given the lack of clarity, that failure could not be sufficiently far outside

reasonable bounds as to be manifestly incompetent so as to constitute professional misconduct.

5.27 The failure of the Primary Case meant that the Secondary Case also failed. As to that:-

- The Secondary Case required the Respondent to speculate as to what represented clients on the other side of the transaction may think, and to adjust his conduct so as to accommodate that speculation. Mr Dutton QC submitted that this was an impossible basis on which to allege serious professional misconduct.

- The case on deterrence was not based on fact but on speculation. The Tribunal would not find that there had been professional misconduct on the basis that a person had a suspicion as to the meaning of a clause, which in fact may or may not have meant what it is alleged he suspected. The Tribunal could not find misconduct on a case that was predicated upon speculation.

- A suspicion that a clause may have meant something, such that its potential effect might have been deterring, did not cross the threshold into manifest incompetence, and could not do so.

- The Respondent did nothing to create any perception with Persons A and B that the Agreements had any effect other than their actual effect when properly construed; the Applicant did not allege to the contrary.

- The Respondent was entitled to assume that the legal team advising Persons A and B in respect of the Agreements provided Persons A and B with proper and competent advice.

- It could not be said that any reasonably competent solicitor would have concluded that, despite receiving legal advice that they could take the Specified Steps, Persons A and B could nonetheless still be deterred from taking them. Accordingly, there was no basis for saying that the Respondent "must" have realised to the contrary.

- Even if the Respondent should have realised (because any reasonably competent solicitor would have realised) that Persons A and B could be deterred from taking the Specified Steps, his failure so to realise could not be sufficiently far outside reasonable bounds as to be manifestly incompetent such that it constituted professional misconduct. Thus no breach of Rule 1(d) of the Solicitors' Practice Rules 1990 could be established.

- Mere knowledge that the terms of an agreement could theoretically deter a party from taking the Specified Steps could not, as a matter of principle, amount to a lack of integrity, or constitute a breach of a solicitor's duty to the Court. The Applicant had failed to set out how it could.

5.28 Mr Dutton QC submitted that the letter sent to the Applicant dated 23 July 2019 ("the July letter") set out in clear terms the basis for contending that the proceedings were misconceived and bound to fail as a matter of construction. In its response dated 19 September 2019, the Applicant did not put forward any arguments as to construction. Instead, it was submitted, the Applicant sought to widen its case beyond that pleaded:-

> "whilst the SRA disagrees with your interpretation of the agreements, the correct legal interpretation of the terms is not in any event determinative of the allegations, which focus on their potential effect on Persons A and B and that your client knew, suspected or ought to have known of this effect".

5.29 The construction of the Agreements contended for by the SRA was either plainly wrong, or the clauses upon which the case depended were susceptible to several alternative reasonable interpretations. The Respondent's construction at the time was correct or (at the very least) arguably correct. It was a construction open to a reasonable and competent solicitor. Even if it could be said that the Respondent's construction was incompetent, it would not begin to approach the threshold of misconduct. (See further the submissions as regards Firm S above).

5.30 Mr Dutton QC submitted that there was no evidence, taking the Applicant's case at its highest, upon which the Tribunal, properly directed, could find that the Respondent was guilty of misconduct.

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

5.31 The Applicant's case was dependent on two simple propositions, namely that:-

- a solicitor should not lend his professional support to agreements that could prevent or deter a victim from reporting an allegation of sexual assault or attempted rape to the police, or from fully cooperating with criminal proceedings in respect of which the allegation may be relevant, or from seeking medical assistance; and

- a solicitor should not lend his professional support to terms in an agreement that are contrary to the public interest because they purport to have a preventive or deterrent effect.

5.32 Mr Coleman QC submitted that whilst those propositions were obvious as regards a profession that first and foremost served the public interest and the administration of justice, the Applicant did not need to persuade the Tribunal that this was the case. Rather, it was for the Respondent to persuade the Tribunal that those propositions were untenable and required no further consideration by the Tribunal at a substantive hearing.

5.33 There was no real dispute as to the central issue on the application for the summary dismissal of the proceedings – were the Agreements, having regard in particular to the confidential provisions, ones that a solicitor could properly facilitate? The answer to that question was reliant on the objective assessment of the terms and the meaning of

the confidentiality provisions and their potential effect on Persons A and/or B's ability or willingness at any future point to take any of the Specified Steps.

5.34 In summary, it was the Applicant's case that:

- the confidentiality provisions did purport to prevent Persons A and B taking any of the Specified Steps;
- in any event even if, as the Respondent alleges, properly construed they did not purport to have that effect there was nevertheless, on the facts known to the Respondent, an obvious risk that Persons A and B would understand them in that way; and
- the Respondent knew or suspected that the confidentiality provisions could have the effects detailed in the Rule 5 Statement, (alternatively he ought to have been so aware).

The Construction of the Agreements

5.35 The legal principles governing the construction of contracts were common ground. The Court in construing an agreement would take into account the relevant background as well as the other terms of the agreement; any clause would be interpreted in the context of the agreement as a whole. Mr Coleman QC submitted that, whilst the principles were common ground, the Respondent's application of those principles misapplied the law, and sought to interpret the contractual provisions of the Agreements in a way which was inconsistent with their wording.

5.36 It was common ground that the definition of Confidential Information included the allegation of attempted rape. By virtue of Clause 6, Persons A and B agreed "to keep in confidence and not disclose to or use for the benefit of any third party, any Confidential Information without … prior written consent …"

5.37 The Respondent failed to note that the Agreements specifically addressed the circumstances in which disclosure of the allegation of attempted rape might be made for the purposes of criminal inquiries or proceedings. That was the reference in the Agreements to disclosure being required by legal process. Clause 6 set out the conditions on which any disclosure could be made. Mr Coleman QC submitted that it was abundantly clear that those circumstances did not include a voluntary complaint by Person B to the police.

5.38 The Applicant's interpretation of Clause 6 was, it was submitted, the only possible interpretation based both on the wording of the Agreement and the relevant background of what the parties were trying to achieve. There were no words in the contract that were capable of being interpreted as permitting a voluntary complaint to the police. In those circumstances, the principle in Schuler (where there are two possible interpretations, one reasonable the other unreasonable, the reasonable one should be preferred), did not apply.

5.39 In the Spycatcher case, a former member of MI6 had put in to the public domain matters which were subject to the Official Secrets Act and various newspapers either published or sought to publish them and there was a flurry of injunctive proceedings attempting to stop publication. Lord Goff stated:-

> "I start with the broad general principle which I do not intend in any way to be definitive that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the confidential information to others".

5.40 Mr Coleman QC submitted that an allegation of attempted rape would not be confidential information in the ordinary course, so far as Person B was concerned. Person X, the alleged wrongdoer, could have no expectation that Person B would keep confidential an assault upon her.

5.41 Company Y and Person X were trying to render something that was inherently not confidential, confidential, by defining Confidential Information in the way that it was defined in Clause 6(a). That included the allegation of serious sexual assault or attempted rape.

5.42 Lord Goff then dealt with various limiting principles that apply when one is speaking about confidential information in the true sense:-

> "The third limiting principle is of far greater importance. It is that although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure … Embraced within this limiting principle is of course the so called defence of iniquity. In origin, this principle was narrowly stated on the basis that a man cannot be made "the confidant of a crime or fraud"… But it is now clear that the principle extends to matters of which disclosure is required in the public interest … It does not however follow that the public interest will in such cases require disclosure to the media[2] or to the public by the media. There are cases in which a more limited disclosure is all that is required … A classic example of a case where limited disclosure is required is a case of alleged iniquity in the Security Service. Here there are a number of avenues of proper complaint; these are set out in the judgment of Sir John Donaldson M.R. Like my noble and learned friend, Lord Griffiths, I find it very difficult to envisage a case of this kind in which it will be in the public interest for allegations of such iniquity to be published in the media. In any event, a mere allegation of iniquity is not of itself sufficient to justify disclosure in the public interest."

5.43 Mr Coleman QC submitted that the point being made in the Spycatcher Case was that even though there may be a justification for disclosure to the appropriate person, such a justification would not validate disclosure to the media. That was not the position in

[2] Mr Coleman QC's emphasis

the instant case. The Applicant did not challenge those parts of the confidentiality clause that related to the media. What was in issue were those provisions which prevented proper disclosure to the police. A complaint to the police as contemplated by Lord Goff would be an avenue for proper complaint.

5.44 At this stage of the proceedings, it was not necessary for the Applicant to prove the allegations beyond reasonable doubt, it merely needed to satisfy the Tribunal that its construction of the Agreements was reasonable and tenable.

The Specified Steps

5.45 The Respondent's witness evidence articulated a number of alternative constructions of the Agreements. The correct interpretation of the clauses, it was submitted, was straightforward. It was clear from the language of Clause 6, and the context in which the Agreements were concluded, that it did purport to prevent or deter Persons A and B from taking any of the Specified Steps.

5.46 *Making a complaint to law enforcement authorities*

5.46.1 The allegations of sexual harassment, assault and attempted rape fell squarely within the definition of Confidential Information in Clause 6. The purpose of the Agreements was to compromise the claims arising from the allegation of attempted rape/serious sexual assault. There was no room, in the wording of the Agreements for any different construction. Mr Coleman QC submitted that the clear wording of Clause 6 was such that it could only be interpreted as preventing a voluntary report to the police. It followed that the principle that a Court would adopt a lawful interpretation in preference to an unlawful one, did not apply – the Agreements could not be construed in a way which allowed Persons A and B to report alleged criminality. The Respondent's contention that that the prohibition on disclosure did not apply to a voluntary report to the police was simply, and obviously, wrong, and could not survive the carefully negotiated and considered wording of Clause 6. Further, the Respondent had failed to identify any wording in the Agreements which could be interpreted as permitting a complaint to the police.

5.46.2 The Applicant's construction of Clause 6 was supported by other terms of the Agreement. Pursuant to Clause 10(b) Persons A and B agreed: "not to make any statement of any kind which may have the effect of damaging or lowering the reputation of the Company or any other Released Party". Whilst there had been no complaint made in the Rule 5 Statement as to the propriety of this clause, Mr Coleman QC submitted that the Applicant was entitled to rely on it as support for the construction of Clause 6. A complaint to the police would have had the effect of damaging or lowering the reputation of Company Y and Person X.

5.46.3 Clause 16 addressed enforcement which, it was submitted, was important so as to keep secret an allegation of attempted rape/sexual assault. Clause 16 provided:-

> "In the event that you do not comply with your obligations under this Agreement and in particular your obligations under paragraph 6, then the Company and/or the Released Parties shall have no adequate remedy at law and shall be able to enforce this Agreement by seeking an injunction and such other relief as may be deemed just and proper; provided, however, that the parties expressly acknowledge that their respective rights, duties and obligations under this Agreement are cumulative … in the event that you materially breach your obligations under paragraph 6 (and it is agreed that any breach in respect of the category of Confidential Information defined in paragraph 6(ii) insofar as it relates to [a number of people including Person X] is a material breach), then the Company's obligations under this Agreement, including, without limitation, the Company's obligation to make payments to you immediately shall cease and, without prejudice to the generality of paragraph 18, the Company may recoup the cost of the payments already provided to you hereunder …"

5.46.4 Mr Coleman QC submitted that Persons A and B would understand that any disclosure in breach of Clause 6, including a disclosure to the police, would put them at risk of having to repay what, for them (in comparison to their salaries) was a substantial sum.

5.46.5 Clause 20 of the Agreement specified particular circumstances where disclosure would not be in breach of Clause 6, namely where there had been another complaint and that complainant, having been apprised of the Agreement made a written request to the Company to discuss the Agreement. Mr Coleman QC submitted that this was another pointer as to the meaning of Clause 6 as it detailed the very specific circumstances where disclosure would not be in breach of Clause 6.

5.46.6 The Applicant, as had been submitted by Mr Dutton QC, agreed that there could be no confidence in iniquity. However that principle did not assist the Respondent. By defining Confidential Information in the way that they did, the Agreements were specifically designed to keep the allegation of a serious criminal offence confidential.

5.46.7 Mr Coleman QC highlighted that the Respondent had not sought to rely on an implied term that a report to the police was permitted. That position, it was submitted, was the correct one. The Respondent rightly recognised that there was no basis in law for implying such a term. A term could only be implied to give business efficacy to a business contract, or if its intended effect were so obvious that it goes without saying. The purpose of implying a term was to give effect to the true intentions of the parties, not to rewrite their contract so as to make it fair or reasonable. An implied term that a report could be made to the police would have undermined Company Y's objective of keeping the allegation of attempted rape secret. Any suggested implied term of that nature would have conflicted with the express terms of Clause 6.

5.46.8 [REDACTED]

5.46.9 If the Tribunal accepted the Applicant's construction, then there could be no dispute that it was improper for the Respondent to be associated with that aspect of the Agreement; it was common ground that a term that prevented a voluntary report to the police was contrary to public policy and unenforceable. Mr Coleman QC submitted that, at this stage, he only had to persuade the Tribunal that the Applicant's construction was reasonably tenable; he did not need to prove the case to the criminal standard.

5.47 *Co-operating with Criminal Proceedings*

5.47.1 The Respondent, it was submitted, could not legitimately support the Agreements as they sought to control the manner and extent to which Persons A and B could cooperate with criminal inquiries and proceedings. Any such criminal proceedings would have concerned the allegation of attempted rape/sexual assault.

5.47.2 The disclosure of Confidential Information was prohibited outright, except in the circumstances provided for by clause 6(a)(ii), which allowed for disclosure "if required by legal process". Any such permitted disclosures had to be:-

- notified to the Company 48 hours beforehand, through the Respondent, in the case of civil process;

- notified to the Company 48 hours beforehand, through the Respondent, where reasonably practicable, in the case of criminal process;

- if the Company chose to contest the 'legal process' requiring the Confidential Information to be provided, then Persons A and B were required to provide reasonable assistance in preventing the disclosure;

- in every case, Persons A and B were obliged to "use all reasonable endeavours to limit the scope of the disclosure as far as possible".

5.47.3 In effect, even if reporting an alleged crime to the police had been 'legal process' (as contended for by the Respondent), then Persons A and B were still required to delay notification to the police, delay compliance with requests for information, and comply with those requests only to the minimum degree possible. If Company Y sought to challenge the provision of information to investigators, Persons A and B were required to assist in that.

5.47.4 Reporting an alleged crime to the police was not, as a matter of English law as the governing law of the contract, 'legal process' in any meaningful sense. That was apparent from the fact that the Agreements were worded with the expectation that a legal process could be challenged by the Company, in the way that an order for disclosure could be challenged in civil proceedings or, (to use a criminal context) a warrant permitting police to take a suspect's computer in England could be challenged by the Company under section 59 Criminal Justice and Police Act 2001. The order for disclosure and warrant,

and the granting of them, are legal processes which can require information to be disclosed to third parties. A voluntary decision to inform police officers or regulators would not be 'required by legal process'.

5.47.5 Moreover, there is (at least in England) no general legal obligation to report a crime. Even if Clause 6 was construed as equivalent to 'as required by law' (which the Mr Coleman QC submitted was wrong), a voluntary report of alleged criminality to the police was not required by law.

5.47.6 It was plain that Clause 6 purported to hinder proper cooperation with police investigations and any subsequent criminal proceedings. The clause could not reasonably be construed as having any other intended effect. It specifically regulated the extent and manner in which disclosure could be made as part of a criminal legal process. Clause 6 was self-evidently intended to delay and limit the provision of information in all proceedings, whether criminal or civil, as the express inclusion of wording relating to criminal proceedings made clear.

5.47.7 The clause was liable to prevent the proper investigation of the relevant allegations, and was plainly adverse to the interests of the proper administration of justice. It was the Applicant's position that the clear wording of the clause could only be interpreted as preventing co-operation with police enquiries. It followed that the principle that a court will adopt a lawful interpretation in preference to an unlawful one had no application to the Agreements – Clause 6 could not be construed in any way which did not require Persons A and B not to cooperate with the police.

5.47.8 [REDACTED]

5.47.9 Mr Coleman QC submitted that, if it was accepted that Clause 6 did prohibit a report to the police, that was contrary to public policy and thus unenforceable, such that Persons A and B would be entitled to ignore it. That notwithstanding, this did not render it acceptable in professional conduct terms; even if it was unenforceable, that did not mean that Clause 6 did not, and could not, have a preventative or deterrent effect.

5.48 *Seeking Medical Treatment*

5.48.1 The Respondent, it was submitted, could not legitimately support the Agreements as they sought to impose inappropriate and unnecessary conditions on Persons A and B's access to medical help.

5.48.2 Mr Coleman QC submitted that Clause 6(d) could only be construed as imposing an inappropriate and unethical restriction on a victim of an alleged attempted rape or sexual assault seeking medical treatment. It was the Respondent's position that the reason for an absolute duty of confidentiality being imposed on medical professionals was because the 'hypothetical practitioners… may not have had a positive duty of confidentiality depending on their area of practice'. However, it was argued, such an interpretation ignored Clause 6(d)(ii), which requires that any medical practitioner consulted:-

> "shall be a member of a recognised medical body, the rules of which prohibit disclosure by its members of any information provided by a patient…"

5.48.3 The requirement immediately following in clause 6(d)(iii) is that the practitioner sign up to an 'absolute duty of confidentiality'. That requirement could only be intended to be additional to the pre-condition in clause 6(d)(ii) that the medical practitioner was already subject to professional confidentiality rules. Medical practitioners such as doctors and nurses in the UK do not, and did not in 1998, owe absolute duties of confidentiality to their patients. On the contrary, they were and are subject to legal and professional obligations to disclose information in certain circumstances. The duty of absolute confidentiality conflicted or was inconsistent with a medical practitioner's public interest obligations.

5.48.4 As with the issue of reporting criminal offences, a duty of confidence would not ordinarily be construed as intended to prevent a victim of an alleged crime from seeking medical assistance. Clause 6 made specific provision for medical practitioners and, in doing so, made it clear that seeking medical assistance did fall within the scope of Clause 6. The restrictions in clause 6(d) then imposed additional obligations in respect of seeking such medical treatment, which would make it unlawful for a doctor in the UK to agree to the preconditions imposed. That Clause, it was submitted, was plainly capable of either preventing or deterring Persons A and B from seeking or obtaining treatment.

5.48.5 Mr Dutton QC, in his skeleton argument, had missed the real point. It had been argued on behalf of the Respondent that the medical practitioners might not have had a positive duty of confidentiality depending on their area of practice, however Clause 6(d)(ii) required that the practitioner be appropriately qualified and a member of a recognised body whose rules prohibited disclosure of information provided by the patient.

5.48.6 In seeking to present an innocent interpretation of the detailed restrictions imposed on Persons A and B in Clause 6, the Respondent's submissions did not correctly identify either the plain meaning or obvious intention of Clause 6. It could not be said that the SRA's case must fail. It was open to the Tribunal to conclude that the Respondent was aware of the obvious meaning and intention of Clause 6 and to find the allegations proved accordingly. The Respondent's application to dismiss the allegations must fail.

5.48.7 [REDACTED]

5.48.8 The potential effects of the Agreements over the entire course of the lives of Persons A and B had to be considered. A victim's attitude regarding making a complaint may change with the perspective of time and experience. The logic behind the SRA's alternative allegation that the Agreements would have the effect of deterring reporting and/or the seeking of medical attention simply reflected the fact that this is what the Agreements purported to do. While the relevant provisions of the Agreements were, on the SRA's case, legally invalid as either unlawful or contrary to public policy, the reality is that members of

the public would take contracts drafted with the assistance of lawyers as prima facie valid and binding, and would ordinarily believe that they were required to comply with the terms of such contracts. There was ample justification for the Tribunal finding that the Agreements could have a deterrent effect, even if not legally binding, on the reporting of allegations or seeking of medical treatment.

5.48.9 The Respondent sought to rely on the arguments derived from confidentiality clause precedents published at the time that the Agreements were negotiated. Mr Coleman QC submitted that that was of no assistance to the Respondent as:-

- Those precedents were intended to be used as, and were drafted on the basis of their being used as, standard contracts terminating employment contracts. It was fairly to be assumed that the employment issues that the draftsman of the precedents had in mind were not founded on allegations that the employer had subjected an employee to a serious sexual assault but rather the ordinary course of employment including, to the extent that the precedents concern termination of employment, ordinary employment disputes having nothing to do with the commission of a crime. It was therefore understandable that standard confidentiality clauses did not address complaints to the police. Confidentiality terms for claims of serious sexual misconduct, including attempted rape of an employee, clearly raised different issues which a solicitor who was acting properly would have to consider for himself.

- There was no reason to construe the precedent clauses as covering bona fide complaints of criminal conduct to the police. The clauses exhibited to Mr Gould's statement contained no wording which would lead a court to conclude that they were intended to cover complaints to the police by an employee who alleged that they were the victim of a crime. Indeed, the majority of the contracts relied on were contracts of employment, as opposed to settlement/termination contracts, and those simply contained standard wording that an employee is required to keep the employer's affairs confidential. This was a different proposition from a clause in a settlement agreement settling claims of sexual harassment, assault and attempted rape, which expressly precluded disclosure of the allegations to third parties, in terms which expressly extended to cover criminal legal process.

- The Respondent accepted that he was aware that the terms were unusual and substantially more detailed than those ordinarily imposed. Given that acceptance, the content of precedent agreements, intended for use in ordinary employment disputes (not involving complaints of attempted rape or other serious sexual offences), which did not contain those bespoke terms ,did not support the application in any way.

Position of Firm S and counsel for Persons A and B

5.49 The Respondent had stressed the alleged importance of the fact that no disciplinary proceedings had been commenced against the solicitors who represented Persons A and B. That reliance, it was submitted, was fundamentally misconceived.

5.50 The letter to Firm S confirming that no disciplinary proceedings were being taken against them did not say that the SRA considered that the solicitors at Firm S had acted appropriately. On the contrary, the SRA expressly concluded that the conduct was inappropriate. However, it concluded that it was not in the public interest to take further action. The SRA concluded that the solicitors at Firm S had 'lost sight of the danger that the Agreements could prevent or deter their clients from making [reports to appropriate law enforcement or regulatory bodies] and from seeking appropriate medical treatment', and that they had acted improperly in doing so.

5.51 In addition, the evidence before the Tribunal indicated numerous grounds on which the positions of the Respondent and the lawyers at Firm S (including counsel instructed by Firm S) could be distinguished. In particular:-

5.51.1 Key provisions of the confidentiality clause which were inappropriate were contained in the original draft advanced by the Respondent:-

- The Tribunal was entitled to infer that other inappropriate provisions inserted into the clause during the negotiations were proposed or alternatively required by the Respondent on behalf of his clients, who benefited from those clauses.

- Firm S's instructions, as recorded in the SRA's letter of 31 May 2019 and reflected by Person A's own public account, was that Persons A and B did not wish to report the alleged crimes to the police. While it could be inferred that their counsel was also aware of that, there was no evidence that the Respondent knew that Persons A and B had formed that view. The Respondent had no reason, or alternatively no legitimate reason, to assume that Persons A and B did not wish to make such a complaint, but he facilitated the drafting of an agreement which purported to prevent them from doing so (and thereby prevented or deterred such a complaint). While the SRA's position is that the solicitors are in breach of professional obligations in both cases, that was clearly a relevant factor in considering whether it was in the public interest to refer the case to the Tribunal.

5.51.2 The question for the Tribunal was not whether the Respondent's position was distinguishable from Firm S's but whether the charge against him has at least a realistic prospect of success on its own merits. Even if the SRA – or indeed the Tribunal – had concluded that Firm S did not act improperly, the acquittal of one defendant in criminal proceedings did not mean that other defendants in related proceedings had no case to answer. If there is evidence on which the jury could find the allegations proved, the proper approach is to leave the allegations for the jury to determine, whatever the jury trying the other defendants decided. Nor was it an abuse of process to proceed against a

defendant in such circumstances. The Respondent's reliance on the treatment of Firm S, as well as being unfounded in fact, is wrong in law.

The Respondent's Duties

5.52 The applicable regulations at the time of the conduct were the Solicitors' Practice Rules 1990. However, professional obligations had not materially changed since then so far as this case was concerned. Rule 1(a) concerning integrity now found expression in Principle 2. Rule 1(d) concerning the good repute of the profession now found expression in Principle 6. Rule 1(f) concerning the duty to the Court now found expression in Principle 1.

5.53 Solicitors were required to act within an ethical framework that was intended to serve the public interest. When a solicitor acts in accordance with his or her obligations under the code, this promotes justice and fairness. The confidentiality terms of the contract undermined justice and fairness, in particular the public interest in the detection and prevention of serious crime.

5.54 Guidance on integrity and public confidence was provided by the Court of Appeal in Wingate. Whilst Wingate post-dated 1998 by some years, it did not, in any way, change the law. Mr Coleman QC submitted that Wingate could properly be referred to when considering the 1990 rules. Jackson LJ found that:-

> "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 ought to 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."

5.55 The Applicant alleged that the Respondent knew or suspected that the terms of the Agreements could prevent or deter Persons A and/or B from taking any of the Specified Steps. If those allegations were made out, it was open to the Tribunal to find that the Respondent's conduct lacked integrity.

5.56 As regards the repute of the profession Jackson LJ stated at paragraph 105 of Wingate:-

> "Principle 6 is aimed at a different target from that of Principle 2. Principle 6 is directed at preserving the reputation of and public confidence in the profession. It is possible to think of many forms of conduct which would undermine public confidence in the legal profession. Manifest incompetence is one example. A solicitor acting carelessly, but with integrity, would breach Principle 6 if his careless conduct goes beyond professional negligence and constitutes manifest incompetence. In applying Principle 6 it's important not to characterise run-of-the-mill professional negligence as manifest incompetence. All professional people are human and will from time to time make slips which a court would characterise as negligent. Fortunately, no loss results from most such slips. But acts of manifest incompetence engaging the principles of professional conduct of a different order."

5.57 The Respondent argued that if the Applicant was unable to establish that he knew or suspected the terms could have the effect the Applicant contended for, then the Applicant was required to prove that the Respondent was manifestly incompetent in not appreciating that. This was not accepted. Manifest incompetence, as Jackson LJ made clear, was only one example of conduct which would undermine public confidence in the legal profession.

5.58 Further, even if it was assumed that the Respondent neither knew nor suspected that the terms could have the deterrent or preventative effect alleged, then the Applicant would submit that that was manifestly incompetent. Any competent solicitor would have appreciated that, and certainly ought to have appreciated that.

5.59 Mr Coleman QC submitted that the application for summary dismissal was founded on four fundamental errors:-

- it proceeded on the basis of an incorrect interpretation of the Agreements which is not aligned with the express words of the Agreements;

- it proceeded on assertions that the Respondent did not think that the Agreements meant what the Applicant submitted that they meant;

- it sought to equate the Agreements with typical settlement agreements used to compromise ordinary employment disputes; and

- it took an untenable view of the public interest in that the Respondent did not accept that the provision of the Agreements was a matter of public interest at the time.

5.60 It was accepted that the Tribunal had jurisdiction to dismiss proceedings summarily, however that jurisdiction needed to be exercised with caution. It was submitted that in making the application at this stage in the proceedings, when the Respondent had not yet provided an Answer, the application for summary dismissal effectively contended that the Tribunal had been wrong to certify that there was a case to answer. The matter, it was submitted, was properly certified by the Tribunal as showing a case to answer, and could not be properly dismissed at this stage as:-

- The Respondent seeks to rely on a number of alternative constructions of the Agreements focused on the wording of 'legal process'. The Agreements at least purported to prevent Persons A and B from taking the specified steps. The Agreements had clearly been construed by parties to them (in particular by Person A at least) as preventing reporting to the police. As a consequence, the Agreements had or might have prevented the reporting of alleged crimes.

- To support the arguments on construction, the Respondent's instructed solicitor made assertions as to the Respondent's subjective belief as to the effect of the clauses at the time of the contractual negotiations, the reasonableness of that belief, the knowledge of the Respondent in 1998 and the instructions given to him in 1998. However, there was no direct evidence on how the Respondent did interpret the Agreements, no Answer having yet been served. The Respondent's knowledge or belief was an issue of fact. That was a triable issue that could not

be determined on this application and, accordingly, could not be disposed of summarily.

- The numerous factual assertions that had been made through the Respondent's instructed solicitor could not justify summary dismissal. If those matters were to be relied upon in the Respondent's defence, he was entitled to advance those by way of an Answer and witness evidence at a final hearing. He could not make assertions, through his solicitors, contradicting the SRA's case and thereby suggest that the proceedings should be summarily dismissed.

- There was no basis for concluding, and certainly not for concluding summarily without a trial, that developments in social values or professional standards had materially changed since 1998. The Respondent accepted that he knew that the allegations included an allegation of attempted rape or other serious sexual assault. The Respondent did not suggest that he perceived this at the time as anything other than an allegation of very serious criminal conduct (albeit one that Person X denied). Contracts which frustrate the proper investigation of crimes have been illegal, or at least contrary to public policy, since long before 1998. Whilst there was now an enhanced public awareness and concern about the misuse of non-disclosure agreements, as a result of matters that had entered into the public domain concerning Person X and the terms of the Agreements, the fact that concerns about the misuse of confidentiality agreements may not have entered the consciousness of the general public in 1998 had no bearing on the propriety of the Agreements in this case. The Agreements did not concern ordinary allegations of sexual harassment of the kind that an employment solicitor might regularly see. They were seeking to compromise claims arising from an allegation that a senior person had tried to rape, or had otherwise inflicted a serious sexual assault on, a junior employee. The core allegation was not in reality an employment complaint, but a complaint of serious crime. The SRA did not accept that a professional tribunal would have difficulty identifying and applying the correct professional standards in this context.

5.61 The Applicant relied not only on the meaning of the Agreements, but also on their potential preventative or deterrent effect. That allegation did not depend solely on the construction of the Agreements. Any disputed issue that arose in the proceedings regarding the Respondent's understanding at the time as to the meaning and effect of the agreements was a matter for the substantive hearing. It was not suitable for determination on the basis of the evidence of the Respondent's instructed solicitor or submissions from the Respondent's Counsel.

5.62 The Tribunal could not at this stage, it was submitted, resolve disputed issues of fact - those were matters that could only be determined at a substantive hearing. The Tribunal could not assume that it was in possession of all the evidence that would be before the Tribunal at the substantive hearing. The Tribunal would be required to consider the language used in the Agreements and ascertain what a reasonable person (namely a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract) would have understood the Agreement to have meant.

5.63 It was the Respondent who had the burden of persuading the Tribunal that the case was bound to fail even if the SRA has the chance to call evidence. Taking into account the Galbraith test, it was submitted that it was wholly unrealistic to think that a Tribunal could summarily dismiss the case at this stage.

The Respondent's Reply

The Construction of the Agreement

5.64 Mr Dutton QC submitted that the Tribunal was in a position to construe the Agreements. The Applicant's case was predicated on the construction of the Agreements. The suggestion by the Applicant that there might be further evidence at a substantive hearing on the matter of construction was not a submission that was open to the Applicant. There were no relevant facts to construction which were not already before the Tribunal. Nor were there any facts that could be established following disclosure, given that there were no more relevant documents to be disclosed by any party.

5.65 The Applicant submitted that the Tribunal needed to be in a position to understand the Respondent's understanding of the Agreements, which it could only do at a substantive hearing. That position, it was submitted, was an attempt to reverse the burden and standard of proof:-

- In the November 2018 letter the Respondent made it clear that he did not know or suspect that the Agreements had the meaning now alleged by the SRA. Mr Gould's witness statement reiterated the same point on instruction; the Respondent had put knowledge and suspicion in issue long ago. He did not accept that he knew or suspected that Clause 6 meant what the SRA now alleged. It was for the SRA to prove that the Respondent knew or suspected that Clause 6 prevented Persons A and B from taking any of the Specified Steps, and to establish an arguable case to that effect.

- The only fact relied upon by the SRA in their pleaded case as to R's state of mind is the language of Clause 6 itself. There was no admission by the Respondent during the investigation that he knew or suspected Clause 6 prevented Persons A or B from taking any of the Specified Steps. Further, Clause 6 was not considered improper by any of the Firm S legal team or their counsel. The solicitor for Persons A and B stated, in her interview with the SRA that she "did not then and does not now view the confidentiality provisions as being unethical". It was implicit that Person A and B's counsel (M, now QC) who spent 35 hours advising was also unconcerned by this point as the SRA stated that Person A and B's counsel "appears not to have considered that the terms proposed by [the Respondent's Firm] could not properly be accepted".

- In those circumstances, since the only factual basis upon which the SRA seek to infer knowledge or suspicion is a contractual clause which none of the other lawyers thought had the meaning or effect now contended for, there was no basis whatsoever upon which a Tribunal applying the criminal standard of proof could *ever* safely draw an adverse inference against the Respondent.

- The SRA appeared to be pinning their hopes on cross-examining the Respondent at the substantive hearing into accepting that his own account is incorrect. It relied on the fact that the Respondent had not yet provided an Answer or witness statement. It seemed that the Applicant hoped that these documents, or cross-examination, might turn up something to help its case. That was not a permissible approach; it sought to fill a fatal gap in the Applicant's case by using what it hoped would be the contradictory evidence of the Respondent during cross-examination. That involved reversing the burden of proof. All of the evidence upon which the Applicant relied for proof of the state of the Respondent's mind was before the Tribunal: it was the Agreements.

- As to the submission that there was credible documentary evidence on which the SRA was entitled to rely at the substantive hearing to prove that the Respondent must have understood that the secrecy provisions could have the effects alleged, and that the Tribunal would be entitled to draw inferences from the documents in the usual way, even if the Respondent elected not to give evidence, that submission was problematic:-

  (i) that was not the SRA's pleaded case;

  (ii) the SRA has not identified the documents upon which it relies for that submission; and

  (iii) the SRA's position would presumably have to be that any such documents were also seen by Person A and B's lawyers, but that would in turn be completely impossible to reconcile with the fact that the SRA stated to Firm S that it had seen no evidence that Firm S appreciated the potential allegedly preventative or deterrent effects of the Agreements. Mr Dutton QC questioned when it was that the Respondent should have so realised on the basis of the same documents

5.66 The need to construe the agreements was underlined, it was submitted, in the Applicant's submission that "(i) a solicitor should not lend his professional support to agreements that could prevent or deter a victim from taking the specified steps and (ii) that a solicitor should not lend his professional support to terms in an agreement that are contrary to the public interest because they purport to have a preventive or deterrent effect in the way I have just described". Those propositions, it was submitted, proceeded on the basis that the Agreements had the construction contended for by the Applicant. That was not correct.

5.67 Contrary to the Applicant's submissions, the issue of contractual construction was precisely the kind of issue that was suitable for summary disposal. The Tribunal was referred to an extract from the notes to the Civil Procedure Rule (citing ICI Chemicals & Polymers Ltd [2007] EWCA Civ 725):-

> "it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's

> case is bad in law, he will in truth have no real prospect of succeeding on his claim……the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real as opposed to a fanciful prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction".

5.68 The SRA was not in the position of being able to say what evidence "may turn up" at trial as allegedly having a bearing on the correct construction of the Agreements as it was not open to the SRA on its pleaded case to argue that there was any background relevant fact that should have a bearing on construction. Nor had the Applicant identified any potentially relevant material. Accordingly, the Applicant was unable to show what material was likely to exist which could have a bearing on the correct construction of the Agreements. At its highest, the SRA's position was that "it's entirely possible – and we don't need to tell you for sure one way or another, but it's entirely possible that the tribunal that considered a substantive hearing would have oral evidence from one or both of Persons A and B, and therefore some evidence from them as to the relevant background". Such a position could not amount to a reason for the Clauses not to be construed by the Tribunal.

5.69 Mr Dutton QC submitted that to adopt a "cautious approach" and wait for the substantive hearing to construe the Agreements would be wrong in law.

The Specified Steps

5.70 Properly construed, the Agreements did not prevent a voluntary report to, or co-operation with, the police. Mr Coleman QC, during his oral submissions referred to how carefully the clauses were considered, and the care and attention paid to the Agreements. Mr Coleman QC also submitted that given the extreme importance of confidentiality to Person X and Company Y, it was untenable to suggest that Persons A and B were entitled to make a report to the police. Further, "the idea that they [Company Y and Person X] just forgot about reporting to the police is unrealistic" and that "the reason reporting to the police is not dealt with is because parties agreed and understood there would be no reporting to the police". Mr Dutton QC submitted that the Applicant's logic did not work. It was seemingly the Applicant's case that whilst taking a very careful approach to drafting the Agreements, despite being agreed that Persons A and B were not allowed to go to the police, and despite the absolute importance of confidentiality such that even their dealings with the Inland Revenue needed to be governed by specific drafting provisions, the parties elected not only not to include an express provision that said "you cannot go to the police" but they simply failed to mention the police at all, electing instead to rely upon an entirely standard general confidentiality clause. The detailed nature of the Agreements demonstrated that, had it been the intention that Persons A and B could not go to the police, the Agreement would have stated that expressly.

5.71 The Applicant's case was, as submitted orally, that not only was its construction the correct one, but that it was not possible to read the contract as permitting a report to the police. That had to be the Applicant's submission as:-

- if the Agreement was capable of two meanings then Schuler applied such that the Agreement had to be construed so as to accord with public policy; and

- if the construction contended for by the Respondent was open to a reasonably competent solicitor, the Applicant's case failed. It was not professional misconduct to get the construction wrong if that construction was reasonable.

5.72 Mr Coleman QC submitted that "the reason reporting to the police is not dealt with is because the parties agreed and understood there would be no reporting to the police". That submission was not open to the Applicant in circumstances where it had written to Firm S stating:-

> "we have found no evidence that [the solicitors for Persons A and B] were seeking to prevent or deter their clients from making a complaint to a law enforcement or regulatory body concerning the alleged conduct of [Person X] or that they appreciated that this was a potential consequence of the Agreement".

5.73 It was illogical to suggest that there was an agreement and understanding on the part of the Respondent that Persons A and B were not permitted to go to the police whilst simultaneously stating that there was no evidence that Firm S appreciated that this was a potential consequence of the Agreement, or that they were seeking to prevent Persons A and B from going to the police.

5.74 In the absence a Clause clearly prohibiting Persons A and B from taking the specified steps, Clause 6 must be construed so as not to give rise to obligations which would be expected to be unenforceable for reasons of public policy.

5.75 As regards Clause 6(a)(ii), given the Applicant's case was that reporting a crime was not legal process in any meaningful sense, it could not rely on the provisions of that Clause in support of its contention that Clause 6 did not permit Persons A and B to make a report to the police. Its case thus rested solely on the General Prohibition, which said nothing about the police or the reporting of a serious sexual offence.

5.76 In not referring to complaints to the police, it was clear that Clause 6(a)(ii) was not seeking to prevent complaints to the police; it was designed so as to close off a potential loophole. Criminal proceedings were deliberately omitted. The Applicant stated that there was no equivalent disclosure process in criminal law. This did not assist in circumstances where the Clause expressly dealt with what happened in the context of criminal proceedings when there had been an order for disclosure.

5.77 As regards cooperating with criminal proceedings, (i) the Clause was written in the language of reasonableness and (ii) the obligation permitting Company Y to protect its legitimate interest in ensuring that disclosure did not go beyond that which was necessary was not unenforceable for reasons of public policy.

5.78 The other clauses in the Agreement supported the Respondent's construction and demonstrated that the purpose of the Agreements was to settle civil claims, and did not prevent Persons A and B from making a voluntary report to, or cooperating with, the police.

5.79 The Applicant's position as regards the seeking of medical treatment was misconstrued. Clause 6(d) was a specific carve out from the general confidentiality clause so as to enable Persons A and B to seek medical treatment if they so desired. The Applicant's position was untenable:-

(i) The starting position was that the clause must be construed in accordance with public policy if the language permits;

(ii) A requirement that a UK practitioner agree not to comply with their legal obligations would (on the SRA's case) be unreasonable and contrary to public policy.

(iii) The language adopted permitted the clause to be construed so as to comply with the medical professions' duties. In particular, the "absolute duty of confidentiality" was expressly stated to be "in the form of paragraph 6". Clause 6 could not be construed so as to be seeking to impose some extreme obligation of confidentiality that would somehow override a medical practitioner's regulatory/legal obligations. On the contrary, it contained a standard general confidentiality clause, and the requirement that a relevant practitioner be bound by a duty of confidence was no more than a statement of the law in the UK for regulated medical practitioners. Further, in circumstances in which Persons A and B's obligation not to disclose under Clause 6 was expressly caveated by the wording "if required by legal process", any court would construe a medical practitioner's confidentiality obligation in the form of Clause 6 as permitting disclosure where he or she was required by law to make it.

(iv) The Applicant's suggestion that the duty of absolute confidentiality could only be intended as additional to Clause 6(d)(ii) (which required that any medical practitioner be a member of a recognised medical body, the rules of which prohibit disclosure by its members of any information provided by a patient) missed the purpose of the Clause. The Clause was designed so as to give Company Y a degree of comfort in the context of any such disclosures, in circumstances in which the information might well be readily saleable to the media, that the recipient of the information would be a regulated professional with high standards and obligations. The reinforcement of the professional duty with an express confirmation did not change the nature of the duty. The additional confirmation required was not improper in circumstances where it was clear that there was no objection to disclosure to a medical practitioner.

(v) The clause did not make it harder for Persons A and B to obtain medical treatment. Had it not been included, there would have only been the standard confidentiality provision with no carve-out for treatment. Further, the requirement that the medical practitioner be bound by a duty of confidence was no more than a statement of the law in the UK for regulated medical

practitioners. Ensuring that a medical practitioner is bound by a duty of confidentiality and confirms it, did not make it less likely that treatment would be offered.

5.80 The Applicant, it was submitted, could not establish the meaning of Clause 6 contended for, and could not establish the Respondent's state of mind. Accordingly, its Primary Case failed. The "ought to have known" case also failed - a solicitor could not be under a duty to know of a meaning which the clause did not have, nor could a solicitor be required to ascertain the state of mind of another party, who was properly represented, to confirm the advice they have received.

5.81 Mr Dutton QC submitted that even if the Applicant's construction was correct, there was no properly arguable case that the Respondent knew or suspected that the Agreements had that meaning or that his failure to so appreciate the meaning was manifestly incompetent.

5.82 The Primary Case against the Respondent was that he knew or suspected that the Agreements prevented Persons A and B from taking the Specified Steps, or that if he did not know, he ought to have known. The Rule 5 Statement pleaded: "This risk would have been obvious to a competent, ethical solicitor". Mr Coleman QC's skeleton argument stated: the Applicant "will establish Allegation 2 if it proves that a reasonably competent solicitor ought to have appreciated that the Agreements could have the alleged effects". Mr Dutton QC submitted that that formulation was wrong as a matter of law; the test articulated was that of negligence. Mere negligence was not sufficient for a finding of processional misconduct.

5.83 The Applicant, having not pleaded manifest incompetence, argued that it did not need to do so "since the effect of an adverse finding would be that the Respondent facilitated an improper agreement". That, it was submitted, was a non sequitur. In order to make a finding against the Respondent, the Tribunal would need to be satisfied that he ought to have appreciated that the Agreements had the meaning contended for by the SRA, and that he was manifestly incompetent in failing to appreciate that fact. The Applicant sought to remedy the deficiency by arguing that manifest incompetence was merely one example of conduct that could bring the profession into disrepute and that in failing to appreciate the Agreements had the meaning contended for by the Applicant, the Respondent was manifestly incompetent. As to that, it was clear that the Applicant thought that negligence was enough and manifest incompetence had not been pleaded.

5.84 There was no properly arguable basis for the contentions that the Respondent either knew or was negligent or manifestly incompetent in failing to realise the Agreements had the Applicant's contended for meaning. The Respondent denied that he had such knowledge. In the absence of a prima facie case as to the Respondent's knowledge or suspicion, the Applicant could not succeed on the allegation that the Respondent's conduct was lacking in integrity. Further, given that none of the lawyers at the time, including the Respondent, thought that the Agreements prohibited or deterred Persons A and B from taking the Specified Steps, the Applicant had no basis upon which it could establish that any reasonably competent solicitor would have so realised. Nor could it show, in all the circumstances, that a failure to so realise, amounted to professional misconduct.

The Applicant's First Alternative Case

5.85 The First alternative case was that even if Clause 6 did permit the Specified Steps, the Respondent had breached his duties on the basis that he knew or suspected that the Agreement could deter the taking of the Specified Steps. As to that:-

5.85.1 [REDACTED]

5.85.2 The Applicant's case that the Agreements were unclear involved the allegation that in 1998 all solicitors, if dealing with a case of alleged sexual assault were bound, so as not to professionally misconduct themselves, to draft clauses which clearly qualified the general duty of confidentiality. Such a position, it was submitted, reversed the principle in Schuler, namely that if the parties wished to agree something that was contrary to public policy, that intention needed to be made abundantly clear. Mr Dutton QC submitted that there was no evidence that this was the appropriate standard in 1998. Further, it had been suggested that in 1998 a general confidentiality clause would not give rise to misconduct in an ordinary "employment" case, but it would be improper in a case involving alleged sexual assault or attempted rape. It was also suggested that such a clause would also be proper if it was thought by the employer's solicitor that the complaint was malicious. The Applicant had produced no evidence to show that in an employment case, other than an "ordinary" employment case, the profession was under a duty to create a carve-out from a general confidentiality clause so as to permit a complaint to the police. There was no logic to what the Applicant considered to be not an "ordinary" case. There was no explanation as to why cases of racial discrimination, assault or theft (all of which could occur in an employment situation and could be criminal conduct) were not matters in which there would need to be a carve-out. There was no logic in a carve-out that applied only to allegations of a sexual crime; the carve-out would have had to apply to any serious criminal complaint.

5.85.3 Further, in attempting to establish the First Alternative case, the Applicant incorrectly relied upon the test in negligence. In any event, the Applicant could not establish that the Respondent's conduct was manifestly incompetent (as to which see above).

5.86 As with its Primary Case, the Applicant's pleaded case did not rely on anything other than the Agreements as having allegedly alerted the Respondent to the alleged deterrent effect:-

- The Applicant's reliance on the knowledge of the payment agreed in comparison to the salaries of Persons A and B, and the fact that the sum was repayable in the event that confidentiality was breached, was hopeless. A clause that did not, in fact, have the deterrent effect contended for, was not capable of becoming deterrent due to the size of the payment.

- There was no evidence that any of the lawyers involved believed or suspected that the Agreements had the deterrent effect contended for. Further, the suggestion that the Respondent must have realised the deterrent effect was contrary to the

position of the Solicitor at Firm S, who stated during her interview that the Respondent had "behaved appropriately throughout the process". It was also contrary to the Applicant's own position of accepting that Firm S did not appreciate the meaning contended for.

- The Respondent was entitled to proceed on the basis that Persons A and B would be properly advised.

- As with its Primary Case, the Applicant sought to prove this allegation through cross-examination, thereby reversing the burden of proof.

The Second Alternative Case

5.87 As to the Applicant's case that the relevant Clauses were contrary to public policy and that the Respondent knew or suspected (or ought to have known or suspected) that this was the case:-

- Properly construed, the Agreements did not prohibit A or B from taking the Specified Steps. The obligations that the Agreements did contain were not contrary to public policy. The Respondent did not consider that this was the case. The Applicant could not prove that the Respondent knew, suspected or ought to have known that the Agreements had an effect which they did not in fact have.

- The submission that Clause 6(a)(ii) hindered proper investigation and was contrary to public policy was misconceived:-

  (i) No authority was cited to support the proposition that this clause was contrary to public policy.

  (ii) On the SRA's own case, the provisions could not prevent the proper investigation "of the relevant allegations", as the stipulations in Clause 6(a)(ii) did not apply in the event of a complaint to the police by Persons A and B. Clause 6(a)(ii) was only concerned with the scenario where Persons A and B were being required to disclose Confidential Information "if required by legal process".

  (iii) Given the reasonableness requirement, Clause 6(a)(ii) did not in any way impact on a proper investigation by the police. Had the parties wanted to contract not to co-operate with the police they would have needed to make that intention abundantly clear. They did precisely the opposite, making each stipulation subject to reasonableness.

  (iv) As the requirement is to give 48 hrs notice, it was likely that a person in possession of confidential information would contact the entity to whom a duty was owed to inform it of the legal process. If there could be legitimate objections to the extent of a disclosure proposed, it was very much in the interests of the person subject to the duty to sidestep the risks and costs of forming their own judgement by involving the owner of the Confidential Information in the process of disclosure. Persons A and B had learnt substantial amounts of confidential

information during their employment (as the Agreements recorded). There would have been no reason at all to divulge any such information to the police and there would have been every reason for Company Y to have engaged with the CPS or the police as to the scope of any appropriate disclosure. The requirement for "reasonable assistance" did not hinder any investigation.

(v) The requirement for Persons A and B to "use all reasonable endeavours to limit the scope of disclosure as far as possible", as well as being subject to reasonableness, did no more than to require that Persons A and B use reasonable endeavours to disclose only that which they were required to disclose pursuant to the legal process and not to go beyond it so as to disclose irrelevant Confidential Information. That was not objectionable.

(vi) Clause 6(d) did not prevent medical treatment or make it harder to obtain medical treatment. The Applicant had cited no authority for its position that Clause 6(d) was contrary to public policy. As the Respondent did not consider that this Clause interfered with Person A and B's ability to obtain treatment, there was no properly arguable basis for saying that he knew or suspected (or ought to have done).

5.88 Mr Dutton submitted that in all the circumstances, and for the reasons given above, the Tribunal ought to dismiss the case against the Respondent.

The Tribunal's Decision

The Legal Framework

5.89 As detailed above, the Tribunal considered that the appropriate test on an application for summary dismissal was that espoused in Galbraith, namely:-

> "If there is no evidence that the crime alleged has been committed by the Defendant there is no difficulty, the Judge will stop the case. The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness, because it is inconsistent with other evidence. Where the Judge concludes that the Prosecution case, taken at its highest, is such that a Jury properly directed could not properly convict on it, it is his duty on a submission being made to stop the case. Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses reliability or other matters which are generally speaking within the province of the Jury and where on one possible view of the facts there is evidence on which the Jury could properly come to a conclusion the Defendant is guilty the judge should allow the matter to be tried by the Jury".

The Construction of Clause 6

5.90 Mr Dutton QC invited the Tribunal to construe the meaning of Clause 6. Mr Coleman QC submitted that whilst the Tribunal could construe Clause 6, it may want to take "a cautious approach" as there might be further relevant evidence.

5.91 The Tribunal had been referred by the parties to Rainy Sky SA v Kookmin Bank [2011] UKSC 50 (as well as a number of other authorities detailed in the submissions above) which stated:-

> "the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant".

5.92 Both the Applicant and the Respondent, in their submissions as regards Clause 6, had referred to the intention of the parties. The Tribunal determined that an application for summary dismissal did not include a consideration of the intention of the parties. The purpose of a summary dismissal application was to consider the case against the Respondent, taking the Applicant's case at its highest. That principle was derived from Galbraith, and was agreed by the parties. It was the Applicant's position that the construction of the Agreements was such that it prohibited or deterred Persons A and B from taking the Specified Steps. It followed that in considering the application, the Tribunal was required to consider the case against the Respondent applying the Applicant's construction, subject to the Tribunal finding that such a construction was reasonably tenable. In order to undertake that assessment, it was not necessary for the Tribunal to determine whether the Applicant or the Respondent had the correct construction; the Tribunal was only required to consider whether the Applicant's construction was reasonably tenable. Given the centrality of the construction of the Agreement to the allegations, it was clear that, in the event that the Applicant's construction was untenable/unreasonable, there would be no case for the Respondent to Answer. The Tribunal did not need to construe the Agreements to determine whether the Applicant's construction was untenable or unreasonable. In the circumstances, the Tribunal did not consider that it was bound to construe the Agreements. The Tribunal found that such an approach was neither cautious, nor was it wrong in law.

The Specified Steps

5.93 As detailed above, the Tribunal considered only whether the Applicant's construction was unreasonable or untenable. In so doing, the Tribunal also considered the Respondent's construction of the Clauses. The Tribunal did not consider that it was appropriate for it to comment on the reasonableness of that construction, or the likelihood that the fact finding Tribunal would consider that the Respondent's construction was the appropriate and correct one. Its consideration of the Respondent's contention for meaning was solely for the purpose of ascertaining whether the Applicant's case was unreasonable or untenable. Accordingly the Tribunal determined that it would be inappropriate for it to make any assessment in this document of the Respondent's case.

5.94 Taking the Applicant's case at its highest, the Tribunal did not find that the Applicant could only prove its case with the assistance of the Respondent during cross-examination. On its construction of the offending Clauses, the Applicant would be able to prove its case without more. The fact finding Tribunal, if it found that the Clause had the meaning contended for by the Applicant, could properly infer that the Respondent knew that that was the meaning

5.95 *Making a complaint to law enforcement authorities*

5.95.1 It was the Respondent's position that the contention that Persons A and/or B were prohibited by the Agreements from making a complaint to the police was "wholly without merit and unadvanceable"; there was no confidentiality in the report of a serious criminal offence to the police; and that no Court would construe Clause 6 as making such a prohibition.

5.95.2 The Tribunal found that the purpose of the Agreements was to prevent the disclosure of Confidential Information, which included, indeed was directed to, the allegation of serious sexual assault. It was the Applicant's case that there was only one construction that could be applied to the Agreements. The Tribunal considered that, when taking the Applicant's case at its highest, the principles in Schuler did not apply. As had been submitted and agreed, Schuler only applied when there were alternative constructions. The application of the Schuler principle was a matter for the fact finding Tribunal, who would determine the meaning of Clause 6 by considering which of the parties had the correct construction.

5.95.3 The Tribunal found that, whilst there could be debate as to the meaning of legal process, that debate was not sufficient to cause the Applicant's case to be unreasonable or untenable. The intention of the parties in including Clause 6(a)(ii) was a matter for the fact finding Tribunal to determine. The Tribunal did not consider that Clause 6(a)(ii) demonstrated that the Applicant's case was unreasonable or untenable.

5.95.4 The Tribunal did not consider that the failure in Clause 6 to expressly prohibit a report to the police meant that the Applicant's contended construction was untenable or unreasonable.

5.95.5 The Respondent had contended for a different construction of Clause 6, which did not prohibit Persons A and B from making a voluntary report to the police. It was Mr Dutton QC's submission that the Respondent's construction was the correct construction. The Tribunal did not find that the submission of alternative constructions meant that the Applicant's construction was untenable and unreasonable. As to the proper construction, that was a matter for the fact finding Tribunal.

5.95.6 As detailed above, the Tribunal did not consider whether the construction contended for by the Respondent was open to a reasonably competent solicitor, such that an incorrect construction did not amount to professional misconduct. That was a matter for the fact finding Tribunal to determine.

5.95.7 The Tribunal did not find that the Respondent had demonstrated that, as regards the ability of Persons A and B to make a voluntary complaint to the police, the Applicant's case was unreasonable or untenable. Accordingly, the Tribunal found that the Galbraith test had not been satisfied. There was a case to answer and it was open to a properly directed fact finding Tribunal to find that the Applicant's construction of the Agreements was correct.

5.96 *Co-operating with Criminal Proceedings*

5.96.1 Mr Dutton QC submitted that Clause 6(a)(ii) could not have the meaning contended for by the Applicant as:-

- Such a meaning would be unenforceable as a matter of public policy;
- The parties did not make such an intention abundantly clear;
- The parties had deliberately adopted the language of reasonableness;
- The obligation, allowing Company Y to protect its legitimate interest as regards any disclosure, was not improper.

5.96.2 The Tribunal determined that unenforceability did not equate to a defence, nor did it mean that the Applicant's contention for construction was either unreasonable or untenable. The Tribunal repeated its findings detailed above as to the application of Schuler. The fact finding Tribunal would be entitled to find (and could find without more) that whilst Clause 6(a)(ii) referred to the provision of notice where "reasonably practicable", the use of the word reasonably did not evidence that the Clause was reasonable.

5.96.3 The Tribunal considered that if the Applicant's contention was accepted, a Tribunal could properly find that Persons A and B were prohibited from co-operating with criminal proceedings. It did not accept that the Applicant was not able to rely on Clause 6(a)(ii) as supporting its case due to its submission that the reporting of a crime was not "legal process". Accordingly, the Tribunal did not find that the Respondent had satisfied the Galbraith test.

5.97 *Seeking Medical Treatment*

5.97.1 It was the Respondent's case that Clause 6(d) was specifically worded so as to allow medical treatment, with appropriate protection regarding disclosure. The provision of an absolute duty of confidentiality did not prevent or deter Persons A and B from seeking medical treatment, nor did it make it harder for them to do so. On the contrary, it ensured that Persons A and B could seek medical treatment and make full disclosure without being in breach of the Agreement.

5.97.2 It was the Applicant's case that Clause 6(d) prevented or deterred the seeking of medical treatment. It imposed an inappropriate and unethical restriction on the ability to obtain medical treatment. Further, the duty of absolute

confidentiality conflicted with a medical practitioner's public interest obligations.

5.97.3 The Tribunal repeated its findings above as to the application of Schuler. The Tribunal agreed with Mr Coleman QC's submission that it was open to the Tribunal to determine that the Agreements had the effect of preventing or deterring Persons A and B from seeking medical treatment. As to the Respondent's construction, that was a matter for the fact finding Tribunal. The Respondent's construction did not, the Tribunal found, render the Applicant's construction untenable or unreasonable. Accordingly, the Tribunal did not find that the Respondent had satisfied the Galbraith test.

Position of Firm S and counsel for Persons A and B

5.98 The Tribunal considered that the position of Firm S, and the Applicant's treatment of Firm S, was not a matter on which it should make any determination. Firm S was not a party to the proceedings, nor was any information which would allow the Tribunal to analyse the views attributed to Firm S by the Applicant, or the conclusions reached by the Applicant as to Firm S's conduct. It was for the regulator to decide which matters should be referred to the Tribunal. The Tribunal could only consider those matters brought before it. Similarly, the view that the Solicitor, of Firm S, had taken of the Respondent was not determinative. The failure by the Applicant to refer Firm S to the Tribunal was not determinative of the application, nor was it evidence that the Respondent had not committed professional misconduct. As to how that would be viewed in the context of the case, was a matter for the fact finding Tribunal.

5.99 The Tribunal did not accept that Firm S's certification regarding advising Persons A and B, or its repute meant that the Applicant's case was unreasonable or untenable. The Tribunal found that the position of Firm S and counsel for Persons A and B was not, of itself, or in combination with the other submissions, sufficient to satisfy the Galbraith test.

The Respondent's Duties

5.100 The Tribunal agreed with Mr Coleman QC's submission that the alleged duty breaches were embodied in the Codes of Conduct produced subsequent to the Solicitor's Practice Rules 1990.

Rule 1(d)/Principle 6 - Professional Repute

5.101 It was the Respondent's position that, in order for the Applicant to establish a breach of this duty, it would need to demonstrate that the Respondent's conduct had been manifestly incompetent, such that any reasonably competent solicitor would have known or suspected that the Agreement had the construction the Applicant contended for. The Applicant had failed to plead manifest incompetence. It sought to remedy that omission by arguing that manifest incompetence was just one example of conduct that bought the profession into disrepute. It was clear from the pleaded case, that the Applicant considered that negligence was enough to establish a breach. That was not the case. Mr Dutton QC submitted that there was no properly arguable basis for the contention that the Respondent was negligent, let alone manifestly incompetent.

5.102 Further, even if it was the case that any reasonably competent solicitor would have realised the Agreements prohibited or deterred the Specified Steps, given the lack of clarity, such a failure was not sufficiently outside reasonable bounds so as to constitute professional misconduct.

5.103 Mr Coleman QC did not accept the Respondent's contention that manifest incompetence had to be established in order to prove a breach of Rule 1(d). Jackson LJ had made clear in Wingate that manifest incompetence was one example of a breach of Principle 6. In any event, in failing to appreciate or suspect that the Agreement prevented or deterred the Specified Steps, the Respondent had been manifestly incompetent.

5.104 The Tribunal did not accept that Wingate was authority for the proposition that only manifest incompetence could amount to a breach of Principle 6. The failure by the Applicant to plead manifest incompetence was not detrimental to its case. There had been numerous cases before the Tribunal where a breach of Principle 6 had been alleged and properly found proved, without manifest incompetence having been pleaded. The Tribunal considered that manifest incompetence, as found by Jackson LJ, was one example of a breach of Principle 6; it was not the only type of conduct that could breach that duty. As to whether the Respondent's conduct in the instant matter was in breach of his duty, that was a matter for the fact finding panel. For the avoidance of doubt, the Tribunal made no finding as to whether the Respondent was or was not in breach of that duty; it found that taking the Applicant's case at its highest, the Respondent's conduct was capable of being deemed in breach of his duty.

Rule 1(a)/Principle 2 - Integrity
Rule 1(f)/Principle 6 – Duty to the Court

5.105 The Tribunal determined that, taking the Applicant's case at its highest, namely, in short, that the Respondent knew or suspected that the Agreement was improper, it would be open to the fact finding Tribunal to determine that the Respondent's conduct was without integrity and in breach of his duty to the Court. The fact finding Tribunal would be entitled to find that a solicitor of integrity and acting in accordance with his duty to the Court would not facilitate an agreement if he knew or suspected it to be improper.

5.106 The Tribunal determined that the Respondent had not demonstrated that a Tribunal, properly directed, would be unable to find that the Respondent had breached his professional duties as alleged. Accordingly, the Respondent had failed to satisfy the Galbraith test.

5.107 Mr Dutton QC's submissions as regards the Applicant's First and Second Alternative cases were predicated on the Applicant having incorrectly construed Clause 6. As detailed, the Tribunal was required, when considering an application for summary dismissal, to take the Applicant's case at its highest. For the reasons detailed above, the Tribunal found that in so doing, the Respondent had been unable to establish that there was no case to answer, or that the Applicant's construction was unreasonable or untenable.

5.108 Accordingly, the Respondent's application to dismiss the matter summarily was not successful.

Application to Stay the Proceedings

Preliminary Issues

6. The Tribunal's Announcement

6.1 Following the government's advice in relation to Covid-19, on 18 March 2020, the clerk to the hearing was required to self-isolate. The parties addressed the Tribunal as to how to proceed. The parties agreed that the Tribunal should conclude the submissions of Mr Coleman QC as regards the application for summary dismissal. Thereafter, and once that decision had been announced, Mr Coleman QC, if required, would respond to Mr Dutton QC's submissions as regards the application for the stay, which Mr Coleman QC described as "the health issue". (Those submissions having been made by Mr Dutton QC in November 2019). The Tribunal had understood that the parties were asking it to consider all matters save the submissions as regards the Respondent's health.

6.2 On 31 March 2020, the Tribunal announced that the application for summary dismissal had not been successful, and that the matter was not being stayed as an abuse of process on grounds unrelated to the Respondent's health. The parties explained that they had not expected the Tribunal to make any determination as regards the stay application. The Tribunal confirmed that it would therefore consider the stay application in full, taking into account the matters raised as regards the Respondent's health which permeated the three strands of the application, and which had not previously been considered.

6.3 On 22 April 2019, prior to hearing Mr Coleman QC's Answer and Mr Dutton QC's Reply, the Tribunal clarified the position explaining that Tribunal had at all times understood that the Respondent's health was relevant to Strands 1 and 3 of the application to stay the proceedings (as well as being the only matter to consider under Strand 2). It had understood that it was being asked to consider Strands 1 and 3 minus the health issues, on the basis that it would reconsider those matters taking health into account if the proceedings continued beyond the summary dismissal application. The Tribunal was conscious, when considering Strands 1 and 3 (minus any health issues) that its decision on those matters might change once health was taken into account.

6.4 Mr Coleman QC stated that the Applicant's position was that the Tribunal was in no way tainted or disqualified from hearing the application. If the Respondent was of a different opinion it ought to make an application, as opposed to reserving its position for a judicial review. Mr Dutton QC submitted that he would be unable to make an application beyond the Tribunal's stated intention. He reserved his position as to any future application.

7. The Content of the Memorandum

7.1 The parties submitted that all private aspects in relation to the Respondent's health should not be detailed in the Memorandum, but should be recorded in a separate

document appended to the Memo, so as to preserve the Respondent's privacy. The Tribunal agreed that this was an appropriate way to document those matters. Accordingly, whilst health will be referred to in this Memo, the details of the Respondent's health condition, and any detailed submissions and findings with regard to the Respondent's health will not be included.

Witnesses

8. The following witnesses provided statements and gave oral evidence:

- Dr F – Expert witness on behalf of the Respondent
- Dr C – Expert witness on behalf of the Applicant

9. The written and oral evidence of the witnesses is quoted or summarised 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, made notes of the oral evidence, and referred to the transcript of the hearing. 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 Respondent's Submissions

Legal Framework

10. The leading authority on an application to stay proceedings was R v Crawley [2014] 2 Cr.App. R.16, in which the Court of Appeal stated:

> "… there are two categories of case in which the court has the power to stay proceedings for abuse of process. These are, first, where the court concludes that the accused can no longer receive a fair hearing; and, second, where it would otherwise be unfair to try the accused or, put another way, where a stay is necessary to protect the integrity of the criminal justice system. The first limb focuses on the trial process and where the court concludes that the accused would not receive a fair hearing it will stay the proceedings; no balancing exercise is required. The second limb concerns the integrity of the criminal justice system and applies where the Court considers that the accused should not be standing trial at all, irrespective of the fairness of the trial itself.
>
> ….
>
> The categories of cases in which it may be unfair to try the accused will include, but are not confined, to those cases where there has been bad faith, unlawfulness, or executive misconduct."

11. Brian Leveson P confirmed that ordering a stay of proceedings was a remedy of last resort.

12. Mr Dutton QC submitted that the Applicant might seek to argue that the proceedings had not been brought in bad faith or unlawfully, and thus the Tribunal's conscience was not offended, however the circumstances in which the Tribunal's conscience could be offended were not limited to such cases.

13. The Applicant relied on the remarks of Brooke LJ in the earlier decision of R (Ebrahim) v Feltham Magistrates' Court [2001] 1 WLR 1293 where it was stated:

> "In most cases any alleged unfairness can be cured in the trial process itself" and that proceedings should only be stayed in 'exceptional circumstances'."

14. Mr Dutton QC submitted that the evidential deficiencies in this matter could not be cured during the trial process.

15. The application to stay the proceedings was advanced on three grounds: (i) a fair trial was not possible; (ii) to prevent a breach of the Respondent's Article 2 and/or Article 8 rights; and (iii) the proceedings offended the Tribunal's conscience.

16. Mr Dutton QC submitted that whilst considering the three grounds, the Tribunal should take into account the following:

16.1 Given the allegations, the Respondent would be required to give evidence so as to properly defend himself. Given his health condition he would not be able to do so.

16.2. The Applicant suggested that the Respondent may not be required to give evidence, however a major plank of its arguments as regards the summary dismissal application was that the Respondent's evidence would need to be tested at trial. Given that allegation 1 was not being withdrawn, the fact that allegation 2 may not require the Respondent to give evidence was irrelevant. He would still need to give evidence as regards allegation 1.

16.3 In order to determine what the Respondent knew, suspected, or ought to have known, the Tribunal would be required to make findings of fact as to (inter alia):

- Did the Respondent know at the time that Persons A and B had decided not to go to the police? If so, that would be relevant as to whether reporting to the police was simply not addressed in the Agreement at all because it was not directed at stopping a report to the police, or whether the Agreement had been consciously drafted so as not to permit a report to the police. The Applicant asserted that there was no evidence that the Respondent was aware of the position of Persons A and B as regards a report to the police. This was demonstrable of the inability for the Respondent to have a fair trial with the nature of documents that were missing (as to which see below). Documents that might have been contained on Firm S's file had been destroyed; those documents could have evidenced what information had been conveyed to the Respondent. The Applicant relied on the lack of evidence in building its case.

- What was the Respondent's understanding as to what Persons A and B understood about the Agreements? The Applicant had relied on the witness statement of Person A in which she stated that she did not think she could tell the police about an attempted rape. It had been submitted that such an understanding was predictable in light of the draconian terms of the Agreements. It was the Respondent's position that there was nothing during the process that suggested to him that Persons A and B were anything other than satisfied with the Agreements, or that they had felt pressured into signing them.

A Fair Trial Is Not Possible

17. Mr Dutton QC submitted that in order for the Respondent to be successful under this ground, he would need to demonstrate that he would suffer prejudice. The question was whether a fair trial was possible for the Respondent in his particular circumstances. A fair trial was not possible for three reasons, namely (i) witnesses and missing documents; (ii) reconstructing professional standards of 1998 in relation to a new or novel issues; and (iii) the Respondent's health.

17.1 *Witnesses and missing documents*

17.1.1 The matters concerned events which took place in 1998. Any substantive hearing would not take place until late 2020 at the earliest. Witnesses would be required to recall events that took place 22 years previously, in meetings that occurred over 10 days from 13 to 23 October 1998. Mr Dutton QC submitted that no witness could be expected to accurately recall events that had taken place 22 years previously without contemporaneous documents. The events in question had taken place before email was a staple in a solicitor's Firm. There were no meeting notes from either side. The two potential witnesses that had been contacted on behalf of the Respondent either had a very limited recollection of the matter or no recollection at all. Given the significant passage of time, it was unsurprising that Person A's various accounts to the media and to the WEC contained a significant number of inconsistencies.

17.1.2 As detailed above in relation to the summary dismissal application, it was not accepted that the parties construed the Agreements as preventing a report to the police.

17.1.3 The Applicant referred to cases that were heard many decades after the events in question. The Applicant relied on R v Sawoniuk [2000] 2 Cr. App. Rep 220. That case concerned mass murder committed by a concentration camp guard during World War II. It was not a regulatory case about the meaning of clauses in an agreement. Sawoniuk was wholly different and unhelpful. In the case of Aaron v the Law Society [2003] EWHC 2271, the Administrative Court concluded that the Respondent had not been prejudiced by the delay of over 12 years since the conveyancing transaction in issue on the basis that the transaction had been well documented, Mr Aaron had given detailed evidence about it quite recently and he had not complained about prejudicial delay when

the matter was before the Tribunal. Even in those circumstances Auld LJ stated that he felt "some unease, particularly on such serious allegations of professional misconduct, on the institution of proceedings so long after the event – 12 to 13 years".

17.1.4 The position in this case was a delay of 22 years between conduct and hearing. Firm S's file (which would contain relevant documents) had been destroyed in a fire in 2006. There was incomplete information on the Firm's file (for example, there were no meeting notes). Mr Dutton QC submitted that the "unease" described by Auld LJ in Aaron would be profound after 22 years (by the date of the substantive hearing) and with material contemporaneous documents destroyed. Further, in Aaron, there was no complaint made to the Tribunal about the length of the delay. In this case the Respondent did highlight the delay. Additionally, the Respondent detailed his medical condition. No reliance was placed on a similar condition by Mr Aaron.

17.1.5 Mr Dutton QC submitted that Tribunal's did not ordinarily try matters which were as old as this, unless there was cogent evidence of wrongdoing where the public interest demanded that a matter should be heard (the regulatory equivalent of Sawoniuk), it was not possible to give the Respondent a fair trial.

17.1.6 In the event that the Applicant called any witnesses, (notwithstanding that its position as regards the relevance of witness evidence was inconsistent), those witnesses would be required to recall events that had taken place, without the benefit of documentary evidence that would aide in their recollection. The Respondent and the Tribunal, it was submitted, would want to explore with the witnesses and from the documents whether the complained of clauses had any deterrent effect, and whether there was any basis for asserting that such a deterrent effect would have been apparent to the Respondent. The documents that were contained in Firm S's file were of the utmost importance. The loss of those documents was not a hole that could be filled. In the circumstances, the Applicant's assertion that Firm S's file was of limited relevance was untenable.

17.1.7 The intense media interest was also relevant to whether the Respondent could receive a fair trial. Persons A and B had publically revisited their accounts of the Agreements during interviews they had attended. They had jointly answered questions dealing with issues that fell to be decided in the case. The Tribunal could not, in the circumstances, be sure that the evidence it heard from either Person A or B was an independent and accurate recollection.

17.1.8 As to the Applicant's submission that a fair trial was possible:

- The documenting of the Respondent's involvement in the transaction was not to the point, and was entirely different to the transaction being well documented. Whilst there were some documents available, the missing documents evidenced that the Tribunal would not have before it a well-documented transaction.

- The Respondent's involvement in this matter (72 hours in a ten-day period 22 years ago) was not untypical in the context of a busy and successful employment partner at a City Firm. Nor was it correct to say that his involvement was protracted. Other than some correspondence regarding undertakings between October and November 1998, (the same year as the Agreements), the only other work carried out by the Respondent [concerned a related tax issue] that was concluded by 2001 and some limited correspondence with Firm S from December 2002. The latest invoice for work between December 2002 and 31 October 2003 totalled 7 hours of the Respondent's time.

- The Applicant referred to the Respondent's ability to recall essential facts, and placed weight on the Respondent's answer to the EWW letter. It was not the case, and the Respondent had never suggested, that he had no recollection of key facts. The essential question, it was submitted, was whether it could safely be assumed that the Respondent could recall matters in sufficient detail such as to enable him to have a fair trial. No such assumption could be made.

- The Applicant's submission as regarding Firm S's file being insignificant was wrong.

- The Applicant argued that any inconsistency or error in the accounts of Persons A and B, could not avail the Respondent. Mr Dutton QC submitted that such inconsistencies were highly relevant in circumstances where the Agreements were far more important to Persons A and B (given their experiences leading up to the Agreements) than for the Respondent. The inconsistencies in their account demonstrated the difficulty that they had in recalling details of this important event. The Applicant expected the Respondent to recall details of what was for him, an isolated instruction.

- The Applicant asserted that the delay in bringing the proceedings was not the fault of the Applicant. The issue of fault, it was submitted, was irrelevant to the question of whether a fair trial was possible.

17.2 *Professional Standards in 1998*

17.2.1 Mr Dutton QC submitted that whilst there was some evidence as to the content of precedents and the approach of the lawyers involved at the time, the expert assessment now of professional conduct in 1998, against a current reconstruction of the standards of that particular time, was inherently unsafe in circumstances in which the allegations faced by the Respondent were novel, and were not allegations relating to conduct which had always been clearly improper.

17.2.2 The publication of allegations against a number of individuals (including Person X in particular), changing expectations, and the identification of serious societal issues, had been reflected since 2017 in the consideration, development and publication of warnings and guidance (by the SRA amongst

others). Those warnings and guidance sought to deal with issues in relation to the role of solicitors in confidentiality agreements, which had never previously been considered, and illustrated an on-going debate as to the correct application of principles of conduct to risks of NDA's.

17.2.3 This case would require an assessment of nuanced professional judgments made 22 years ago. Assessing the propriety of negotiating a settlement agreement in connection with an allegation of sexual misconduct, where the allegation was denied, the Respondent had no reason to believe there was a pattern of criminal behaviour, and both sides were legally represented, was quite different from a case of universally recognised misconduct.

17.2.4 It was the Applicant's position that there was no issue in reconstructing standards, as solicitors in 1998 were required to act with integrity, maintain the reputation of the profession and uphold the administration of justice. Further, it had always been the case that it was against public policy to hinder the investigation and prosecution of crimes. Mr Dutton QC submitted that the Applicant's approach was to emphasise the form of basic rules and principles rather than to consider the Tribunal's actual task, which was to apply the principles to the facts on the basis of the required standards of the relevant time. Such an exercise would involve examining whether within the legal profession at the time, the use of confidentiality clauses in employer/employee settlement agreements which imposed a blanket requirement of confidentiality with no express carve outs permitting a report to the police, were or were not accepted when dealing with allegations of harassment, or racial or sexual discrimination, or indeed any other forms of alleged serious misconduct (including conduct which, if proved, might amount to a criminal offence). Mr Dutton QC noted that until recently, precedents did not include such express carve outs.

17.2.5 The position might be different if the Agreements were obviously and palpably unlawful, but that was not this case. If Clause 6 did not (or did not obviously) prevent the Specified Steps, the Tribunal would be required to determine whether it was professional misconduct in 1998 for the Respondent to have been involved in the negotiation of a clause that, on the SRA's case "could" have had the effect of deterring Persons A or B from taking any of the Specified Steps. That determination would be made in circumstances in which: (i) this was the first ever case brought before a tribunal considering the propriety of a confidentiality clause; and (ii) the professional judgments to be investigated occurred 22 years previously, when there was no applicable guidance at all to the profession in respect of this sort of an agreement (the first warning notice being issued in March 2018, 19 ½ years later).

17.2.6 Whilst this was not the sole factor relied upon as to why a trial would be unfair, it was an important consideration for the Tribunal to keep in mind; the Tribunal would be putting itself into an extremely difficult position if the case were allowed to proceed.

17.3 *The Respondent's Health*

17.3.1 The detailed submissions as regards the Respondent's health are contained in Appendix 1 to this Memorandum. In short, it was submitted that the Respondent's health condition was such that he was unable to have a fair trial.

The Proceedings Should Be Stayed To Prevent A Breach Of The Respondent's Article 2 And/or Article 8 Rights

18. The detailed submissions as regards Article 2 and 8 are contained in Appendix 1 to this Memorandum. In short, it was submitted that the continuance of the proceedings, in light of the Respondent's health condition, was such as to amount to a breach of Articles 2 and 8.

The proceedings should be Stayed so as to protect the integrity of the Tribunal system

19. The categories of proceedings in which it would offend the Tribunal's sense of justice and propriety to be asked to try the Respondent, whilst including cases of bad faith, unlawfulness or executive misconduct, were not confined to such cases. The Applicant's position that the Tribunal is required to find bad faith for this limb of the application was wrong in law. Crawley deliberately left matters open so that cases could be judged on the facts. Nor was the Respondent required to show that the Applicant was prosecuting the case for extraneous political reasons, as opposed to a belief that the prosecution was meritorious and in the public interest. Notwithstanding that, there was a clear inference that the continued pursuit of this matter by the Applicant, given the Respondent's health condition, was the result of political pressure. The Respondent was seemingly a 'big scalp' whose prosecution enabled the Applicant to disprove the WEC's sentiment that: "It leaves a taste in the mouth that the SRA's relationship with solicitors is like some sort of cosy old boys' network kind of thing, where you are scratching each other's backs and not really taking anything seriously …"

20. Mr Dutton QC submitted that there were four distinct reasons for the proceedings offending the conscience of the Tribunal:

20.1 All the reasons set out above as regards the Respondent's inability to have a fair trial were relevant to conscience. There was no line to be drawn between where the inability to have a fair trial ended and considerations of conscience began.

20.1.a Despite its published policy, the Applicant has at no stage acknowledged the relevance that the Respondent's medical condition has to the public interest in the pursuit of the proceedings. The Applicant has been aware of the Respondent's condition since 5 April 2019. The Applicant had failed to assess the public interest in the continuation of the proceedings in light of the Respondent's condition. Mr Dutton QC submitted that, had the Applicant done so, there would be a decision with reasons. None had been provided.

20.2 The Applicant had failed to reassess its decision to pursue the proceedings notwithstanding the evidence of its own medical expert, who opined that the continuation of the proceedings gave rise to a significant risk to the Respondent's life, and that the Respondent's ability to defend himself was impaired. The Applicant's submission that the Respondent might make admissions, or the parties might reach an Agreed Outcome, was not to the point when the experts agreed that any continuation of the proceedings posed a significant risk to the Respondent's life. Such a position, it was submitted was irresponsible and, if acceded to, damaged the Tribunal's integrity.

20.3 Despite the SRA's Chief Executive stating in evidence to the WEC that the reason why the investigation had taken so long was that "everybody concerned" had been interviewed, which, it was submitted, implicitly recognised that, on the particular facts of this unusual and very stale investigation, all of the relevant solicitors should have been interviewed, the Respondent had not been interviewed. The Applicant pointed to the fact that it was not under a general duty to interview potential Respondents. That missed the point. The Applicant was required to be particularly careful to conduct a fair and thorough investigation in circumstances where the events were aged and the Respondent had been constrained in his evidence to the WEC pursuant to his professional duties.

20.3.a The Solicitor of Firm S stated that the Respondent had behaved appropriately during the negotiations of the Agreement. The Applicant did not address on what rational basis a distinction had been drawn between the Respondent and Firm S's lawyers, who the SRA had considered it appropriate to interview.

20.3.b The fact that the Respondent provided a letter in November 2018 responding to what was then being argued by the SRA, was not an answer; He was not being asked for his recollection in relation to the matters which now formed the allegations. Had the Respondent been interviewed, he would have been able to explain, or at least indicate any difficulty with memory in relation to, who was involved at what points of the negotiations, how it was, from such recollection as he had, that confidentiality provisions developed and so on. The Applicant sent an EWW and two s44B notices to the Respondent in October 2018, to which it received a written response in November 2018. The Applicant thereafter made no contact with the Respondent, despite considering it necessary to interview the Solicitor at Firm S. The current formulation of the allegation requires, according to the Applicant, a detailed examination of what happened so as to attempt to enable the Respondent to recall precisely what happened and what his state of mind was during the negotiations, which they then wish to cross examine him about.

20.4 It was only after the WEC became involved and the SRA Chief Executive was put under pressure by the WEC, that a decision was made by the SRA to prosecute the Respondent; there was a high degree of correlation between the WEC involvement and the way in which the investigation was conducted. The Applicant pointed to another 6 investigations being carried out concerning the use of NDA's in the context of sexual harassment which pre-dated the warning notice, and noted that there was no suggestion that those other cases

were improperly motivated. Mr Dutton QC submitted that neither the Tribunal nor the Respondent were aware of the circumstances of those other investigations. Nor was it known whether they also related to events that were aged with lost documents and where the lawyers for the other parties were not disciplined but were interviewed when the potential Respondent was not.

21. Mr Coleman QC contended that the Tribunal could not properly adjudicate on whether the investigation was unfair and/or the proceedings were politically motivated as those issues did not go directly to the Respondent's ability to defend the proceedings. Mr Coleman QC sought to rely on R v Horseferry Road Magistrates Court exp Bennett [1994] AC 42 for support for that proposition. In that case, it was held that the jurisdiction exercised by magistrates to protect the court's process from abuse was confined to matters directly affecting the fairness of the trial of the defendant with whom they were dealing, and did not extend to the wider supervisory jurisdiction for upholding the rule of law. The issue in that case (whether there had been a deliberate abuse of the extradition procedure) would need to be determined by the Divisional Court. Mr Dutton QC submitted that Mr Coleman QC's submission did not assist. The Respondent was not asking the Tribunal to make a determination of whether there had been a deliberate abuse of the procedure for investigating and prosecuting cases. Rather, it was contended that the circumstances of the case fell with the second limb of Crawley, which was left deliberately open-ended.

22. The Respondent was not in a position to prove that the prosecution of the Respondent was a direct result of political pressure placed upon the Chief Executive of the SRA as a result of the enquiries being made by the WEC. However, it did not need to do so to meet the test for a stay under this limb. In any event, the Respondent was able to establish that this investigation took the turn that it did as a result of political pressure and not as a result of an objective and fair investigation. Had the investigation been carried out in an objective and fair way, then all of the relevant participants would have - as the Chief Executive claimed they had - been interviewed, all of the relevant documents would have been assembled, and consideration would have been given as to whether or not it was possible for a fair trial to be had in all of the circumstances. Further, the Applicant would have properly reviewed the continuation of the proceedings on receipt of Dr F's reports, and reassessed its position following receipt of the joint report. Mr Dutton QC submitted that the fact that none of those things happened appeared to be directly related to the pressure placed on the SRA's Chief Executive by the WEC.

23. For the reasons detailed above, the Tribunal should stay the proceedings against the Respondent.

The Applicant's Submissions

Legal Framework

24. The relevant principles in Crawley were agreed. There were two circumstances in which proceedings could be stayed, namely (i) the Respondent could not receive a fair trial and (ii) a stay was necessary to protect the integrity of the Tribunal.

25. The Tribunal was referred to the discussion as regards abuse of process in Archbold – Criminal Pleading, Evidence and Practice 2020:

> "The jurisdiction does not extend to staying a prosecution which the court considers is ill advised or unwise; the question to prosecute or not is for the prosecutor; if a conviction is obtained in circumstances where the court, on reasonable grounds, feels that the prosecution should not have been brought, this can be reflected in the penalty".

26. Whilst the Respondent relied on both heads under Crawley, the Tribunal was required to consider them independently, not cumulatively. The Tribunal was reminded that a stay of proceedings was a last resort. The Respondent relied on the commentary regarding the satisfaction of category 2 of the Crawley test not being confined to cases of unlawfulness or bad faith. Mr Coleman QC referred the Tribunal to paragraphs 22 and 23 of Crawley:

> "The cases where the courts have considered this type of abuse of process to arise tended to involve very serious cases of malpractice and unlawfulness … Where there has been alleged bad faith, unlawfulness or a particular misconduct the court is concerned not to create the perception that it is condoning malpractice by law enforcement agencies or to convey the impression that it will adopt the approach that the end justifies the means. The touchstone is the integrity of the criminal justice system."

27. The second category of abuse was concerned with, in effect, serious wrongdoing by the prosecutor whether committed in good faith or bad faith. Mr Coleman QC submitted that the Respondent did not come close to bringing the case within that category. In illustration of that position, the Tribunal was referred to the categories of evidential problems and unfairness which were generally considered on applications for a stay of proceedings on the grounds of unfairness:-

- whether a prosecutor failed in its duty to obtain or retain relevant evidence;
- delay;
- oppressive conduct on behalf of a prosecutor;
- prosecutions following declarations by civil courts that the relevant conduct was lawful and/or following promises by prosecutors not to prosecute, neither of which is sufficient in itself to found an application for a stay;
- improper manipulation of criminal procedure by the prosecutor;
- entrapment;
- control of witnesses;
- abuse of executive power (citing case law on forcible abduction and rendition of suspects from foreign countries); and
- serious procedural failures by the prosecution.

28. Save for delay (as to which see below) it had not been submitted by the Respondent that any of the other factors were present in this case.

A Fair Trial Is Not Possible

29. The public interest in the disposal of allegations of wrongdoing on the merits meant that the hurdle for staying proceedings on the basis that a fair trial was not possible was high. Mr Coleman QC submitted that, when properly considered, the grounds that were relied upon by the Respondent fell far short of that which was sufficient for the Tribunal to order a stay of the proceedings notwithstanding that the Respondent had a case to answer.

30. The leading decision on staying proceedings on the ground that a trial will not be fair was R (Ebrahim) v Feltham Magistrates Court [2001] 1 W.L.R. 1293, in which the Divisional Court noted at [25]-[26]:

> "Two well known principles are frequently invoked in this context when a court is invited to stay proceedings for abuse of process. (i) The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, because the fairness of a trial is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as those about whose guilt there is any reasonable doubt should be acquitted. (ii) The trial process itself is equipped to deal with the bulk of complaints upon which applications for a stay are founded. We have derived the first of these principles from the judgment of Sir Roger Ormrod in R v Derby Crown Court, Ex p Brooks 80 Cr App R 164 , 169 and the second from the judgment of Lord Lane CJ in Attorney General's Reference (No 1 of 1990) [1992] QB 630, 644b – c. The circumstances in which any court will be able to conclude, with sufficient reasons, that a trial of a defendant will inevitably be unfair are likely to be few and far between…."

31. As regards delay, the Respondent had failed to establish that a fair hearing was not possible due to the passage of time. As stated by Lord Lane in AG's Reference No 1 of 1990: "no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held…"

32. There was extensive case law from criminal procedure on the circumstances in which delay might give rise to a ground to stay proceedings on the basis of unfairness. The Respondent was incorrect to suggest that nothing could be gained from the leading decision of Sawoniuk. Although the facts of that case (involving a prosecution of war crimes which turned on disputed witness evidence of factual events as long as 56 years after the crimes took place) were distinct from the circumstances of this case, the Court of Appeal approved the general statements of principle made by the trial judge, which included that it would be rare for a stay to be imposed in the absence of fault on the part of the prosecutor or complainant; and that delay contributed to by the actions of the defendant should not found the basis of a stay. Mr Coleman QC submitted that it was immediately apparent that the Respondent's case contradicted those propositions in circumstances where (i) there was no suggestion that the Applicant was at fault for not proceeding against the Respondent more quickly and (ii) it was inherent in the preventative and deterrent disclosure terms of the Agreement that the Respondent's conduct might remain undetected for many years.

33. Sawoniuk was relied upon as evidence that (i) the fact that the conduct took place 20 years ago and that this was (allegedly) the first time that the Applicant had brought a case concerning conduct that had taken place that long ago was immaterial and (ii) the seriousness of the crime or misconduct did not affect the principles. The question for the Tribunal was not whether the Applicant had prosecuted matters where the alleged conduct was more aged than that of the Respondent, but whether the Respondent's conduct in this case was in breach of his professional duties as alleged.

34. Mr Coleman QC referred the Tribunal to R v Stephen Pauls, a criminal prosecution involving allegations of sex offences dating back between 26 and 32 years by the time of the trial in 2005. An application to stay on the grounds of abuse was dismissed by the trial judge, and upheld by the Court of Appeal. Lord Justice Rose enunciated the relevant principles:

> "The correct approach for a judge to whom an application for a stay for abuse of process on the ground of delay is made is to bear in mind the following principles:
>
> (i) Even where delay is unjustifiable permanent stays should be the exemption rather than the rule;
>
> (ii) Where there is no fault on the part of the complainant or prosecution it would be very rare for stay to be granted;
>
> (iii) No stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held;
>
> (iv) When assessing the possible serious prejudice the judge should bear in mind his or her power to regulate the admissibility of evidence and the trial process itself should ensure that all relevant factual issues arising from delay will be placed before the jury for their consideration in accordance with an appropriate direction from the judge.
>
> (v) If, having considered all these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted."

35. Mr Coleman submitted that this was important because, for example, the Respondent speculated that there may be relevant evidence from Firm S's files, or that there may be evidence that he was told that Persons A and B did not want to go to the police, or that there may be missing evidence about the precise course that the negotiations took. The Applicant's primary response to those speculative complaints was that none of those points touched on the core of the wrongdoing alleged. In any event, insofar as the substantive Tribunal panel considered those matters to be relevant, it would take them into account when determining whether the Applicant had discharged its burden of proving matters to the criminal standard.

35.1 *Witnesses and missing documents*

35.1.1 Mr Coleman QC noted that there was no suggestion that the Applicant was responsible for the alleged absence of evidence before the Tribunal. The

Respondent, it was submitted, relied both on the loss of the hard copy of Firm S's file and the passage of time since the complained of conduct. It was noteworthy that Mr Dutton QC, during his submissions, had not taken the Tribunal to all of the evidence contained in the documents that would be available at the substantive hearing, and that he had made his submissions on prejudice without reference to the issues that would require determination at the substantive hearing.

35.1.2 The principal issues likely to arise were:

1. Did the Settlement Agreements contain terms which could prevent or deter Persons A and Person B from taking any of the Specified Steps?

2. Did the Settlement Agreements contain terms which: (a) could interfere with the due administration of justice; or (b) were contrary to public policy in any of the ways set out in allegation 1.4?

3. In respect of any of the issues at 1 to 2 above that the Tribunal may determine against the Respondent: (a) did the Respondent know or suspect them; or (b) ought the Respondent to have been aware of them?
4. In so far as issues 1 to 3 are determined against the Respondent, did the Respondent thereby compromise or impair, or act in a way likely to compromise or impair: (a) his integrity (in so far as he knew or suspected the matters set out in issues 1 and 2); (b) the good repute of the Respondent and of the solicitors' profession; and/or (c) his duty to the court?

35.1.3 Mr Coleman QC submitted that the only issue on which the Respondent's oral evidence would be important was whether the Respondent knew or suspected the Agreement prevented or deterred the taking of the Specified Steps. It was unlikely that the Respondent could have much relevant evidence on the issue of whether he ought to have known. It had been submitted that the Respondent might have relevant evidence on that issue concerning matters such as the course of the negotiations, who led them and what, if anything, he had been told about intentions to report the matter to the police. Mr Coleman QC submitted that such evidence would be peripheral or irrelevant to an allegation which was based on the inherent impropriety of a solicitor tendering an agreement that prevented or deterred the Specified Steps.

35.1.4 The Tribunal determining this application did not have all the evidence before it upon which the Applicant might rely at the substantive hearing. If there remained a concern as to the availability of documentary evidence at the substantive hearing, the Respondent would have the benefit of that doubt.

35.1.5 Mr Coleman QC summarised the Applicant's position as regards the inability to have a fair trial:

- The Respondent's involvement in the transaction was well documented on the Respondent's file. Further, in the covering letter in response to the

Applicant's Section 44B Notice, there was no indication that the file was, or might be, materially incomplete.

- The central evidence in the proceedings was the Agreement itself.

- The Respondent's involvement in the matter was substantial and protracted. This was not a fleeting or momentary piece of work.

- The Respondent's engagement would have been very memorable; he had every reason to remember the essential facts given the unique and unusual features – the profile of Person X and Company Y; the nature of the allegation against Person X; and the nature of the extreme confidentiality provisions seeking to impose secrecy; the provisions requiring the Respondent to have on-going involvement in the matter and the highly unusual features as regards the future monitoring of the conduct of Person X. Further, the Respondent had already accepted that he recalled the essential facts. The Respondent sought to focus on the possibility that he may not recall what the Applicant considered to be irrelevant or peripheral details (such as Firm S's negotiating position). To focus on such matters was to miss the point that the Agreements, by reason of their secrecy provisions, were objectionable in principle.

- It was apparent from the Respondent's reply to the EWW letter that he had a good recollection of the essential facts. His response was notable as regards the amount of detail it contained, and demonstrated that the Respondent was able to respond in detail to the allegations made. The essential case against the Respondent had not changed in any material way from the EWW letter to the allegations he faced at the Tribunal.

- The absence of Firm S's file was not significant and any suggestion by the Respondent that it might assist was speculative. Facts that the Respondent neither knew, nor ought to have known, were irrelevant. What did matter was that the Respondent's file was intact. In any event, as was demonstrated by the authorities examined above, the trial process was well suited to dealing with any issues that might arise due to missing documents or missing witness evidence. It was for the Applicant to prove its case to the criminal standard. Should the Respondent persuade the Tribunal that it could not properly consider his defence due to missing documents, then he would be the recipient of the benefit of any doubt.

- The Respondent relied on the suggestion that the evidence of Person A (and Person B insofar as available at this stage) contained inconsistencies. Any such inconsistencies, it was submitted, could not avail the Respondent. The issues addressed by them concerned the details of what took place in relation to the underlying incident itself, and the negotiations leading to the Agreements. The evidence of Persons A and B did not, it was submitted, touch upon the Applicant's case regarding the impropriety of the Respondent's conduct in associating himself with Agreements that contained the secrecy provisions preventing and/or deterring the Specified Steps.

- As detailed above, any delay was not the fault of the Applicant. The time between the conduct and the proceedings was the natural consequence of an Agreement the purpose of which was to keep secret not only the allegations levelled at Person X by Person B, but also the existence of the Agreement itself.

35.2 *Professional Standards in 1998*

35.2.1 Mr Coleman QC submitted that the Tribunal was a specialist Tribunal that was readily capable of considering what the relevant professional standards were at the time of the misconduct and could assess whether there had been any material change in professional standards. It was not accepted that professional standards and practice in 1998 would have supported the use of the confidentiality provisions in the Agreements to keep secret an allegation of attempted rape or serious sexual assault. Nor was it accepted that the date on which the misconduct took place was a sufficient reason to stay the proceedings.

35.2.2 Further, and in any event, there had been no material shift in the standards of professional conduct. The principles contained in Rules 1(a), 1(d) and 1(f) of the Solicitors' Practice Rules 1990 remained applicable through Principles 1, 2 and 6 of the SRA Principles 2011.

35.2.3 The Respondent relied on changes in the legal landscape and developments in social values. Mr Coleman QC submitted that such submissions were misconceived in circumstances where the Respondent accepted, in his EWW response, that he was aware that the allegations made by Person B, which were the subject of the Agreement, included allegations of serious sexual assault and/or attempted rape, which he also accepted were regarded as serious criminal offences in 1998.

35.2.4 Whilst it was correct that there were now strong public concerns with the reporting of sexual harassment, most famously expressed in the '#MeToo' movement, that development reflected an increased recognition of widespread concerns on sexual harassment, and the degree to which failures to address such conduct had contributed to the perpetuation of environments in which they can take place. As significant as the development in societal attitudes was, it did not call into question the fact that the allegations to be kept secret were allegations of conduct which was, on any proper assessment, very serious at the time that the allegations were made. Preventing or deterring a report of attempted rape or other serious sexual assault from being made to the police formed no part of the duty that the Respondent owed to his client, and conflicted with the wider duties to which a solicitor was subject in the public interest. The offensiveness of contracts which sought to prevent or hinder the investigation and prosecution of criminal conduct dated back centuries – increased awareness in society of the problems caused by non-disclosure agreements reflected a change in the general public's awareness of the issues, not a change of policy or law. The Tribunal, it was submitted, was readily capable of considering the allegations without undue regard to the current political and social debate on non-disclosure agreements. In short, the

professional values that underlay the Applicant's allegations were based on the enduring obligations of lawyers to uphold public confidence in the profession and had nothing to do with changes in societal values. Whilst there might have been a change in the willingness of people to speak up, and awareness generally as to the extent to which sexual assault and abuse occurred, that was not reflective of a change in the attitude to the underlying conduct itself.

35.2.5 Mr Coleman QC submitted that it had been settled law for centuries that it was against public policy, and indeed a criminal offence, to 'compound' criminal offences by accepting valuable consideration in return for not prosecuting, or hampering the prosecution of, a criminal offence. That ancient offence, along with the similar offence of misprision of a felony, were replaced with a new offence of concealing offences under section 5 the Criminal Law Act 1967. Under that Act, it was an offence, punishable by imprisonment for up to two years, for someone who knew or believed that an arrestable offence had taken place to receive valuable consideration in return for agreeing not to disclose information. The Applicant did not rely on the Criminal Law Act 1967 in support of an allegation that the Agreements were criminal. It was sufficient for the Applicant to demonstrate that contractual agreements which hindered the disclosure of information to prosecutors, and thereby hindered the investigation and prosecution of crimes, had long since been accepted as being repugnant and contrary to the administration of justice. That the alleged offences took place abroad did not change that position.

35.2.6 It should also be borne in mind that, to the extent that the allegation against Person X was well-founded, the information was not confidential at all. A victim of an attempted rape or other serious sexual assault owed no duty whatever to keep the assault confidential and was free to report it to anyone. There was no confidence in iniquity. The information regarding the allegation therefore had nothing in common with the usual confidences and commercial secrets that might properly be the subject of a confidentiality agreement. A clause that sought to impose an obligation of confidentiality in respect of an alleged crime required very careful consideration as to how far it could properly go.

35.2.7 The concern underpinning the restraint on reporting of alleged criminal activity to the police, or of subsequent cooperation with police investigations, was one which was directly relevant to the administration of justice. Solicitors had, since 1990, had an express statutory duty to act so as to further the administration of justice when conducting reserved legal activities. There could be no question that acting in such a way as to prevent the investigation and prosecution of criminal activity interfered with the administration of justice.

35.2.8 Mr Dutton QC referred to the novelty of the misconduct. Mr Coleman QC submitted that the impropriety alleged was novel, in that it was a result of the imposition of secrecy in respect of an allegation of attempted rape or serious sexual assault. The underlining ethical principle was not novel – The Tribunal would be familiar with the fundamental point that a solicitor should not lend support to an improper agreement. Whilst the context might be new, the point

of a code of conduct based on ethical and professional principles was that it should govern all aspects in which a solicitor worked (and also aspects of a solicitor's private life).

35.2.9 Whilst the Applicant acknowledged that it was a long time since 1998, it did not accept that the Tribunal hearing the case today would have any difficulty in assessing the respondent's conduct judged in the light of 1998 standards. Mr Coleman QC submitted that it was important to note that the Respondent himself acknowledged that it would have been improper in 1998 for a solicitor to negotiate or conclude an agreement that clearly purported to prevent the report of an alleged crime to the police. The public policy in that regard had not changed since 1998.

35.3 *The Respondent's Health*

35.3.1 The detailed submissions as regards the Respondent's health are contained in Appendix 1 to this Memorandum. In short, it was submitted for the Respondent that the Respondent's health condition was such that he was unable to have a fair trial.

<u>The Proceedings Should Be Stayed To Prevent A Breach Of The Respondent's Article 2 And/or Article 8 Rights</u>

36. The detailed submissions as regards Article 2 and 8 are contained in Appendix 1 to this Memorandum. In short, it was submitted on behalf of the Respondent that the continuance of the proceedings in light of the Respondent's health condition was such as to amount to a breach of Articles 2 and 8.

<u>The Proceedings Should Be Stayed To Prevent A Breach of the Respondent's Article 2 And/Or Article 8 Rights</u>

37. The detailed submissions as regards the Respondent's health are contained in Appendix 1 to this Memorandum. In short, it was submitted by the Applicant that the Respondent's health condition did not engage Article 2 such that there was not breach of his Article 2 Right. Further, the prosecution was proportionate in line with Article 8.

<u>The Proceedings Should Be Stayed So As Necessarily To Protect The Integrity Of The Tribunal System</u>

38. Mr Coleman QC submitted that the only additional points raised under this head of the application were (i) the unfounded allegation that the proceedings against the Respondent were politically motivated and (ii) the unfounded complaint that the investigation was unfair.

39. The Tribunal, it was submitted, had no power to adjudicate on those points as they did not go directly to the Respondent's ability to defend the proceedings, and did not bear directly on the fairness of the proceedings. The Tribunal was referred to <u>R v Horseferry Road Magistrates Court, ex p Bennett</u> in which the defendant had been unlawfully seized abroad and returned to England for a criminal prosecution. The

question arose as to whether the Magistrates' court could deal with questions of abuse of process and conscientiousness. In the House of Lords judgment, Lord Griffiths stated:

> "I would accordingly affirm the power of the Magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. However, in the case of Magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures."

40. Mr Coleman QC submitted that the same would apply to the Tribunal whose remit was to consider complaints. The Tribunal should consider whether a prosecution could be fairly tried in light of delay or other points bearing directly on the fairness of the trial, but it could not consider wider points of a kind that might be raised in a judicial review concerning political motivation and taints in the investigation. In any event, both matters had no merit.

41. As to the alleged political pressure and statements made to the WEC:

41.1 Whilst there had undoubtedly been political interest in the case, and in steps taken by the SRA regarding the Settlement Agreements, that interest was entirely proper and understandable (and the Respondent did not appear to say otherwise). Proceedings before the WEC were privileged. The adequacy or effectiveness of those proceedings and the reliability of the evidence given by any witness were not issues that could arise on this application.

41.2 If the allegation that the proceedings were "politically driven" was intended to imply that the SRA had in any way taken account of extraneous political considerations in its decision to prosecute, that was not the case. No inference of improper motivation could be drawn from the fact that the investigations against the Respondent moved in parallel with the SRA's evidence to a Parliamentary Committee. It was unsurprising that at a time when the SRA was required to focus on the investigations, by reason of the evidence to be given to the WEC, the investigation against the Respondent was also being progressed. It simply did not follow that the allegations were politically motivated or were a response to any form of political pressure.

41.3 As was confirmed by the Applicant to the WEC in December 2018, the investigation against the Respondent was one of seven cases concerning the use of NDAs in the context of sexual harassment which predated the Warning Notice. It had not been suggested by the Respondent that all of those cases were improperly motivated. On the contrary, the natural inference was that there was no political motivation in this case. It was just one of several such cases, albeit, because of the attention on Person X, a case with greater public and political profile than some others.

41.4 The inference of political pressure was apparently based on a line of questioning from Members of Parliament, in which individual MPs made allegations against the Respondent and his Firm based on their own review of the Agreements. On the Respondent's own evidence, the SRA's decision to issue s.44B notices was taken, and the notices were sent, before the SRA's Chief Executive appeared in front of the Committee.

41.5 Mr Coleman QC submitted that it was wrong to state that the SRA's stance was based on 'considerable pressure' put on the SRA's Chief Executive – on the contrary, the SRA Chief Executive maintained his evidence that there was an on-going investigation and that it would be inappropriate for him to comment on the MPs' allegation. That approach was entirely correct and demonstrated the proper independence with which the SRA conducted its investigations. It could not be inferred from the SRA Chief Executive insisting on the SRA's independent investigation being respected that the SRA subsequently abandoned that position and caved in to political pressure.

41.6 In any event, following the Tribunal's determination of the summary dismissal application, the fact that MPs have also pressed for those allegations to be made does not render the proceedings unfair. On the contrary, that would tend to demonstrate the harm to the reputation of the profession done by the Respondent's conduct, which would indicate that the allegations are well-founded and should be considered by the Tribunal.

41.7 The allegation of prosecution for political reasons rather than on the merits was one of bad faith. There was no evidence to support an allegation that the prosecution had been brought in bad faith. The Respondent's argument on this point failed to distinguish between on the one hand, improper political motivation, and on the other, the wider political interest expressed through the WEC. That wider political interest supported the Applicant's contention that (if the allegations were found proved) the Respondent's conduct had compromised the profession's reputation.

41.8 The main thrust of the Respondent's criticism of the investigation was that the Respondent was not interviewed. Such a criticism, it was submitted, was entirely insufficient to support a stay of the proceedings in circumstances where the Respondent was given an opportunity to inform the SRA of his position in writing. The detailed EWW response had been taken into account by the SRA, and was cited in the Rule 5 Statement. Further, a solicitor being investigated by the SRA did not have a right to an oral interview, nor did natural justice require that the Respondent be interviewed.

41.9 Mr Coleman QC submitted that the Respondent's submissions were insufficient to justify the conclusion that the proceedings must be stayed to protect the integrity of the proceedings. The only concerns with any substance were on evidential uncertainties and health issues. Those matters were amply provided for by the Tribunal's well-established procedures, and gave rise to no unfairness or offensiveness to the Tribunal's sense of justice.

42. Accordingly, and for the reasons stated above, the Respondent's application to stay the proceedings as an abuse of process should be dismissed.

The Tribunal's Findings

43. As detailed above, the Tribunal reconsidered Limbs 1 and 3 of the application to stay the proceedings taking into account the Respondent's health. The findings detailed below are the findings of the Tribunal taking all matters into account.

44. A Fair Trial Is Not Possible

44.1 *Witnesses and missing documents*

44.1.1 The Tribunal noted the length of time from the alleged conduct to any likely substantive hearing in this matter, and the potential impact this might have on witness recollection. It also noted that the main issue in the case was one of the construction and meaning of the Agreement. Mr Dutton QC had submitted that the Applicant's case was predicated entirely upon the construction of the Agreements; if that construction was incorrect or there were other reasonable interpretations of the Agreement, the Applicant's case would fail. It had also been submitted that the test of meaning was objective. In support of that submission, the Tribunal had been referred to an excerpt from Chitty on Contracts.

44.1.2 Mr Dutton QC submitted that the suggestion that there might be further relevant evidence before the Tribunal at a substantive hearing on a matter of construction was not a submission that was open to the Applicant on its pleaded case. Mr Coleman QC submitted that the Applicant did not need to rely on witness evidence to prove its case. Given those submissions, the Tribunal considered that the witness evidence was not a determinative factor in the case. The potential evidence of Persons A and B was relevant to the conduct of Person X, and their entering into the Agreements. Mr Coleman submitted, and the Tribunal agreed, that their evidence did not address the issue of whether the Respondent knew or suspected that the Agreement prohibited or deterred the Specified Steps, or whether he ought to have known. As to any inconsistencies in their evidence, those were matters that could be put to them in cross-examination in the usual way. The Tribunal did not accept that any inconsistencies arose solely due to the time between the incident and the prosecution. It was commonplace for witnesses to make inconsistent statements and for those inconsistencies to be put to a witness during cross-examination. Further, any doubt that existed as regards prosecution witness evidence would be resolved in the Respondent's favour.

44.1.3 It had been submitted on behalf of the Respondent that it was not the case, and had never been suggested, that the Respondent had no recollection of the key facts. The key issues likely to arise in the case had been detailed by both Mr Dutton QC and Mr Coleman QC. The Tribunal noted the detail with which the Respondent had recalled events in his response to the EWW letter. The Tribunal considered that the response demonstrated the Respondent's ability to recall matters in sufficient detail so as to defend the proceedings.

For those reasons, the Tribunal did not consider that issues with witness recollection due to the passing of time meant that the proceedings ought to be stayed.

44.1.4 As to the Tribunal not usually trying matters that were so aged, the Tribunal considered all matters that were referred to it, regardless of age or novelty of the issue. The Tribunal had considered, and rejected the application to summarily dismiss the proceedings, finding that there was a case for the Respondent to answer. Accordingly, it was the Tribunal's finding that there was evidence upon which the substantive panel could find matters proven following a substantive hearing.

44.1.5 As to the delay, the Tribunal did not consider that there had been a delay in the Applicant bringing the proceedings once it became aware of the Agreement. The Tribunal considered that it would be contrary to natural justice to find that the time between the alleged misconduct and the proceedings amounted to a prejudicial delay such that the proceedings should be stayed in circumstances where the secrecy clauses in the Agreement had prevented earlier discovery. That the secrecy of the Agreement itself was paramount, was clear in circumstances where Persons A and B, as parties, were not permitted to retain a copy of their Agreement. The Tribunal found that the time between the alleged misconduct and the hearing was not an unjustifiable delay that caused serious prejudice to the Respondent. The length of the Applicant's investigation, upon discovery of the alleged misconduct was not unreasonable. The fact that the conduct complained of had taken place over 20 years previously was not a matter, in and of itself, and in all the circumstances, which meant that the Respondent would suffer serious prejudice to his defence such that he could not have a fair trial.

44.1.6 As detailed above, it was the parties' position that the case was predicated on the construction of the Agreement. The Agreement was an available document; indeed it had been considered in detail by the Tribunal during the application for summary dismissal. The Tribunal considered that the relevance of the documents that were on Firm S's file was questionable. It was unlikely that such documents would speak to the Respondent's state of mind as regards the prohibition/deterrence of the Specified Steps. As to cross-examining witnesses about any deterrent effect of the complained of clauses, the documents on Firm S's file would not be required for questions of that nature to be put to the witnesses.

44.1.7 The Tribunal considered all the authorities referred to by the parties. In particular it noted the comments of Lord Justice Rose in R v Stephen Pauls. It determined that the matters relied upon by the Respondent as regards witnesses and documents, were matters that could be dealt with at the substantive hearing. As detailed above, any doubt as regards those matters would be resolved in the Respondent's favour.

44.1.8 The Tribunal considered whether the health of the Respondent had any bearing on those issues. It found that it did not. There was no suggestion that the Respondent's health condition meant that he was less able to recall events

than someone without his condition. Nor did it have any bearing on the missing documents.

44.1.9 For all the reasons detailed, the Tribunal considered that the issues raised as regards witnesses, delay and missing documents did not mean that the Respondent could not have a fair trial. All of those matters could be put before the substantive panel, which would consider those issues and determine whether they, in any way, hindered the Respondent's defence, or whether such issues meant that the Applicant had been unable to prove its case to the requisite standard.

44.2 *Professional Standards in 1998*

44.2.1 The professional duties which the Respondent was alleged to have breached remained in the current version of the Code of Conduct. Solicitors in 1998, as now, were required to act with integrity, to uphold the reputation of the profession and to comply with their duty to the Court. The Respondent accepted that it was misconduct in 1998 to draft a clause which sought to prevent the reporting of a crime to the police. Whilst the context in which it was said that the Respondent was in breach of those duties was novel, the consideration of whether those duties were breached was not. The Tribunal was a professional Tribunal that was more than capable of applying the principles to the facts of the case, and to considering standards in 1998. Mr Dutton QC submitted that the Tribunal would be putting itself into a difficult position in trying to reconstruct those standards. The Tribunal did not consider that such difficulty came anywhere close to establishing that the Respondent was unable to have a fair trial. That decision was unaffected by considerations of the Respondent's health.

44.3 *The Respondent's Health*

44.3.1 The Tribunal's detailed reasons are contained in Appendix 1 of this Memorandum. In summary, the Tribunal found that the Respondent's health was such that he could not have a fair trial. Accordingly, the application to stay the proceedings on that basis was granted.

<u>The Proceedings Should Be Stayed To Prevent A Breach Of The Respondent's Article 2 and/or Article 8 Rights</u>

45. The Tribunal's detailed reasons are contained in Appendix 1 of this Memorandum. In summary, the Tribunal found that the Respondent's Article 2 right was engaged. The continuance of the proceedings would breach that right. Such a breach was not outweighed by public interest considerations. Accordingly, the application to stay the proceedings on that basis was granted. Given its findings on Article 2, the Tribunal found that it would not be proportionate to continue the proceedings. Given that such a continuation was not proportionate it would amount to a breach of the Respondent's Article 8 right.

The Proceedings Should Be Stayed So As To Protect The Integrity Of The Tribunal System

46. Mr Dutton QC submitted that there were four reasons why the proceedings offended the Tribunal's conscience.

46.1. *All the reasons as to the Respondent's inability to have a fair trial were relevant to conscience.*

46.1.1 The Tribunal repeated its findings as to the Respondent's inability to have a fair trial detailed above. The Tribunal found that the Respondent's health condition alone was the reason that he could not have a fair trial and, to that extent, its conscience would be offended if the matter was to proceed.

46.2. *The failure of the Respondent to apply its Issuing Solicitors Disciplinary Tribunal Proceedings policy.*

46.2.1 The Tribunal considered that there was no evidence that the Applicant had failed to apply its policy. Mr Coleman QC submitted orally that the policy had been applied. It was clear, given the vehemence with which both sides had presented their case, that there was a strong belief in their respective positions. There was, the Tribunal determined, a difference between a failure of the Applicant to apply its policy, and an application of the policy which did not yield the result that the Respondent considered to be the correct one. Accordingly, the Tribunal did not find that this was a reason that its conscience should be offended.

46.3 *The investigation was unfair*

46.3.1 Mr Dutton QC submitted that the failure to interview the Respondent, whilst Firm S's lawyers had been interviewed, was demonstrable of a flawed investigation. Mr Coleman QC submitted that the Applicant was under no duty to interview the Respondent.

46.3.2 The Tribunal did not find that the failure to interview the Respondent meant that its conscience was offended such that it should stay the proceedings. The failure to interview the Respondent was not sufficient to show that the investigation was flawed, notwithstanding that the Applicant had chosen to interview lawyers from Firm S. Accordingly, the Tribunal did not find that its conscience was offended.

46.4 *Political pressure*

46.4.1 The Tribunal noted the submission by Mr Dutton QC that there was no proof that the prosecution of the Respondent was as a direct result of political pressure upon the SRA's Chief Executive as a result of enquiries by the WEC. Mr Coleman QC submitted that the investigation of the Applicant and the WEC interest had been parallel, and there was no evidence that the allegations the Respondent faced were politically motivated. The Tribunal found that there was no evidence that the proceedings were improperly motivated and

that the allegations had not been brought on the merits. Accordingly, the Tribunal did not find that its conscience was offended.

47. For the reasons detailed above, the Tribunal determined that the proceedings against the Respondent must be stayed; the application to do so was thus granted.

48. The Tribunal made the following directions:

48.1 Within 10 days of receipt of the Tribunal's detailed reasons, each party will notify the other of the orders which they will be seeking in respect of four areas: costs, publication, the stay order and the response to press enquiries;

48.2 Within 14 days thereafter the parties will exchange skeleton arguments;

48.3 The matter be listed for 1 day for the parties to present their oral arguments as to the four areas listed above;

48.4 Liberty to apply.

Dated this 2nd day of July 2020
On behalf of the Tribunal

A. Horne
Chair

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11941-2019

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

SOLICITOR Z Respondent

Before:

Ms A. Horne (in the chair)
Mr R. Nicholas
Mr S. Howe

Date of Hearing:
14, 15, 20 November 2019, 16-19, 31 March, 9, 22, 29 April 2020

Appearances

Richard Coleman QC and Philip Ahlquist both of Fountain Court Chambers, Fountain Court, Temple, London EC4Y 9DH instructed by Daniel Purcell, solicitor of Capsticks LLP, St George's Road, Wimbledon, London SW19 4DR for the Applicant.

Timothy Dutton QC and Marianne Butler both of Fountain Court Chambers, Fountain Court, Temple, London EC4Y 9DH instructed by Michael Stacey, solicitor of Russell Cooke, 8 Bedford Row, London WC1R 4BX for the Respondent.

APPENDIX 1

A Fair Trial Is Not Possible

Respondent's Submissions

1. *The Respondent's Health*

1.1 Mr Dutton QC submitted that in order to defend the allegations:

(i) All the current documentary evidence, and the evidence of Persons A and B (currently in draft), would need to be discussed with the Respondent for the purposes of preparing an Answer and then a witness statement;

(ii) Instructions would need to be taken as to other potential witnesses, who would need to be approached and, in turn, the issues arising from their evidence discussed with him (such as the lawyer to Company Y, the other solicitors at the Firm, the Firm S legal team (including counsel) or anyone else that the Respondent considered to be relevant);

(iii) Following service of the SRA's evidence, all that evidence would need to be discussed with the Respondent and his instructions obtained in order to prepare for trial;

(iv) An extensive trawl through the documents would be necessary in an attempt to enable him to chart what happened in October 1998; and

(v) Thereafter, at the substantive hearing itself, again, in order to be able properly to defend himself, the Respondent would need to be able: (i) to give instructions to his legal team as to all matters arising from the oral evidence and submissions; and (ii) to be cross examined and to answer questions from the Tribunal.

1.2 Dr F, the Respondent's expert Consultant [REDACTED], had produced four reports relating [to] the Respondent's health and his fitness to participate in the proceedings. [REDACTED]. Dr F considered that the Respondent "should not engage in attempts to defend himself in any tribunal and be realistic about the adverse effects of such attempts on his short and medium term survival". His ability to defend himself was significantly impaired. [REDACTED].

1.3 Mr Dutton QC submitted that in circumstances in which the Respondent had no prospect of recovering from the underlying condition, [REDACTED], the usual steps which the Tribunal might have been minded to take (such as holding the hearing in private or having shorter hearing days with breaks) would only mitigate, but not remove, the risk to the Respondent's life.

1.4 Following the Applicant's instruction of its own expert [REDACTED], Dr C, the experts produced a joint report in which the following matters were agreed:

- [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

1.5 Mr Dutton QC submitted that [REDACTED]. Even on the evidence of Dr C, the proceedings posed a [significant and] unacceptable risk to the Respondent's life; that risk being real and immediate.

1.6 The Applicant sought to draw an analogy between the Respondent's case and that of Lindsay v SRA [2018] EWHC 1275 (Admin) as to the Tribunal's ability to depart from the opinion of the experts. Mr Dutton QC submitted that such a comparison was untenable in circumstances where the position of Mr Lindsay was in no way similar to that of the Respondent. In that case the expert cardiologist concluded that Mr Lindsay's condition did not prevent him from participating in the proceedings. In this case it was the agreed expert opinion that the Respondent's condition did prevent his participation in the proceedings.

1.7 The right to a fair trial was addressed by Carr J in Maitland-Hudson v SRA [2019] EWHC 67 (Admin) at paragraphs 73 to 76 as follows:

> "[73] The right to a fair trial is enshrined under the common law and Article 6. The concept of procedural fairness is infinitely flexible; it is not possible to lay down rigid rules to be applied identically in every situation. Whilst there is a core minimum of process required, involving notice and some form of hearing, what is necessary to meet the requirements for a fair trial in any given case will depend on the specific facts, including for example the nature of the proceedings, the stage reached by the proceedings and the overall procedural history. So, for example, a "fair" hearing does not necessarily mean that there must be an opportunity to be heard orally.
>
> [74] The ability of a respondent to participate effectively in regulatory proceedings is a fundamental element of the right to a fair trial. It is to be assessed in the context of the particular proceedings (see for example R v Marcantonio and Chitolie [2016] EWCA Crim 14 at [7] ("Marcantonio")). The courts will interfere to protect it when necessary: see for example Anastasi v Police Appeal Tribunal [2015] EWHC 4156 at [38] and Brabazon-Drenning v UKCC [2001] HRLR 6 where Elias LJ stated at [18] and [19]: "Save in very exceptional cases

> where the public interest points strongly to the contrary, it must be wrong for a committee which has the livelihood and reputation of a professional individual in the palm of its hands, to go on with a hearing when there is unchallenged medical evidence that the individual is simply not fit to withstand the rigours of the disciplinary process. She clearly was unable to attend this hearing because she was too ill to do so. In those circumstances, I do not think there were any overriding public interest considerations which should have deprived her of her basic rights to be present when the case was put against her, and to be in a position where she could either cross-course examine herself, or have a representative with whom she could communicate cross examine on her behalf. It was a breach both of the principles of natural justice and Article 6."

1.8 Mr Dutton QC submitted that there was, in this case, "unchallenged medical evidence that the individual is simply not fit to withstand the rigours of the disciplinary process" such that it would be an abuse for the Tribunal to go on, and a breach of Article 6. The agreed medical evidence was that the Respondent's acute medical condition meant that he would be impaired in taking the steps necessary to properly defend himself (as detailed above).

1.9 It was imperative that the Respondent be heard orally; any suggestion to the contrary was untenable in circumstances where the Respondent faced an allegation that his conduct lacked integrity, there was a paucity of documents, and there were no witness statements from any of the other lawyers involved.

1.10 Further, in addition to the fact that the Respondent's ability to properly defend himself was impaired by his medical condition (such that, were the proceedings to proceed, they would amount to an abuse and a breach of Article 6):

- It was common ground that attendance at any hearing would [REDACTED] risk to his health could not be reduced or avoided by adopting the kind of reasonable adjustments that would usually be considered

- Whilst in the joint report, Dr C considered that the Respondent could reduce the risk by just giving instructions to his legal team and not attending for cross-examination, he accepted that the risk to his life from preparing for the hearing would remain significant. During cross-examination Dr C accepted that the risk to the Respondent of attendance at the hearing and being cross examined would be "similar, although cross-examination per se I suspect would cause a greater degree [REDACTED]".

1.11 The Applicant stated that it considered that the Respondent's health was a matter for case management with which the Applicant would "continue to engage responsibly and carefully". Mr Dutton QC submitted that no amount of engagement by the Applicant with the Respondent's health could assist the Respondent in circumstances where careful case management could not

remove the risk to the Respondent's life, of the continuation of the proceedings.

1.12 Due to the Respondent's inability to properly defend himself as a result of his ill health, the Respondent could not receive a fair trial.

2. For all the reasons detailed above, the proceedings should be dismissed.

The Proceedings Should Be Stayed To Prevent A Breach Of The Respondent's Article 2 And/or Article 8 Rights

Article 2:

3. Article 2 provided that:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which the penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary in defence of any person from unlawful violence, in order to effect a lawful arrest or to prevent the escape of a person lawfully detained, and in action lawfully taken for the purpose of quelling a riot or insurrection."

4. Mr Dutton QC referred the Tribunal to the decision of Soole J in GMC v X [2019] EWHC 493 (Admin), in which it was found that in addition to not permitting a public authority to take a life intentionally, Article 2 was engaged where there was a real and immediate risk to the life of an identified individual, and it was known or ought to be known to the relevant authority. A real risk was one that was objectively verified and an immediate risk was one that was present and continuing. The Tribunal was required to do all that was reasonable to avoid that risk. That meant a consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available. Further, there was a distinct question as to the weight to be given to the public interest when set against the fundamental and unqualified right in Article 2.

5. The suggestion by the Applicant that GMC v X was authority for the proposition that Article 2 could not be used as a shield against findings of professional misconduct was incorrect. The threat to life in that case was sufficiently met by the hearing being conducted in private. Mr Dutton QC submitted that if it had been found in that case that hearing the proceedings in private would not have ameliorated the risk, then consideration would have had to have been given to staying the proceedings.

6. Mr Dutton QC submitted that the Tribunal should adopt the approach of Carswell LCJ in Re Meehan's Application [2003] NICA 34 when examining whether continuation of these proceedings would constitute a breach of the Respondent's Article 2 right:

> "In our opinion it is useful to focus, as did the judge in the present case, on whether a breach of Article 2 has been established rather than concentrating on the question whether Article 2 has been engaged. Of course if Article 2 has not been engaged at all, there cannot be a breach, but a decision that it has been engaged does not necessarily provide a conclusive answer to the question whether the State has been in breach of the requirements of the Article…The court should ascertain the extent or degree of risk to life, take into account whether or not that risk has been created by some action carried out (or proposed) by the State, determine whether it would be difficult for the State to act to reduce the risk and whether there are cogent reasons in the public interest why it should not take a course of action open to it which would reduce the risk. It should then balance all these considerations in order to determine whether there has been a breach of Article 2."

7. The questions that the Tribunal were required to ask were:

- Is there a real and immediate risk to the Respondent's life caused by these proceedings continuing, such that his Article 2 right to life is engaged?

- If so, is the SRA/Tribunal doing all that is reasonable so as to avoid that risk given that the Respondent's Article 2 right is fundamental and unqualified? In particular, if there is a course of action that is open to it which would reduce the risk, are there cogent reasons in the public interest why it should not take that course of action?

8. It was for the Respondent to satisfy the Tribunal on the balance of probabilities that, by reason of the answers to those questions, a continuation of the proceedings would amount to a breach of the Respondent's Article 2 right.

9. The experts agreed that the Respondent had a severe [REDACTED] condition that gave rise to a high risk to his life, and that the risk posed to his life by the continuation of the proceedings, no matter what reasonable adjustments were put in place, remained significantly adverse.

10. Dr C agreed that the risk to the Respondent would be of a lower degree if the proceedings were stayed. Dr F considered that any continuation of the proceedings would grossly affect the Respondent's chance of survival. Accordingly, the degree of risk posed to the Respondent by the proceedings was significant.

11. The experts agreed "that deferment of the proceedings only increases the risk of [REDACTED]."

12. Mr Dutton submitted that in all the circumstances, the application to stay the proceedings was not pre-emptory, as had been asserted by the Applicant. There was an immediate risk to the Respondent by the fact of the proceedings. Any suggestion that the proceedings could continue to be reassessed at the stage that the substantive hearing took place was contrary to the agreed medical evidence.

13. Mr Dutton QC submitted that the answer to the questions above was clear; the risk posed to the Respondent's life was clear from the expert medical evidence. It was also clear that there was no course of action that the Tribunal could take, short of staying the proceedings to mitigate the risk.

14. As to the public interest, there were no cogent reasons why the Tribunal should not stay the proceedings. The Tribunal's legitimate objective was to protect and promote the public interest in upholding standards and maintaining the reputation of the profession. The Applicant, in its submissions, had not addressed why there was a strong public interest in the continuation of the proceedings such as to outweigh the Respondent's Article 2 right. It was the Applicant's position that, if Article 2 was engaged, there would be no breach of Article 2 in view of the public interest of the determination of the allegations.

15. The Applicant relied on Maitland-Hudson v SRA [2019] EWHC 67 (Admin) for the general proposition that there was an important public interest in the Tribunal being able to determine allegations of misconduct. This, it was submitted, did not assist in circumstances in which the relevant question was what public interest there was in these particular proceedings. Further, Maitland-Hudson was concerned with fundamentally different facts.

16. The Applicant also relied on Maitland-Hudson in support of its submission that if the Respondent was not fit, the Tribunal could conduct the equivalent of a trial of the facts without making any findings of misconduct in relation to the Respondent. That submission misstated and misunderstood the Tribunal's function. The Tribunal was enacted to consider allegations of professional misconduct. Its function was not to advise the profession as to future conduct. Less still should the Tribunal put the Respondent's life at risk to do so; a trial of the facts would still pose a significant risk to the Respondent even if he did not participate, as it did not remove the significant risk to his life from the proceedings continuing in any form.

17. Mr Coleman QC submitted that a trial was justified in the public interest. As to that:

    (i) It was the Applicant's case that the Respondent lacked insight and that this was evident from his application for summary dismissal. Such a stance, it was submitted, assumed proof of allegations yet to be established. The question of whether or not the case is arguable is a matter of law, and was advanced because an experienced and specialist legal team considered the application to be properly arguable. The length of time taken by the Tribunal to reach its decision following almost 4 days of submissions was consistent with that conclusion.

    (ii) The SRA ignored the Respondent's evidence to the WEC at which he stated, that looking at it now, he would have made it clearer in the drafting that nothing would override or limit an individual's legal duties, and said that he understood how some people might think that the provisions in the Agreement could be seen as perverting the course of justice. The Respondent gave evidence voluntarily. The partner and associate at Firm S elected not to give evidence to the WEC. The Applicant was aware of this. There was no evidence in the documents served that that anyone at Firm S expressed any

regret for the drafting. Notwithstanding this, the Applicant pursued allegations against the Respondent alone, and continued to pursue those allegations despite the risk to the Respondent's life.

(iii) Mr Coleman QC submitted that "concerns about the settlement agreements in this case have been identified not only by the SRA but also by the Women and Equalities Committee". The SRA's Chief Executive came under serious criticism, and announced to the WEC (not to the Respondent) that the SRA was bringing these proceedings. Mr Dutton QC submitted that that tended to indicate where the pressure was coming from. Choosing to make a partner in a large City firm the Respondent to these proceedings, and not those advising Persons A and B, indicated that the SRA was being driven by the current political "*MeToo*" atmosphere and pressure from the WEC. The Applicant had chosen a City solicitor from a large firm as its sacrificial lamb. This was to choose what the public was interested in, and not what was proportionate and in the public interest properly defined, as the basis for prosecution.

(iv) In any event, the WEC had no knowledge of the Respondent's serious [REDACTED] [health condition]. Nor was the WEC aware of the Applicant's conclusion that there was no evidence that the Firm S legal team believed the agreements were in any way improper, and it was thus not in the public interest to proceed against them. Further, the WEC was unaware that the Respondent's evidence was constrained by his professional duties to his clients. In contrast, the Tribunal whose role it is to adjudicate this matter, was aware of those facts.

(v) The proceedings concerned an aged and isolated instruction; there was no suggestion that matters complained of would be repeated.

(vi) If the Applicant considered that the Respondent posed a risk, that risk could be addressed by requiring the Respondent to heed advice, as had been required of Firm S.

(vii) In not bringing proceedings against Firm S, it was clear that the Applicant considered that it was not proportionate to prosecute the lawyers who were directly responsible for advising Persons A and B. In those circumstances, it was neither proportionate nor reasonable to pursue proceedings against the Respondent, particularly when to so do put his life at risk.

18. The Tribunal was referred to the Applicant's "Issuing Solicitors Disciplinary Tribunal Proceedings" policy, which stated that heath was a relevant factor when considering whether proceedings were required in the public interest:

> "Whether the regulated person is currently suffering from mental or physical ill health such that proceedings would have a seriously harmful effect on their health or would impact on the person's right to a fair hearing."

19. Mr Dutton QC submitted that the policy recognised that there would be occasions when it would not be appropriate to prosecute in cases of ill health. Despite that policy, the Applicant elected to continue the proceedings notwithstanding its knowledge of the risk to the Respondent's life.

20. Mr Dutton QC submitted that it was clear that the Respondent's Article 2 right was engaged. To proceed would be a breach of that right in circumstances where there was no legitimate public interest in continuing with the proceedings.

Article 8

21. **Article 8 provided that:**

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

22. The Applicant accepted that the Respondent's Article 8(1) right was engaged. In the circumstances the only matter for the Tribunal to determine was whether the Applicant could rely on Article 8(2) and in so doing, satisfy the proportionality test as set out by the Supreme Court in Bank Mellat v HM Treasury (No 2) [2014] AC 700, which required the Tribunal to conduct:

> "an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them".

23. Mr Dutton QC submitted that the Applicant had failed to apply that test. On close analysis, it was clear that the Applicant was unable to demonstrate that the continuation of the proceedings was proportionate; it could not satisfy any of steps (i)– (iv):

Step (i) The objective of bringing these proceedings to a full trial so as to hold the Respondent to account was not sufficiently important on the facts of this case to justify the limitation of his fundamental right to his private life and the protection of his health.

Step (ii) On the facts of this case, there was no rational connection to the objective of protecting the public and the reputation of the profession by holding solicitors to account for professional misconduct. The rational connection, it was submitted, could be tested by the fact that the Applicant did not consider it necessary to bring similar proceedings against the solicitors who held a greater responsibility towards Persons A and B. The Applicant had rationally decided that there was no need to bring proceedings because the public interest was protected by issuing a letter of advice as to future conduct.

Step (iii) The less intrusive measure of a letter of advice could have been used, as the treatment by the Applicant of the Firm S lawyers demonstrated. Further, the SRA could have sought to impose conditions on the Respondent's practising certificate using its powers under Section 12 of the Solicitors' Act 1974, or it could have used its internal regulatory disciplinary powers under the Regulatory and Disciplinary Proceedings Rules 2011. All of those lesser measures were available to the Applicant and were less intrusive than the measure of bringing a full scale prosecution before the Tribunal.

Step (iv) Having regard to all of these matters and the severity of the significant risk of death or serious harm to the Respondent if the proceedings continue, no fair balance could be struck between the Respondent's interests and the public interest such as to allow the proceedings to continue. The suggestion that a fair balance was struck by continuing the proceedings in circumstances where (a) proceedings had not been brought against anybody else, (b) the proceedings related to events which were 22 years old, (c) there were missing documents, and (d) witness recollection would be hampered was impossible to advance under Step (iv).

24. In its written submissions, the Applicant asserted that "the right to privacy is not absolute as the Respondent recognises and ordinary disciplinary proceedings will impact on a Respondent's privacy to a degree". That statement was generic, whereas the Tribunal was concerned with the particular proceedings against the Respondent given his medical condition. The Applicant had not considered the Respondent's medical condition in its consideration of the application of Article 8.

25. The Applicant's Issuing Solicitors Disciplinary Proceedings policy clearly anticipated that a Respondent's health was relevant to assessing the public interest in pursuing a prosecution, even if there would otherwise be a realistic prospect of conviction. Mr Dutton QC submitted that the Applicant's motivation in pursuing the matters against the Respondent, given its knowledge of his health, was questionable. It was the Applicant's position that there were substantial public interest grounds. It pointed to the fact that (i) the Respondent should be held accountable for his conduct; (ii) the interest of the WEC; and (iii) it would be wrong in principle for a solicitor to practise whilst not being fit to be held accountable. Those reasons, it was submitted, did not address Steps (i)-(iv). In any event:

- The assertion that the Respondent should be held accountable for his conduct was a generic statement. Whilst the Applicant's legitimate objective, in most cases, would justify the interference with a Respondent's Article 8 right, it did not do so in this case. The Applicant's submission was fatally flawed in circumstances where the Applicant did not consider there to be a sufficient public interest in pursuing proceedings against the Firm S lawyers for the same conduct, and in circumstances where the duties owed by the Firm S lawyers to their clients were greater than those owed by the Respondent to Firm S's clients.

- As regards the WEC, (a) the WEC was not carrying out an investigation into the proportionality of these Tribunal proceedings continuing, [REDACTED], applying the Bank Mellat test; (b) the WEC's interest in the matter did not justify an infringement of the Respondent's Article 8 right; and (c) the WEC did not know anything about a number of relevant factors in this case, including, importantly for Article 8, the Respondent's severe medical condition.

- The Applicant's submission that lesser measures were insufficient given the Respondent's lack of insight was, it was submitted, unattractive. There were a range of measures available to the Applicant. As regards insight, the Respondent, in his voluntary evidence to the WEC, made it clear that he wished he had made it clearer in the Agreements that a report to the police was not prohibited. The Respondent's statement demonstrated far more insight than had ever been shown by Firm S who did not even give evidence to the WEC, did not express any regrets, and yet were only given advice by the SRA.

26. In summary, it was submitted that the Applicant had failed to show that the interference with the Respondent's Article 8 right was proportionate in line with the Bank Mellat test. For the reasons detailed above, the proceedings against the Respondent ought to be stayed.

The Applicant's Submissions

A Fair Trial Is Not Possible

27. *The Respondent's Health*

27.1 The Tribunal had the benefit of reports from both Dr F and Dr C, as well as a joint report. The experts appeared to agree that there was significant risk [REDACTED], whether or not the proceedings continued, and that these proceedings increased that risk [REDACTED]. They disagreed as to the level of that increased risk.

27.2 Mr Coleman QC submitted that, where a Respondent invited the Tribunal to stay or dismiss proceedings on the basis of expert evidence, the Tribunal was required to examine the expert evidence with particular care and to reach its own conclusion as to the ability to participate any further in the proceedings. The Tribunal should also consider what case management measures might be available to reduce the risk to the Respondent, balancing the competing demands of the public interest and the Respondent's health. It was not bound

to accept expert evidence. In Levy v Ellis-Carr [2012] EWHC 63 (Ch) at [37], the High Court stated:

> "The court can then consider what weight to attach to that opinion, and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case)."

27.3 The Tribunal should therefore make its own assessment of the impact that the continuation of these proceedings might have on the Respondent's health, taking due account not only of the expert evidence but also of the facts that (i) the expert doctors do not have expert knowledge of the proceedings and of what will be involved in defending them, or the facts and underlying evidence, or of the Tribunal's case management powers, and (ii) the shape of any substantive hearing is unclear at this early stage. As to the latter point, the Respondent had not yet served an Answer to the allegations and it was reasonable to think that the position he took might be informed by the Tribunal's decision as to the meaning of the settlement Agreements.

27.4 Mr Coleman QC referred the Tribunal to Lindsay v SRA [2018] EWHC 1275 (Admin), in which Mr Lindsay sought a permanent stay of proceedings on the grounds of his ill-health supported by evidence that he suffered from a potentially life-threatening heart condition. The Tribunal dismissed the application. The Administrative Court, in upholding the decision, referred to the importance of balancing the Tribunal's duty to act fairly to a respondent with the 'public interest that action be taken against solicitors facing serious charges of misconduct…'. The Court said at [55]:

> "The Tribunal recognised that the Appellant suffered from a serious cardiac condition, which was potentially life-threatening, and potentially exacerbated by his symptoms of anxiety and stress. The Appellant's position was that the Tribunal proceedings should be permanently stayed because of his medical condition. However, in addition to its duty to act fairly to the Appellant, the Tribunal was under a duty to ensure that the disciplinary proceedings were effective, if at all possible, as it was in the public interest that action be taken against solicitors facing serious charges of misconduct and dishonesty. Thus, the Tribunal rightly addressed the question whether, and to what extent, the Appellant could nonetheless participate in the proceedings, despite his ill-health. The Appellant did not address this question, and nor did the two doctors (Dr Gall, a cardiologist, and Dr Saleem, a psychiatrist) whom the Appellant instructed to prepare medical reports on his behalf."

27.5 In the present case the doctors had sought to address the extent to which the Respondent could participate in the proceedings, but had rightly acknowledged the limitations of their expertise in that regard.

27.6 Mr Coleman QC submitted that principally, the Tribunal was in a better position than the experts when considering what was likely to be involved in defending the allegations, and what reasonable adjustments could be made to the Tribunal's usual procedures to ensure that the Respondent could participate in the proceedings. The experts accepted that the assistance they could give on this issue was limited; they did not fully understand what would be involved in the Respondent providing instructions to his legal team without personally attending or giving evidence at the hearing.

27.7 Neither Doctor had been able to say what the effect would be on the Respondent if the allegations were never determined, with the continued risk of press enquiries which might follow from the lack of a resolution to these proceedings. That was a matter on which the Tribunal would need to form a view. [REDACTED].

27.8 As to the areas of disagreement between the doctors:

- [REDACTED]
- [REDACTED]

27.9 Mr Coleman QC submitted that when considering the medical evidence, the Tribunal should also take account of the fact that the Respondent was now well enough to return to work as a partner at a major City law firm, albeit on reduced hours and with a carefully-managed workload. The proposition that he was not fit to face the further continuance of the proceedings, and that they should be stopped before he had even provided his Answer deserved careful scrutiny, as did the legal question of whether it could be right in law that a solicitor facing allegations of this nature could continue practising whilst all allegations against him had to be dismissed on the grounds of ill-health. Mr Coleman QC submitted that it was wrong in principle for the Tribunal to stay proceedings on the basis that the Respondent, who was fit enough to engage in practice as a solicitor, was unfit to deal with serious allegations of professional misconduct. Regulatory and legal accountability was integral to practising as a solicitor. Having regard to Principle 6 and Principle 8 of the SRA Principles 2011, it was obvious that a solicitor could not practise if he was not fit to deal with the responsibilities and risks that were inherent in practice, which must include a complaint of professional misconduct. A solicitor accused of serious misconduct could not be immune from answering those allegations before the Tribunal whilst continuing to practice as a solicitor.

27.10 In Maitland-Hudson, Green LJ observed that he would be 'loath to accept the argument that the unfitness of a solicitor to face disciplinary proceedings inevitably meant that such proceedings had to be abandoned, or placed in more or less permanent stasis'. He stated:

> "These two positions raise the spectre of a classic Catch 22: the proceedings should, in all fairness, have been adjourned pending the appellant's recovery but (once adjourned) those proceedings could not

> be resumed for the very reason that being in abeyance he would remain prone to the disability. It seemed to me that this Catch 22 was part of the Appellant's forensic end game. As observed, we have not needed to grapple with this as a discrete issue of law. I would however add that even if the Catch 22 had been a justifiable position on the evidence this would not necessarily have meant that the Tribunal became powerless. Once again, the analogy with criminal proceedings is instructive. There, if a defendant is unfit to plead, the charges are not dismissed, or the trial adjourned into an uncertain future without limit. On the contrary, if the court considers that the defendant is unfit to plead then the hearing continues with the jury being instructed not to find guilt or innocence, but only to decide whether the defendant did the acts charged. The court then disposes of the case by making appropriate non-punitive orders, for instance under mental health legislation. The relevance of this is that even when a defendant faces very serious charges an inability to defend himself, because of unfitness, does not automatically mean that the important public interest in the pursuit of the proceedings is set aside. In such a case the court adopts a modified approach which balances that public interest in pursuing proceedings with the right of the defendant to a fair trial."

27.11 Mr Coleman QC submitted that the premise of that analysis was that ill-health was not a trump card which permitted a Respondent to escape the scrutiny of the Tribunal. The case for maintaining the Tribunal's jurisdiction was compelling when the Respondent was continuing in active practise as a solicitor while at the same time arguing that he was unfit to answer allegations before the Tribunal.

27.12 The Respondent was also plainly capable of giving instructions to his solicitors, as evidenced by the complexity of the present application which has been advanced on his behalf through a long statement from his solicitor addressing both the facts and various legal issues. Mr Coleman QC submitted that in addition to the health related arguments advanced by the Respondent, he had also applied to have the proceedings summarily determined on grounds unrelated to his health. There was no evidence that giving instructions for either application has caused any adverse [REDACTED] effect.

27.13 The risk to the Respondent's health could not be properly ascertained in circumstances where the Tribunal had not made a ruling as to the interpretation of the Agreements and in the absence of the Respondent's Answer. The Tribunal does not yet know what the scope of the disputed issues at any substantive hearing would be. If the Tribunal found that the Applicant's construction of the Agreements was the correct one, it was possible that the scope of any disputed matters of fact would be limited.

27.14 It was also likely that the facts would, in the main, be agreed. The main factual point in issue was likely to be the Respondent's state of mind concerning the meaning and effect of the Agreements. Further, that issue was only relevant to the allegation that the Respondent's conduct was lacking in integrity. It was

not relevant to the allegation that his conduct did not uphold the good reputation of the profession.

27.15 The high point in the Respondent's fair trial case as regards health was the experts' agreement that "the risk posed by the proceedings, however modified, remained significantly adverse [REDACTED]". In response to questions about the impact on the Respondent's health of various aspects of the process it was stated that: "The doctors agreed that in this answer they were not sufficiently conversant with the procedural demands of examining documentation and providing instructions. However, the ability of the Respondent to give sufficient attention to these matters, examining documentation or giving a proper account of himself in cross-examination would be impaired [REDACTED]."

27.16 Mr Coleman QC noted that the experts only went as far as saying that the Respondent's attention to these matters would be impaired; it had not been said that it was impossible for him to address those matters (subject to the question of the risk that would pose). In assessing the significance of that agreed evidence, and whether the experts were in a position to assess whether the Respondent could have a fair trial, the Tribunal should take into account the limitations on the expertise of the doctors:

1. There was no indication that either doctor was aware that the Respondent had already provided a detailed reply to the EWW letter.

2. They did not have a clear understanding of the scale and scope of the case. That was evident, for example, in Dr F's oral evidence when he stated: "My understanding of what would be required would be weeks/months/years of detailed retrieval of records. I don't think he would have capacity to concentrate." Dr F also referred to the Respondent: "Looking at presumably boxes and boxes of data that will fill half of this room."

3. [REDACTED].

4. Dr C, in his second letter of 17 February 2020, stated: "I would also confirm it is not within the scope of my expertise to comment on what is involved in defending these regulatory proceedings [REDACTED]" The Article 2 argument (as to which see below) required the Tribunal to question whether there was a real and immediate risk to life if the proceedings continued at all, and if there was, whether that was outweighed by the public interest. The fair trial argument, insofar as it doesn't simply duplicate Article 2, was to the effect that the Respondent would not be able to properly engage with the proceedings [REDACTED].

5. The Respondent's ability to concentrate had to be judged in the context of his continued work at the Firm, where he was being held out as a practising solicitor and presumably was able to properly discharge all of

those responsibilities, and in circumstances where he had produced a full reply to the EWW. [REDACTED]

27.17 The Respondent's ill-health could not render the proceedings an abuse of process. Mr Coleman QC submitted that the Respondent had confused abuse of process with a case management issue. Were the Tribunal to conclude that the Respondent was not currently fit to answer the allegations made against him, it could impose a case management stay for as long as that remained the case. It was a matter that could be determined at a CMH; it was not a ground for concluding that the proceedings were so fundamentally unfair that they could not be permitted to continue at all.

28. Mr Coleman QC submitted that the Respondent had failed to cross the high hurdle required to demonstrate that the proceedings should be stayed on the basis that he could not have a fair trial, and accordingly the application to stay for abuse of process under that limb should be dismissed.

<u>The Proceedings Should Be Stayed To Prevent A Breach of the Respondent's Article 2 And/Or Article 8 Rights</u>

Article 2

29. Mr Coleman QC noted that this strand of the abuse application had been progressively enlarged. The letter of 23 July 2019, setting out the basis of the application did not rely on health issues. By 6 August 2019, the Respondent's solicitors stated that they did not know how the position would develop, and that they would be guided by the medical evidence. It was, however unlikely that the Respondent would be fit enough to stand trial and undergo cross-examination. There was no suggestion that the proceedings were an abuse on the basis of the Respondent's health. The position now was that the proceedings could not continue to any extent. The enlargement of the application reinforced the need for the Tribunal to examine the application with particular care

30. Article 2 was concerned with a state's obligation to protect human life. The Respondent sought to invoke it well outside the context in which it was ordinarily applied. Mr Coleman QC submitted that the Applicant was not aware of any case where Article 2 had been invoked to stop properly brought legal proceedings (criminal, regulatory or civil). The suggestion that it could be in the present case, if well-founded, would have wider implications for the regulatory scheme.

31. It was common ground that the Respondent had to establish that the continuation of the proceedings would pose an immediate threat to the Respondent's life. Mr Coleman QC submitted that the correct question was whether the continuation of the proceedings "in any way or to any extent" would pose such a risk. The Respondent suggested that the Tribunal should assume that the matter would proceed to a fully contested hearing prior to the service of his Answer. It was agreed that the threat should not be outweighed by the public interest in the determination of the allegations on their merits.

32. The Tribunal was referred to Re Officer L and Others [2007] UKHL 36 in which witnesses claimed that denying them anonymity would breach Article 2. Lord Carswell confirmed that a real risk was one that was objectively verified, and that an immediate risk was one that was present and continuing. The threshold was a high one that was not readily satisfied. Lord Carswell stated:

> "Secondly there is a reflection of the principle of proportionality striking a fair balance between the general rights of the community and the personal rights of the individual to be found in the degree of stringency imposed upon the state authorities and the level of protection. The standard accordingly is based on reasonableness, which brings into consideration the circumstances of the case, the ease or difficulty of taking precautions and the resources available. In this way the state is not expected to undertake an unduly burdensome obligation. It is not obliged to satisfy an absolute standard requiring the risk to be averted. It has not been definitively settled in the Strasbourg jurisprudence, where the countervailing factors relate to the public interest. Such matters as the credibility of the enquiry and its role in restoring public confidence as distinct from any practical difficulties in providing elaborate or far reaching precautions may be taken into account in deciding whether there has been a breach of Article 2. It does appear that it may be correct in principle to take such factors into account but I would reserve my opinion on that."

33. Even if it was assumed that Article 2 was already engaged (i.e. that the proceedings already constituted a real and immediate risk to the Respondent's life), the risk to life needed to be weighed against the public interest in properly brought allegations of professional misconduct being determined and in the maintenance of public confidence in the profession. Once Article 2 is engaged, the Tribunal must conduct a balancing exercise, of the sort described by Lord Carswell in Re Officer L, and also by Lord Carswell (when Lord Chief Justice of Northern Ireland) in Re Meehan's Application [2003] NICA 34 at [18]:

> "In our opinion it is useful to focus, as did the judge in the present case, on whether a breach of Article 2 has been established rather than concentrating on the question whether Article 2 has been engaged. Of course if Article 2 has not been engaged at all, there cannot be a breach, but a decision that it has been engaged does not necessarily provide a conclusive answer to the question whether the State has been in breach of the requirements of the Article. The court should ascertain the extent or degree of risk to life, take into account whether or not that risk has been created by some action carried out (or proposed) by the State, determine whether it would be difficult for the State to act to reduce the risk and whether there are cogent reasons in the public interest why it should not take a course of action open to it which would reduce the risk.[1] It should then balance all these considerations in order to determine whether there has been a breach of Article 2."

34. Mr Coleman QC submitted that the public interest in this case was the cogent reason for the determination of the allegations on their merits.

[1] Mr Coleman QC's emphasis

35. It was important to note that GMC v X (upon which the Respondent relied) was not a case in which the respondent argued that the allegations should not be determined on their merits. Rather, it was argued that the findings of professional misconduct should not be published due to the risk of suicide. The Tribunal recognised that the loss of identity following adverse findings of misconduct could not be mitigated. It was accepted in that case that Article 2 could not be used as a shield against findings of misconduct. The issue was whether the risk to life could be mitigated by orders of privacy. Mr Coleman QC invited the Tribunal to take the same approach, which prevented the Respondent from using Article 2 as a shield against responding to the allegations. Orders of privacy, such as those already in place for the proceedings could be used to mitigate against any threat the proceedings posed to the Respondent's life.

36. Mr Coleman QC submitted that the Respondent had failed to prove to the required degree of cogency that the continuation of the proceedings, to any extent, would pose a real and immediate risk to his life. It was submitted that in order to consider the Respondent's case in that regard, the Tribunal should firstly consider what the continuation of the proceedings could entail. The Tribunal ought to have regard to the entire range of reasonable possibilities. The Respondent's application wrongly assumed that the proceedings would only conclude by way of a fully contested substantive hearing. However, there were a range of possible outcomes:

- Allegation 2, it was submitted, did not require the Respondent to give evidence at all in circumstances where the relevant facts were not in issue, and the allegation did not depend on the Respondent's subjective belief as to the terms and their effect. Accordingly, there would be no need for the Respondent to be cross-examined and the allegation would be resolved on the basis of argument through counsel as to whether the undisputed facts amounted to professional misconduct. Mr Dutton QC stated that the Respondent may want to give evidence in relation to Allegation 2. The matters upon which it had been suggested that the Respondent would give evidence were, it was submitted, peripheral in the context of the case. Even if the Tribunal considered that the Respondent was not fit to defend Allegation 1, it did not follow that he was not fit to defend Allegation 2.

- The Respondent could make admissions to some or all of the allegations, and there was the inherent possibility of a regulatory settlement. The Applicant was not suggesting that the Tribunal speculate as to the Respondent's Answer to the allegations. Rather, Mr Coleman QC submitted, the Tribunal ought to keep in mind the range of possibilities as with any other case. In contrast, the Respondent's case required the Tribunal to make the assumption that the only possible outcome of the continuation of the proceedings was a fully contested trial.

- The Tribunal's determination on the summary dismissal application, further underlined the importance of not condemning the proceedings as an abuse of process by reason of the Respondent's health without first giving the Respondent the opportunity to consider the allegations.

- If the proceedings continued to a fully contested hearing, the Tribunal would use its case management powers to seek to ensure that the Respondent's health did not prevent him from having a fair hearing:

  (i) Any counsel cross-examining the Respondent would be under a duty to avoid unnecessary confrontation and hostility. The Tribunal could limit cross-examination. Areas that need to be addressed could be clearly identified and agreed between the parties and the Tribunal before the hearing commences.

  (ii) The Respondent could choose in due course not to be cross-examined if he was not fit to give oral evidence and could seek to rely on a witness statement.

  (iii) Even if the Respondent on medical advice did not make himself available for cross-examination, he could give evidence that confirmed the truth of his witness statement followed by questions by the Tribunal.

  (iv) If the Respondent did not give evidence due to his health, it would not be open to the Tribunal to draw any adverse inferences

  (v) Insofar as there was any significant deficit in the evidence as a result of the Respondent's not being cross-examined (in particular as to his state of mind in relation to the settlement agreements), the Respondent would have the benefit of the doubt.

37. If, in due course, the Tribunal considered that these case management powers would be insufficient to permit a fair trial, then it could impose a general stay. However, it was submitted, that question did not arise on this application and was one for a future case management hearing, to be taken in the light of all relevant considerations obtained at the time. In the circumstances, the application made for a stay was pre-emptory. Mr Coleman QC submitted that the Tribunal could be satisfied as regards the Respondent's ability to review material, recall events and provide instructions in a way that was acceptable to him as he had done so for these applications.

38. In the absence of admissions, and the Tribunal having been persuaded that the allegations could not be fairly determined on the basis of the Respondent's health, it would be open to the Tribunal to consider conducting a trial of the facts insofar as this could be done fairly without the Respondent's participation, and without making any findings of misconduct in respect of the Respondent (as per the observations of Green LJ detailed above).

39. It would be open to the Applicant to apply at the relevant time to withdraw allegations having regard to its assessment of what was required in the public interest. That point had not been reached. The application, it was submitted, sought to pre-empt the question of what impact the Respondent's health should have on the future conduct of the proceedings.

40. Mr Coleman QC submitted that the Respondent had failed to establish that the continuation of the proceedings to any extent would cause a real and immediate risk to the Respondent's life at this time. Both Dr F and Dr C did their best to assist the Tribunal. They were both senior and eminent [REDACTED]; the Tribunal should not prefer the evidence of one over the other; rather it should make the best assessment it could, based on the evidence, regarding any threat to the Respondent's life should the proceedings continue any further. In considering that question, the Tribunal should take into account the expert evidence together with its own expertise and knowledge of the Tribunal's procedure and practice. It was for the Tribunal to make its own assessment of the significance of the fact that the Respondent continued in practice.

41. Whilst there was some discussion as to the cause of the Respondent's illness, it was agreed that the Respondent suffered from very severe [REDACTED] disease. Moral responsibility could not be attributed to the Applicant, even if the Respondent's condition was linked to [REDACTED] the investigation and prosecution. The Applicant had been, and remained, sympathetic to the Respondent's health, and had sought to accommodate his health condition in a manner that was consistent with the Applicant's discharge of its regulatory responsibilities.

42. The key question, Mr Coleman QC submitted, was the extent to which the continuation of the proceedings would increase the already existing risk of the Respondent [REDACTED]. The expert evidence, it was submitted, did not clearly distinguish between the already existing risk and the increased risk caused by the continuation of the proceedings. It was common ground that regrettably, the Respondent faced a significant risk [REDACTED] whether or not the proceedings continued.

43. As to the risk of the Respondent [REDACTED] if the proceedings were to continue:

- [REDACTED]. Mr Coleman QC agreed with Mr Dutton QC insofar as it being unnecessary for the Tribunal to seek to quantify the percentage risk of the Respondent [REDACTED] if the proceedings were to continue:

- The Respondent faced a significant risk [REDACTED] whether or not the proceedings continued.

- [REDACTED].

- [REDACTED].

44. Mr Coleman QC submitted that following the finding of a case to answer, stopping the proceedings now on the grounds of the Respondent's ill health would not remove the [significant risk to the Respondent's health associated with the proceedings] [REDACTED]. Mr Coleman QC submitted that the pre-existing risk, and the fact that such risk would be present irrespective of any order the Tribunal made [REDACTED], went to the [core] of the application and was a point to which the Respondent had no answer. [REDACTED]. To meet that point, Mr Dutton QC stated in his written submissions that: "It is irrelevant whether, if these proceedings are stayed, the Respondent continues to be at risk from the actions of third parties. The SRA and Tribunal must, as public authorities bound by statutory duties under the

ECHR, ensure that their actions do not breach the Article 2 and 8 rights of the Respondent. In circumstances in which the experts agree that stopping these proceedings would materially reduce the risk [REDACTED] posed to the Respondent, that is the end of the matter [REDACTED].

45. In summary, the Respondent was arguing that the Tribunal should put out of its mind the possibility or likelihood that the risk to the Respondent's life would not disappear even if the case was stopped as the Tribunal ought only to be concerned with its own actions and not the likely consequences of questions from the WEC or the media. Mr Coleman QC submitted that such a legalistic approach was not justified when considering whether Article 2 was engaged, or when balancing the threat to the Respondent's life against the public interest. The Tribunal was bound to consider in the round the extent to which stopping the proceedings would benefit the Respondent's health and reduce the risk he faced.

46. Additionally, even in the event that the Tribunal stayed the proceedings, the matter was already in the public domain; the Tribunal would need to make an order that could be read out in public. It was untenable for the proceedings to be stopped without an appropriate order or statement being made. The Tribunal was thus unable to provide the Respondent with the blanket protection he sought as regards his name not entering the public domain in connection with the proceedings. Also, the Respondent's continued work at the Firm was an important factor for the Tribunal to consider. Professional accountability was inseparable from the right and privilege to practice. If a solicitor is heard to say that he is fit to practice, albeit on light duties three days a week, but not fit even to provide an Answer to the Tribunal to these allegations, or to await the Tribunal's reasons on the summary dismissal application, that risked undermining public confidence in the regulatory regime. The tension on the one hand between the Respondent's position that he could not be held accountable for these allegations at the Tribunal, and on the other that it was perfectly appropriate for him to continue to practice was a matter of major regulatory concern for the SRA.

47. [REDACTED].

48. Looking at all the matters in the round, the Respondent, it was submitted, had failed to prove that allowing the proceedings to continue to any extent would pose a real and immediate risk to his life. However, if the Tribunal were persuaded that the Respondent had discharged that burden, there would nevertheless be no breach of Article 2 in view of the public interest that the allegations be determined on their merits.

49. There was a strong public interest in pursuing the proceedings against the Respondent. The allegations were serious and there was genuine and legitimate public concern, articulated for example in the evidence given to the WEC and in the resulting report, about lawyers' involvement in the perceived misuse of confidentiality provisions in settlement agreements concerning allegations of sexual misconduct.

50. The Respondent's submissions as to the public interest did not give proper weight to the public interest in the Tribunal being able to determine these proceedings. In particular:

- The Respondent did not acknowledge the seriousness of the case as alleged.

- This was not a case, as the Respondent suggested, where the public interest was met by asking the Respondent to re-read a Warning Notice. If any or all of the allegations were found proved, the Tribunal might conclude that a significant sanction was appropriate. Moreover, the Respondent had not accepted the principle that lawyers should not lend their support to settlement agreements of the kind in issue, and had not, it was submitted, demonstrated insight into the objectionable nature of the settlement agreements.

- There was a clear and legitimate public interest in allegations, arising out of obligations of secrecy in serious allegations of sexual misconduct, being determined on their merits when the facts came to light. It was not unusual for allegations of sexual misconduct to take many years to emerge, even in the absence of secrecy obligations of the kind in issue in these proceedings. The risk that the secrecy obligations in the settlement Agreements would suppress the reporting of a serious allegation of sexual misconduct to the police, or inhibit any co-operation by Persons A and B with police inquiries, and enable Person X and Company Y to prevent the allegation from being investigated by the police or entering the public domain, was at the heart of what made them objectionable. It could not therefore be said that the public interest in pursuing these proceedings was diminished by the passage of time resulting from the secrecy obligations.

- References to the WEC were not made for illegitimate and prejudicial purposes. The proceedings before the WEC, and the report that followed, demonstrated clearly the damage to the reputation of the profession which the allegations, if proved, gave rise to.

51. Mr Coleman QC reminded the Tribunal of the novel nature of the application. Article 2 was usually invoked to protect or safeguard against the threat of an unlawful killing, or in the case of a vulnerable prisoner in the State's care and to whom a special duty may be owed. It was submitted that in the circumstances of this case, Article 2 could not protect the Respondent from the determination of proper allegations of professional misconduct; Article 2 was not a construct by which the Respondent could be protected against the health consequences of a finding of professional misconduct.

52. Further, the application was, in any event, misconceived. If the Tribunal were persuaded that the proceedings should be stayed, the stay would be on the grounds of the Respondent's ill health and not due to any impropriety in the Applicant's conduct. Whilst the Tribunal had been referred to a previous matter where, as a result of the Respondent's ill health, allegations against that Respondent had been withdrawn, that case was distinguishable from the instant case. In that case there had been no application to strike out the matter on the grounds that it was an abuse of process. That matter was adjourned *sine die*.

53. In all the circumstances the Respondent had failed to show that Article 2 was engaged and/or had failed to show that the risk posed was not outweighed by the public interest in the determination of the allegations on their merits.

Article 8

54. The factors as regards Article 8 were similar to Article 2, and added nothing to the context of the case. The Respondent rightly recognised that the right to privacy was not absolute and that ordinarily, disciplinary proceedings would impact on a Respondent's privacy to a degree.

55. As regards proportionality, it was submitted that there was a substantial public interest in the proceedings for the reasons already given above. The proceedings were proportionate to the Applicant's legitimate objective that the Respondent be held accountable for his conduct and that public confidence in the profession be maintained.

56. It was not accepted that any lesser measures, such as a warning, were sufficient. That position, it was submitted, was reinforced by the consideration that the Respondent had not demonstrated any insight; he did not consider that he had done anything wrong, and took the position that the proceedings were wholly unjustified and offended the Tribunal's dignity.

57. The pursuit of the allegations, in respect of which the Tribunal had found that there was a case to answer, struck a fair balance between the rights of the Respondent and the public interest.

58. The Respondent had, on numerous occasions, referred to the treatment of Firm S. That did not assist him. The Applicant had explained why proceedings had not been brought against Firm S in its response to the summary dismissal application. Mr Coleman QC submitted that it would be wrong in principle to assess the proportionality of the proceedings by seeking to compare the Respondent's position with that of another solicitor whom the Applicant, in the exercise of its regulatory judgment, had decided not to bring before the Tribunal.

59. As regards the Applicant failing to apply its own policy, that was not accepted. The Applicant considered that, taking into account the Respondent's health, it was proportionate to bring the proceedings.

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

<u>A Fair Trial Is Not Possible</u>

60. *The Respondent's Health*

60.1 The Tribunal listened with care to the oral evidence of the experts called by both parties and read all of the expert reports submitted; in particular it noted the contents of the joint report both as to the agreed matters, and the matters in dispute. The findings of the joint report as regards the Respondent's health were (inter alia) as follows:

- [REDACTED];
- [REDACTED];

- There was significant risk to the Respondent's health caused by the continuation of the proceedings: [REDACTED] risk was high, representing a [REDACTED];

- The risk could not be reduced by, for example, shorter hearing days, the Respondent providing instructions but not attending the hearing for cross-examination, or any other steps. Dr F considered that it was difficult to see how the Respondent providing full instructions, involving all the details that would be required at the Tribunal, would pose a less hazardous threat than a hearing. Dr C, whilst largely agreeing with Dr F in principle, felt that the Respondent giving instructions to his legal team, but not attending the hearing to be cross-examined, would constitute a reduced risk [REDACTED] but that such risk would remain significant;

- The deferment of the proceedings would only increase the risk of the Respondent's [REDACTED] mortality [REDACTED];

- The ability of the Respondent to give sufficient attention to such things as examining documents and providing a proper account of himself during cross-examination, would be impaired, and [REDACTED] participation would have an adverse impact on his [REDACTED] health. [REDACTED].

60.2 The Tribunal agreed with the parties that it was not necessary for any finding to be made as to the exact percentage of risk to the Respondent's life in light of the differences of opinion expressed by the doctors, given the agreed position that the risk was substantial, even on the lower assessment of risk of Dr C.

60.3 The Tribunal considered the findings of Elias J in Brabazon-Drenning:

> "Save in very exceptional cases where the public interest points strongly to the contrary, it must be wrong for a committee which has the livelihood and reputation of a professional individual in the palm of its hands, to go on with a hearing when there is unchallenged medical evidence that the individual is simply not fit to withstand the rigours of the disciplinary process. She clearly was unable to attend this hearing because she was too ill to do so. In those circumstances, I do not think there were any overriding public interest considerations which should have deprived her of her basic rights to be present when the case was put against her, and to be in a position where she could either cross-course examine herself, or have a representative with whom she could communicate cross examine on her behalf. It was a breach both of the principles of natural justice and Article 6."

60.4 The Tribunal also had regard to the findings in Maitland-Hudson (quoted in the Respondent's submissions above).

60.5 The agreed medical evidence was clear; the Respondent was unfit [REDACTED] to undergo the rigours of a hearing. The risk to him arose, not

just as regards any substantive hearing, but in the continuation of the proceedings in any form. He was not fit enough to provide instructions, [REDACTED]. The Tribunal considered the steps Mr Dutton QC highlighted as being necessary for the Respondent to take in preparation for any hearing. It found that all those steps were necessary in the proper preparation of the Respondent's defence. The medical evidence made it clear that the risk to the Respondent in taking those steps would be significant.

60.6 Mr Coleman QC relied on the findings in Lindsay, in which the Tribunal found that notwithstanding his medical condition, the Respondent could still participate in the proceedings, he having applied for a permanent stay. However, in that case the experts had not addressed if, and to what extent, the Respondent could participate despite his ill health. The experts in this case, accepting that they had no expertise as regards proceedings before the Tribunal, had addressed this point.

60.7 As detailed, the Tribunal considered that the steps outlined by Mr Dutton QC were all necessary steps to be taken by the Respondent in the preparation of his defence. The Tribunal agreed with Mr Coleman QC's submission that it was in a better position than the experts to assess what was likely to be involved in defending the allegations, and what reasonable adjustments could be made to enable the Respondent to participate safely. The Tribunal did not consider that there were any reasonable adjustments that could be made to its usual procedures that would enable the Respondent to participate whilst reducing the risk he faced. The experts were agreed, for example, that shorter hearing days and regular breaks would not mitigate the significant risk posed. Mr Coleman QC submitted that the Respondent could participate in the hearing and give his evidence by way of, for example, a witness statement, not be cross-examined and suffer no adverse inference from his failure to be cross-examined. The Tribunal noted that whilst a fair trial did not necessarily mean that a Respondent be heard orally, the "ability of a Respondent to participate effectively in regulatory proceedings is a fundamental element of the right to a fair trial" (as per Carr J in Maitland-Hudson). The Tribunal considered that the Respondent's inability to take the necessary steps in the preparation of his defence meant that he could not participate effectively in the proceedings.

60.8 The Tribunal had been directed to the Respondent's continued practise as a matter for consideration alongside the medical evidence. [REDACTED]. The Tribunal was sympathetic to Mr Coleman QC's submission as to the Respondent, by nature of his health, being immune from answering allegations before the Tribunal whilst continuing to work. It was of concern that the Respondent could continue in practise, but could not appear before the Tribunal as regards any allegations of misconduct. Mr Dutton QC submitted that the Respondent should not be beyond the reach of regulation. The Tribunal found that, whilst the Respondent was still subject to the same regulatory regime, the submissions as regards his ill-health (if accepted), meant that the Applicant would not be able to have proceedings against him determined by the Tribunal. It was also likely that the Applicant would not be able to require an explanation from him as to his conduct in future (unless his

condition significantly improved, which the experts considered unlikely), [REDACTED]. The Tribunal considered that such a position was unsatisfactory; a solicitor in practise should be subject to the entirety of the regulatory regime including, where appropriate, proceedings before the Tribunal. However unsatisfactory the position was, it did not mean that the continuation of the proceedings notwithstanding the Respondent's medical condition was a fair outcome.

60.9 Mr Coleman QC submitted that the risk of the proceedings to the Respondent's health could not be properly evaluated in circumstances where there had yet to be a determination of the meaning of the Agreements, and no Answer had been served by the Respondent. Mr Coleman QC argued that the application was therefore premature, and the risk should be assessed once the future course of the proceedings was certain. The Tribunal did not accept that proposition. The agreed medical evidence, as detailed above, had been clear. The mere continuation of the proceedings posed a significant risk to the Respondent's life.

61. The Tribunal considered all of the evidence and submissions. It found that in circumstances where the Respondent was unable to effectively participate in the proceedings due to his ill health, he could not have a fair trial. For that reason, the proceedings must be stayed.

<u>The Proceedings Should Be Stayed To Prevent A Breach Of The Respondent's Article 2 and/or Article 8 Rights</u>

Article 2

62. The parties agreed that the Respondent was required to establish that there was a real and immediate risk to his life, and that there were no cogent public interest reasons in the continuation of the proceedings, for his application under this limb to be successful.

63. Mr Coleman QC submitted that Article 2 was being invoked well outside of its usual sphere of operation. The suggestion that it was engaged in properly brought proceedings, if well-founded, had wider implications for the regulatory regime. The Tribunal found that the novelty of the application had no bearing on the matters that it was required to consider.

64. The threshold for a real and continuing risk was a high one. As per Lord Carswell the real risk had to be objectively verified, and an immediate risk was one that was present and continuing.

65. It was the Applicant's position that the Respondent had failed to establish to the required degree of cogency that the proceedings posed a real and immediate risk to his life. The Tribunal was referred to the case management powers it possessed as regards the entire range of possibilities if the proceedings continued.

66. It had also been submitted that Allegation 2 would not require the Respondent to give evidence, and that there was the possibility of admissions, or some other final determination of the proceedings, which would not necessitate a fully contested hearing. As to that, and as had been found, the Respondent was unable due to his ill-health, to participate effectively in the proceedings. The alternative outcomes suggested would all necessitate the Respondent taking steps which the Tribunal considered, based on the agreed medical evidence, the Respondent was unable to take. There were no case management powers that the Tribunal could deploy that would mitigate the risk to the Respondent's health and life. (See the Tribunal's reasons above as regards the Respondent's health).

67. A key question, Mr Coleman QC submitted, was the increased risk caused by the proceedings, as opposed to the risk the Respondent faced generally. The Tribunal noted that neither expert had been able to quantify exactly the increased risk. However, they both agreed that the proceedings created an increased risk, and that it was significant.

68. As to whether Article 2 was engaged, the Tribunal found:

- The medical evidence established that there was a real risk to the Respondent's life. That had been the position of Dr F instructed by the Respondent. Dr C, instructed by the Applicant, had agreed with that assessment, and whilst he considered that the percentage risk was lower than Dr F had opined, the risk to the Respondent was nevertheless significant. The Tribunal agreed [REDACTED]. The medical evidence, it was determined, amounted to objective verification of the risk.

- The medical evidence established that there was significant risk to the Respondent's health caused by the continuation of the proceedings: [REDACTED]. The Respondent was highly unlikely to recover from his condition. Indeed, the Applicant submitted that it was common ground that, regrettably, the Respondent faced a significant risk [REDACTED] whether or not the proceedings continued. The Tribunal considered that the risk to his life faced by the Respondent was immediate and continuing.

69. The Tribunal found that Article 2 was engaged by virtue of the real and immediate risk posed to the Respondent's life by the continuation of the proceedings. The issue for consideration in those circumstances was whether there were any public interest considerations that meant that the proceedings should not be stayed.

70. Mr Coleman QC submitted that determination of the allegations on the merits was in the public interest; and that interest was a cogent reason that outweighed the risks faced by the Respondent. The genuine and legitimate concern expressed both in the media and by the WEC demonstrated the public interest issues. There was a clear and legitimate public interest in the determination of allegations arising out of obligations of secrecy in allegations of serious sexual misconduct.

71. The Tribunal agreed that there was real and legitimate public interest in this case. It also agreed that the determination of allegations on their merits was in the public interest. Notwithstanding the legitimacy of the public interest, the Tribunal

determined that in this case, and in the particular circumstances of the very real and immediate risk the proceedings posed to the Respondent's life, the cogent public interest reasons did not outweigh the risk to the Respondent.

72. Mr Coleman QC had suggested that the Tribunal could perhaps decide the facts of the case without making any determination as regards the Respondent. The Tribunal rejected that submission. There was nothing in the Tribunal's Rules that allowed it to take such a course of action.

Article 8

73. Given its findings as regards Article 2, the Tribunal found that it would not be proportionate to continue the proceedings.