SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12505-2023

BETWEEN:

SOLICITORS REGULATION AUTHORITY LTD. Applicant

and

PHILIP JOHN BURBIDGE Respondent

Before:

Mr D Green (in the chair)
Mrs C Evans
Mr A Pygram

Date of Hearing: 14 March 2024

Appearances

Matthew Edwards, barrister employed by Capsticks Solicitors LLP of 1 St George's Road, London, SW19 4DR, for the Applicant.

The Respondent did not attend and was not represented.

JUDGMENT

Allegations

1. The Allegations against the Respondent, Philip Burbidge, made by the SRA, are that, whilst a Consultant Solicitor at Battens Solicitors Limited ("the Firm") and while practising as a Solicitor, he:

1.1. On 4 November 2016, provided information to Client A and Client B in respect of work that had already been undertaken in the matter which he knew, or ought to have known was false.

PROVED

In doing so he breached any or all of Principles 2 and 6 of the SRA Principles 2011.

PROVED

1.2. Between 7 February 2017 and 3 October 2018, inclusive, when representing Client A and Client B in litigation arising from a construction dispute, failed to adequately comply with Consent Orders and Unless Orders which led to their claim being struck out and costs orders being made against them.

In doing so he breached any or all of Principles 4, 5 and 6 of the SRA Principles 2011 and Outcomes 1.2 and 5.3 of the SRA Code of Conduct 2011.

PROVED

1.3. Between 14 February 2017 and 16 October 2018, inclusive, when representing Client A and Client B in litigation arising from a construction dispute, failed to seek client instructions in respect of ongoing matters.

In doing so he breached any or all of Principles 4, 5 and 6 of the SRA Principles 2011 and Outcome 1.5 of the SRA Code of Conduct 2011.

PROVED

Dishonesty

2. Allegation 1.1 was advanced on the basis that the Respondent's conduct was dishonest. Dishonesty is alleged as an aggravating feature of the Respondent's misconduct but is not an essential ingredient in proving the allegations.

Recklessness

3. In addition, and/or as an alternative to the above allegation of dishonesty as an aggravating feature, Allegations 1.1, 1.2 and 1.3 are advanced on the basis the Respondent was reckless.

Executive Summary

4. The Respondent did not serve an Answer and he played no part in the substantive hearing.

5. The Tribunal found all allegations proved on the balance of probabilities.

6. The Tribunal found the Respondent's letter to Clients A and B did not set out the true and accurate status of their case and that the Respondent had dishonestly misled Clients A and B. There had been a continuum of inaction or inadequately progressed work on the Respondent's part, spread over many months, essentially 'too little too late'.

7. This culminated in his clients' case being struck out unnecessarily by his failure to comply with an Unless Order, and his later failure to notify his clients and obtain their instructions in good time regarding a time-limited without prejudice offer as to costs made by the Defendants. By notifying his clients of this offer a day late his clients were obliged to pay the costs order in full.

8. The Respondent had been qualified for 25 years and he would have been aware of the risk of failing to comply with Unless Orders. Also, the Tribunal found that, as an experienced solicitor he would have been aware of the risks associated with failing to respond to another parties without prejudice offer within the stipulated time frame; it was unreasonable for the Respondent to take such a risk and he was found to have been reckless in relation to allegations 1.2 and 1.3.

Sanction

9. The Respondent was struck off the roll of solicitors.

Documents

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

Preliminary Matters

11. Proceeding in the Respondent's absence

11.1 The Respondent did not attend the hearing and was not represented. Mr Edwards for the Applicant informed the Tribunal that the Respondent had not applied to adjourn or vacate the hearing and there had been no engagement from the Respondent throughout the proceedings.

11.2 Mr Edwards, set out the relevant chronology.

11.3 The Rule 12 Statement was dated 3 October 2023. The Tribunal issued Standard Directions on 9 October 2023.

11.4 Mr Edwards explained the ways in which service of the proceedings had been affected and he submitted that the Respondent had been correctly served with the proceedings under Rule 13(5) the Solicitors Disciplinary Procedure Rules 2019 ("SDPR 2019"). Mr Edwards explained the attempts made by the Applicant to bring the fact of the present hearing to the Respondent's attention. This included the instruction of a tracing agent who in turn confirmed that the Respondent still resided at the address known to the Applicant and the Tribunal, which address, had been used for sending hard copy correspondence.

11.5 The Respondent had not engaged at any point, and he had not served an Answer or statement of means as he had been required to do. His non engagement had resulted in a non-compliance hearing before a senior clerk of the Tribunal on 17 November 2023. Standard Directions 2 and 3, relating respectively to the service of the Answer and service of documents, were varied to permit the Respondent more time.

11.6 At the non-compliance hearing a date was set for a Case Management Hearing ("CMH") on 18 January 2014. The Respondent did not attend this hearing and made no application to adjourn.

11.7 At that hearing Mr Edwards said that there was an indication in the papers that the Respondent may have had issues relating to his health in 2020. In fairness to the Respondent Mr Edwards confirmed the Applicant would write to the Respondent setting out what would be required of the Respondent if he wished to rely on medical evidence with respect to any part of his case. To focus the Respondent's thinking he would be asked to respond by Thursday 1 February 2024, and this would provide sufficient time before the date of the substantive hearing if anything further was required in terms of case preparation on the part of the Applicant, Respondent, or both.

11.8 In the event, the Respondent did not respond and there was nothing from the Respondent which provided any reason or explanation for his non engagement. Mr Edwards submitted that in accordance with the relevant case law, familiar to the Tribunal, it was in the interests of justice for the hearing to proceed without adjournment and in the Respondent's absence.

The Tribunal's Decision

11.9 The Tribunal was aware of the decisions in General Medical Council v Adeogba; General Medical Council v Visvardis [2016] EWCA Civ 16231 which in turn approved the principles set out in R v Hayward, R v Jones, R v Purvis QB 862 [2001], EWCA Crim 168 [2001] namely that proceeding in the absence of the Respondent was a discretion which a Tribunal should exercise with the upmost care and caution bearing in mind the following factors:

- The nature and circumstances of the Respondent's behaviour in absenting herself from the hearing;
- Whether an adjournment would resolve the Respondent's absence;
- The likely length of any such adjournment;

- Whether the Respondent had voluntarily absented himself from the proceedings and the disadvantage to the Respondent in not being able to present his case.

11.10 It was held in Adeogba that in determining whether to continue with regulatory proceedings in the absence of the accused, the following factors should be borne in mind by a disciplinary tribunal:-

- the Tribunal's decision must be guided by the context provided by the main statutory objective of the regulatory body, namely the protection of the public;

- the fair, economical, expeditious and efficient disposal of allegations was of very real importance;

- it would run entirely counter to the protection of the public if a Respondent could effectively frustrate the process and challenge a refusal to adjourn when that practitioner had deliberately failed to engage in the process; and

- there was a burden on all professionals subject to a regulatory regime, to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That is part of the responsibility to which they sign up when being admitted to the profession.

11.12 When bearing those factors in mind and applying them to the circumstances of this case along with the submissions made by Mr Edwards, the Tribunal had little trouble in finding the Respondent's non-attendance to be voluntary. It was in the interests of justice to proceed with the hearing in the Respondent's absence on the basis that it did not appear that an adjournment of any length would ensure the Respondent's attendance.

11.13 The Tribunal considered the Respondent had been correctly served and was aware of the date of the proceedings. The Tribunal also took into account the serious nature of the allegations which had been made against the Respondent. These involved an allegation of dishonesty and related to events that had allegedly taken place from 2016 to 18. A significant period of time had elapsed since then and it was therefore in the public interest that this case should be concluded expeditiously and without further delay.

11.14 The Respondent had a duty to engage but had not done so.

12. Anonymity

12.1 Mr Edwards applied for anonymity in respect of individuals and entities set out in a schedule appended to the application. The basis of this application was to maintain and protect the Legal Professional Privilege ("LPP") relating to these individuals and entities and to avoid jigsaw identification of them. That LPP had not been waived.

The Tribunal's Decision

12.2 The starting point was to consider whether LPP had been waived or not. In circumstances where it had not been waived, it was absolute and must be respected, as emphasised in SRA v Williams [2023] EWHC 2151 (Admin).

12.3 The application was therefore granted in order to protect the LPP of the individuals and entities. It was necessary to take all reasonable steps to preserve this right, including by avoiding jigsaw identification.

Factual Background

13. The Respondent was born June 1964. He was admitted to the Roll of Solicitors in April 1995. At all relevant times the Respondent was a solicitor of the Firm.

14. The Respondent did not hold a practising certificate.

Witnesses

15. There was no live witness evidence.

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

Findings of Fact and Law

17. The Applicant was required to prove the allegations on a balance of probabilities. The Tribunal had due regard to its statutory duty, under section 6 of the Human Rights Act 1998, to act in a manner which was compatible with the Respondent's right to a fair trial and to respect for their private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

18. On 13 May 2016, Client A and Client B instructed the Firm to advise them in respect of possible claims against their architect and building contractor. The client care letter was sent in the name of the Respondent and included the following passage:

> *"I expect to carry out the work in this matter personally, although in my absence my colleague Iain Cole may assist. I am a construction solicitor and head of the firm's construction department. Iain is also a consultant solicitor. In my absence at any timeRachael Webber, Sylvia Bird or Lynn Voizey will be able to take a message."*

19. On 30 September 2016, the Respondent issued proceedings on behalf of Client A and Client B, the Claimants, in the Bristol Civil Justice Centre Technology and Construction Court. Proceedings were issued at this stage to preserve the Claimants

position in limitation. Three defendants were named on the Claim Form signed by the Respondent.

20. The Claimants had a commercial relationship with the Defendants in respect of works that were being undertaken at the Property, a property owned by the Claimants. The Claimants retained the First Defendant in relation to the design of the Property, the Second Defendant in relation to ensuring compliance with the building regulations at the Property and the Third Defendant to build the Property. The claims against the First and Second Defendants were for breach of contract and of the duties owed to the Claimants. The claim against the Third Defendant was in relation to the breach of the express and implied terms of a construction contract between the Claimants and the Third Defendant, and for breach of duty. The value of the claim was identified as being more than £200,000.

21. The Firm continued to be instructed by Client A and Client B until 18 October 2018. The conduct alleged came to the attention of the SRA following receipt of a report by Hughes Paddison Solicitors ('Hughes Paddison'), to the SRA on 23 April 2019. Hughes Paddison were instructed by Client A and Client B in a professional negligence claim against the Firm following the transfer of the file from them.

22. A subsequent investigation was undertaken by the SRA.

23. Allegation 1.1 - providing information to Client A and Client B which he knew, or ought to have known was false

23.1 On 4 November 2016, the Respondent wrote to Client A and Client B providing an update in the client matter and enclosing an interim note of the Firm's charges. In the penultimate paragraph of the letter, it stated:

> *"We also now await a response as to various protocol letters in relation to [the First Defendant], [the Second Defendant] and [the Third Defendant]."*

23.2 Enquiries made by the SRA revealed that letters sent to the Defendants in accordance with the Pre-Action Protocol for Construction and Engineering Disputes were not sent until 3 January 2017.

23.3 The letters, sent in the name of the Firm, introduced Client A and Client B together with the nature of the claim. The heading and opening paragraphs of this letters read:

> *"[CLIENT A] AND [CLIENT B]: DESIGN AND CONSTRUCTION OF [THE PROPERTY] ("the Studio")*
>
> *We act for Client A and Client B of …*
>
> *Specifically, we act for Client A and Client B in relation to their claims against you and concerning …."*

23.4 Despite the letters being signed in the name of the Firm, they included the following details of the Respondent:

Contact: Philip Burbidge
Direct line: 01935 846122
Direct fax: 01935 846001
Email: philip.burbidge@battens.co.uk

23.5 Under the heading "The next steps", and in accordance with the Pre-Action Protocol, the letters required:

23.6 An acknowledgement of receipt of the letter within 14 days, namely by 19 January 2017; and a full letter of response within 28 days, namely by 2 February 2017.

23.7 The Respondent had not therefore sent "protocol letters" to either the First Defendant, Second Defendant or Third Defendant as set out in his letter to Client A and Client B on or before 4 November 2016. His letter to Client A and Client B on this issue was therefore false and the Respondent would have known this to be the case.

24. Allegation 1.2 - Failing to adequately comply with Unless Orders leading to the claim being struck out and adverse costs orders

24.1 Particulars of Claim were sent to the Defendants on 24 January 2017

First Defendant

24.2 On 7 February 2017, the First Defendant's representative (Clyde & Co LLP) wrote to the Firm acknowledging service of the proceedings and requesting a stay of the proceedings to allow the parties to engage in dialogue as required by the Pre-Action Protocol for Construction and Engineering Disputes. Contained within that letter was a request for:

(a) Pre-Action protocol correspondence with the other defendants;

(b) confirmation as to the other Defendants' representation; and

(c) information regarding remedial works that had been carried out at the Property together with alleged defects that remain capable of inspection.

24.3 On 10 February 2017, the Respondent acknowledged the letter from the First Defendant's representative and indicated that he was taking instructions from his client on the suggested stay period.

24.4 On 8 March 2017, the Respondent wrote to the First Defendant's representative to indicate his clients were happy to agree to a four month stay of the proceedings.

24.5 On 13 March 2017, the Respondent emailed the First Defendant's representative asking if he had instructions on a suggested stay period.

24.6 On 15 March 2017, the First Defendant's representative wrote to the Firm suggesting a proposed stay of 4 months and detailed a number of requests to enable their client to

> *"undertake proper investigations into the allegation made and assist in narrowing the issues in dispute between the parties".*

24.7 Having not received a response to the letter of 15 March 2017, the First Defendant's representative sent the letter again by email on 5 April 2017 and a further letter seeking a response on 16 May 2017.

24.8 On 22 May 2017, the Respondent provided a holding response to the First Defendant's representative indicating that he was "not ignoring the letter but rather trying to deal with document matters in one fell swoop."

24.9 On 23 June 2017, pursuant to CPR Part 18 and Part 31, the First Defendant's representative served the Firm with a Further Information and Document Request. The request asked for a response to the document requests within 7 days pursuant to CPR Part 31.14 and CPR 31.15c and for further information requests within 14 days pursuant to CPR Part 18.

24.10 On 25 July 2017, responding to a call from Ms Sylvia Bird (of the Firm) on behalf of the Respondent, the First Defendant's representative sent a letter to the Firm on the issue of the stay period being extended. In this letter, the First Defendant's representative indicated that in principle they were agreeable to the stay period being extended, however, they indicated that they would like to receive some assurances that a response to their document and information requests will be received as soon as possible. This letter requested a response by close of business on 27 July 2017.

24.11 The Claimants subsequently agreed by way of a Consent Order to provide a response to the information and document requests by 24 August 2017.

24.12 Given that the Firm failed to respond by the agreed deadline, on 25 August 2017, the First Defendant's representative wrote to the Firm asking whether they would be responding to the requests today. The Firm responded the same day at 17:51 through Ian Cole who asked that the query be re-directed to the Respondent who had now returned to work. On 31 August 2017, the email received by the First Defendant's representative from Iain Cole was forwarded to the Respondent. In that email it stated:

> *"Please can you advise when your client will be responding to our client's document and further information request. The deadline for responding to our client's request – pursuant to the agreed Consent Order - was 24 August 2017."*

24.13 On 4 September 2017, the Respondent emailed the First Defendant's representative stating:

> *"Hi Alex.*
>
> *My apologies for not responding last week. I had thought documents had been sent. I will check and resend if necessary. I have chased my clients (and will again, later today) for confirmation on replies so that I can forward to you.*

Kind regards.
Phil".

24.14 On 12 September 2017, the First Defendant's representative sent their Letter of Response in accordance with the Pre-Action Protocol for Construction and Engineering Disputes.

24.15 On or around 14 September 2017, the Respondent provided a response to the information and document request of the First Defendant's representative.

24.16 On 29 September 2017, the First Defendant's representative filed their Defence to the claim.

24.17 On 29 January 2018, the First Defendant's representative wrote to the Respondent indicating that they had failed to comply with the requests:

> *"Firstly, you have failed to provide the majority of the particulars requested – you have simply provided a bundle of documents which may relate to the request. Secondly, many of the requests have been ignored entirely and, it is clear, in many cases where documents have been provided, they are incomplete. Thirdly, contrary to CPR Part18, your response is not verified by a Statement of Truth".*

24.18 On 1 February 2018, the First Defendant's representative filed an application for an Unless Order requiring the Claimants to provide a proper response to their CPR 18 and 31 request for information/documents. In Part 3 of the application the First Defendant's representative asked the court to make the following order:

> *"Unless the Claimants by 4pm on 2 March 2018 file and serve on the solicitors for the First Defendant the further information and documents sought by the First Defendant's Request for Further Information & Documents dated 23 June 2017, to enable the First Defendant to know the case it has to meet, the claim will be struck out and the judgment entered for the First Defendant, along with the costs of the action to be assessed if not agreed.*
>
> *The Order is sought as the Claimant has failed to comply with the terms of the Consent Order dated 3 August 2017 to provide the requested Further Information."*

24.19 The application for an Unless Order was initially listed to be heard on 9 February 2018. However, on 8 February 2018, the Claimants consented to the Application, including making payment of the First Defendant's costs of the Application in the sum of £6,600.

24.20 In consenting to the Order, the Claimants had until 4pm on 2 March 2018 to:

- File and serve on the solicitors for the First Defendant the further information and documents sought by the First Defendant; and

- Pay the First Defendant's costs in the agreed sum of £6,600.

24.21 On 26 February 2018, the First Defendant's solicitors received a letter from the Firm enclosing a cheque for £6,600 in payment for the First Defendant's costs of the application.

24.22 On 2 March 2018, at 15:57, the First Defendant's representative received an email from the Respondent in purported compliance with the Unless Order. A copy of the material purporting to comply with the Unless Order was not filed with the Court.

24.23 On 11 April 2018, the First Defendant's representative telephoned the Firm to query the deficiencies and omissions in the response of 2 March 2018. This was followed up in an email to the Respondent on 13 April 2018, which prompted an email reply from the Respondent to the First Defendant's solicitors providing additional material and explaining that until they received notification on 11 April 2018, they were unaware that their response of 2 March 2018 was incomplete.

24.24 On 18 April 2018, the First Defendant's representative wrote to the Firm outlining why the latest response was patently inadequate and failed to comply with the Unless Order. The First Defendant's representative invited the Firm to provide an explanation with supporting evidence for:

(i) failing to serve all material by 16:00 on 2 March 2018; and

(ii) the patently inadequate responses provided to several of the Part 18 requests.

An explanation was sought by close of business on 19 April 2018.

24.25 On 23 April 2018, the Respondent acknowledged receipt of the 18 April 2018 letter and indicated:

> *"we note the contents thereof and will revert to you shortly"*.

24.26 On 30 April 2018, the First Defendant's representative sent a further letter to the Firm highlighting the breach of the Unless Order and requesting the Firm clarify whether the Claimants intended to apply for Relief from Sanctions, and if so, on what grounds. A response was requested by 17:00 on 2 May 2018.

24.27 On 3 May 2018, the First Defendant's representative made an Application to Strike out the Claim [JTC1 p331-335]. In Part 3 of the application the First Defendant's representative asked the court to make the following order:

> *"The First Defendant is applying for an Order (a draft of which is attached to this Application) requesting that the Court use its power:*
>
> *(i) To Strike Out the Claimants' Claim pursuant to CPR 3.4(2)(c);*
>
> *(ii) To give Judgment in the Claim for the First Defendant pursuant to CPR 3.4(3) and 3.5; and*

> *(iii) To order the Claimants to pay the First Defendant's costs of the proceedings (to be summarily assessed if not agreed) pursuant to CPR 44.2 and the costs of this Application.*
>
> *The reason for the First Defendant seeking the Order is that pursuant to CPR 3.4(2)(c) the Claimants have failed to comply with the Unless Order dated 8 February 2018. The First Defendant is requesting that Judgment is entered for the First Defendant (with costs) because the Court's Order (the Unless Order dated 8 February 2018) has not been complied with."*

24.28 The matter was listed to hear the First Defendant's Application on 7 August 2018. The day before that hearing the Firm made an application on behalf of the Claimants to adjourn the hearing to allow more time to prepare to respond to the applications made. The hearing went ahead as a telephone hearing and the court acceded to the Claimant's application; the matter was relisted for an in-person hearing on 3 October 2018.

24.29 On 3 October 2018, the First Defendant's application to strike out the Claimants' claim was heard before HHJ Russen QC. The Respondent represented the Claimants at that hearing. Upon finding that the Claimants' claim against the First Defendant

> *"stands struck upon the Claimants' failure to comply with the terms of the Unless Order dated 8 February 2018"*,

the Court ordered as follows:

24.30 There be judgment for the First Defendant against the Claimants.

24.31 The Claimants to pay the First Defendant's costs of the action, on the standard basis, and the costs of and arising from the First Defendant's Strike Out application, on the indemnity basis, to be sent to detailed assessment if not agreed.

24.32 The Claimants do pay the sum of £75,000 to the First Defendant by way of payment on account of the costs ordered in paragraph 3 of this Order by 4pm on 17 October 2018.

Second Defendant

24.33 On 11 July 2017, the Second Defendant's representative (Reynolds Porter Chamberlain LLP) sent a Letter of Response to the Firm outlining that the allegations contained within the Letter of Claim were entirely unsubstantiated and ineffectively pleaded. The Letter of Response raised a number of specific queries at paragraph 3.6 in order to highlight to the Claimants what they needed to do to substantiate their claim against the Second Defendant.

24.34 On 1 August 2017, the Second Defendant's representative sent a further letter requesting a response to the letter dated 11 July 2017.

24.35 On 14 November 2017, the Second Defendant's representative sent an email to the Respondent in which they outlined that they had not received a substantive response to their Letter of Response of 11 July 2017 and requested the information/documentation again.

24.36 On 23 January 2018, the Second Defendant's representative made a further request for the information and documentation requested in its Letter of Response.

24.37 On 7 February 2018, the Second Defendant's representative filed and served its Defence. The Defence filed repeated that which was included in the Letter of Response, namely that the Claimant had failed to substantiate their claim and that as a result the Second Defendant's representative could not understand the case pleaded against it.

24.38 On 14 February 2018, the Second Defendant's representative sent an email to the Respondent outlining that they had still not received the documents the Respondent had agreed to provide to the Second Defendant and sought confirmation that the material would be provided by 2 March 2018. The date of 2 March was suggested to coincide with the date that material was being provided to the First Defendant.

24.39 On 7 March 2018, the Second Defendant's representative sent an email to the Respondent which included the following paragraphs:

> *"We are disappointed to have not received the requested documentation from you once again. We have now been requesting this information for well over a year. You have promised it on several occasions. Once again can you confirm when this documentation will be forthcoming?"*

24.40 On 22 and 23 March 2018, the Second Defendant's representative sent further emails to the Respondent personally, seeking a response to their 7 March 2018 email.

24.41 On 4 April 2018, the Second Defendant's representative received a letter from the Respondent which responded to the requests for information. It was the Second Defendant's representative's view that this response was wholly inadequate, and this was communicated to the Respondent in an email on 12 April 2018 and set out the information required to enable the Second Defendant's representative to understand the claim.

24.42 On 11 May 2018, the Second Defendant's representative filed an application for an Unless Order requiring the Claimants to file and serve documents to substantiate the Claimants' case against the Second Defendant. In Part 3 of the application the Second Defendant's representative asked the court to make the following order:

> *"Unless the Claimants by 4pm 28 days after the date of the Order file and serve on the solicitors for the Second Defendant further information and documents to substantiate the Claimants Case against the Second Defendant, the claim will be Struck Out.*
>
> *Specifically, the Claimants need to:*
> *- Provide substantive answers to the queries raised in our Letter of Response dated 11 July 2017;*
>
> *- Establish the scope of duty of the Second Defendant;*
>
> *- Establish that the problems with the property were "defects" in any event;*

- Evidence that even if defects were in existence, how this was a breach of duty by

the Second Defendant;
- Particularise their losses

The Order is sought as the Claimants have not provided the Second Defendant with a case to answer

IF YOU WISH TO RELY ON WRITTEN EVIDENCE AT THE HEARING, YOU ARE REQUIRED, BY CPR 24.5(1) TO FILE AND SERVE COPIES ON EACH AND EVERY OTHER PARTY AT LEAST 7 DAYS BEFORE THE HEARING"

24.43 An order in the above terms was granted on 5 June 2018.

24.44 On 3 July 2018, the Respondent enclosed a copy of his clients' replies in relation to the order of 5 June 2018 together with the documents referred to therein. The letter indicated that *"TCC – Bristol District Registry"* were copied into the communication. The letter references the date of the Unless Order incorrectly as 30 May 2018.

24.45 On 26 July 2018, the Second Defendant's representative wrote to the Court to inform them that the further information provided was insufficient to comply with the Unless Order and therefore, they considered the claim against the Second Defendant's representative to be struck out.

24.46 On 3 October 2018, the Second Defendant's application to strike out the Claimants' claim was heard before HHJ Russen QC. The Respondent represented the Claimants at that hearing.

24.47 Upon finding that the Claimants' claim against the Second Defendant *"stands struck upon the Claimants' failure to comply with the terms of the Unless Order dated 5 June 2018"*, the Court ordered as follows:

"There be judgment for the Second Defendant against the Claimants.

The Claimants to pay the Second Defendant's costs of the action, including the costs of and arising from the Second Defendant's Request for Judgment and Strike Out application, on the indemnity basis, to be sent to detailed assessment if not agreed.

The Claimants do pay the sum of £30,000 to the Second Defendant by way of payment on account of the costs ordered in paragraph 5 of this Order by 4pm on 17 October 2018."

25. <u>Allegation 1.3 - Failing to obtain client instructions</u>

Interaction with Clients A and B

25.1 During the period 14 February 2017 and 3 October 2018, the Respondent communicated with Clients A and B on the following occasions:

25.2 On 13 April 2017, to inform them of the stay in the proceedings that had been agreed between the parties; and

25.3 On 10 May 2018, providing Client A with a Disclosure List.

25.4 On 11 October 2018, the Second Defendant's representative wrote to the Respondent to make a without prejudice offer on costs. The offer outlined:

> *"Our client is prepared to accept the sum of £20,000 in full and final settlement of your clients' costs liability to our client. This offer remains open until 4pm on Monday 15 October, and requires the money to be received into our client account by that time. If it is not received by that time, then the offer will be withdrawn and your client will be required to pay the sum ordered by the Court (i.e. £30,000 to our client by 17 October 2018, with the remainder to be paid following consideration of the costs by way of detailed assessment)."*

25.5 On 16 October 2018, the Respondent wrote to Client A and Client B to update them in respect of:

- The First Defendant's application for an Unless Order;
- The Second Defendant's application for an Unless Order;
- The outcome of the hearing of 3 October 2018;
- The Second Defendant's without prejudice costs offer of 11 October 2018.
- On the same day the Respondent commenced a period of sick leave; he did not return to the Firm.

25.6 Upon receiving this letter, Client A spoke with Mr Peter Livingstone of the Firm to question, amongst other things, why he had not been notified of the 3 October 2018 hearing and why he was only being informed of a costs offer from the Second Defendant the day after that offer had expired.

25.7 On 18 October 2018, Mr Livingstone contacted Client A and Client B to inform them that they could no longer continue to act for them due to a conflict of interest which had arisen because there was a good chance that the claims against the First and Second Defendants had been lost and the costs liability incurred as a result of a mistake by the Firm. This was followed up in a letter from the Firm to Client A and Client B the same day.

25.8 On 23 April 2019, Hughes Paddison, who were subsequently instructed by Client A and Client B to pursue a claim for professional negligence against the Respondent and the Firm made a report to the SRA regarding the professional conduct of the Respondent.

25.9 In that report they set out the following circumstances in which the Respondent made decisions on the file without taking instructions from his client:

- On 14 February 2017, agreed a 28-day extension for the First and Second Defendants to file their defences;

- On 3 March 2017, filed a consent order with the court and paid the filing fee;

- On or around August 2017, agreed a further stay of proceedings;

- On 1 February 2018, filed a SMIS form, disclosure report, electronic disclosure questionnaire, cost budget and draft directions;

- On 8 February 2018, signed an Unless Order by consent requiring Client A and Client B to respond to the First Defendant's part 18 request and pay costs; and

- On 8 March 2018, provided material to the First Defendant in response to the First Defendant's request for information/documents.

25.10 The report also referenced the fact that after receiving the Second Defendant's costs offer of 11 October 2018, the Respondent failed to take instructions on it prior to the offer expiring on 15 October 2018.

26. *Allegations and Breaches of Principles*

Allegation 1.1

26.1 On 4 November 2016, the Respondent informed Client A and Client B in a letter that they were awaiting responses to various "protocol" letters in relation to the First Defendant, Second Defendant and Third Defendant. It is averred that "protocol letters", as referred to in the letter dated 4 November 2016 from the Respondent to the three prospective defendants meant formal letters before claim sent in accordance with the Pre-Action Protocol for Construction and Engineering Disputes.

26.2 The Respondent knew, or ought to have known, that this statement was false given that letters in accordance with the Pre-Action Protocol for Construction and Engineering Disputes, were only sent to the three Defendants on 3 January 2017.

26.3 The letters sent in the name of the Firm on 3 January 2017, introduced the Firm's clients together with the nature of the claim. They also detailed the Respondent as the contact at the Firm.

26.4 After these letters were sent on 3 January 2017, the Respondent took no remedial action to inform Client A and Client B that the information that had previously been given to them was false.

26.5 In doing so the Respondent breached any or all of Principles 2 and 6 of the SRA Principles 2011. These are mandatory Principles which apply to all those regulated by the SRA.

Breach of Principle 2 (integrity)

26.6 Principle 2 requires that solicitors "act with integrity": as per Wingate v Solicitors Regulation Authority v Malins [2018] EWCA Civ 366 this:

> *"connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty… a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse".*

26.7 The Respondent, by representing to his clients that 'protocol letters' had previously been sent to the proposed defendants in a civil action prior to 4 November 2016, when he knew or ought to have known had never been sent, was misleading. He knowingly or recklessly provided misleading information to his clients which would lead them to believe the letters had been sent. This showed a lack of integrity.

26.8 A solicitor of integrity would ensure that all information he provided to his clients was true and accurate. By providing misleading information to his clients when he knew, or at the very least ought to have known, was not true and accurate and was likely to mislead his client as to the steps that had been undertaken by him/the Firm, he failed to act with integrity and therefore breached Principle 2 of the SRA Principles 2011.

Breach of Principle 6 (public trust and confidence)

26.9 Principle 6 requires solicitors to behave in a way that maintains public trust: the Respondent did not behave in such away.

26.10 A member of the public would expect a solicitor to ensure that he always acted fairly and not to mislead or attempt to mislead his clients. A member of the public would also expect all information provided to his client was true and accurate. By acting as described above the Respondent failed to behave in a way that maintained the trust the public placed in him and in the provision of legal services and therefore breached Principle 6 of the SRA Principles 2011.

27. Allegation 1.2

27.1 Outcome 1.2 of the SRA Code of Conduct 2011, states:

O (1.2) You provide services to your clients in a manner which protects their interests in their matter, subject to the proper administration of justice.

27.2 Outcome 5.3 of the SRA Code of Conduct 2011, states:

O (5.3) You comply with court orders which place obligations on you.

27.3 Between 7 February 2017 and 3 October 2018, the Respondent:

- Failed to substantively respond to correspondence requesting information and documents sent by the First Defendant on 15 March 2017, 5 April 2017, 16 May 2017;

- Failed to substantively respond to an application by the First Defendant made on 23 June 2017, pursuant to CPR Part 18 and Part 31 for further information and documents;

- Failed to substantively respond to correspondence received from the Second Defendant requesting information and documents on 11 July 2017, 1 August 2017, 14 November 2017, 23 January 2018, 14 February 2018 and 7 March 2018;

- Failed to comply with the terms of the Consent Order dated 3 August 2017 (First Defendant);

- Failed to comply with the terms of the Unless Order dated 8 February 2018 (First Defendant);

- Failed to substantively respond to correspondence requesting an explanation with supporting evidence for (i) failing to serve all material by 16:00 on 2 March 2018; and (ii) the patently inadequate responses provided to several of the Part 18 requests sent by the First Defendant on 18 and 30 April 2018; and

- Failed to comply with the terms of the Unless Order dated 5 June 2018 (Second Defendant).

27.4 In doing so, this resulted in the claims against the First and Second Defendants being struck out and adverse costs orders being made against Client A and Client B.

27.5 It was the Applicant's case therefore that the Respondent failed to achieve Outcomes 1.2 and 5.2 of the SRA Code of Conduct 2011 by failing to (a) comply with court orders; and (b) protect his clients' interests.

27.6 A solicitor acting in the best interests of their client progresses their client's claim, where possible, in a timely manner. It is incumbent on a solicitor acting in a litigation claim to provide timely responses to correspondence from defendants and comply with court orders. By failing to do so in the circumstances set out above, the Respondent breached Principle 4 of the SRA Principles 2011.

27.7 For the same reasons, the Respondent failed to provide a proper standard of service to his clients and therefore breached Principle 5 of the SRA Principles 2011.

27.8 Principle 6 of the SRA Principles 2011, require solicitors to behave in a way that maintains the trust the public places in them and in the provision of legal services. That trust is undermined by a solicitor who continuously fails to respond to the opposing side in a litigation claim and who fails to comply with court orders in the circumstances outlined above. The Respondent therefore breached Principle 6 of the SRA Principles 2011.

28. <u>Allegation 1.3</u>

28.1 Outcome 1.5 of the SRA Code of Conduct 2011, states:

O (1.5) The service you provide to clients is competent, delivered in a timely manner and takes account of your clients' needs and circumstances.

28.2 The Respondent, when instructed by Client A and Client B between 7 February 2017 and 10 October 2018, communicated with them on two separate occasions. He did so via letter on 13 April 2017, to inform them of a stay in the proceedings. Subsequently on 10 May 2018, he provided a Disclosure List to Client A via email and requested that he sign it. In communicating with his clients in the way that he did during this period, he failed to notify them or take instructions on the following:

- The First Defendant's requests for information/documentation as outlined in their letter of 15 March 2017;
- The First Defendant's Further Information and Document Request pursuant to CPR Part 18 and Part 31 of 23 June 2017;
- The Second Defendant's requests for information/documentation as outlined in their letter of 11 July 2017
- The First Defendant's application for an Unless Order of 1 February 2018;
- The Unless Order of 8 February 2018, made by consent;
- The First Defendant's costs in applying for an unless order, agreed in the sum of £6,600;
- The First Defendant's Application to Strike out the Claim of 3 May 2018;
- The Second Defendant's application for an Unless Order of 11 May 2018;
- The Unless Order of 5 June 2018, made by HHJ Russen QC; and
- The Hearing before HHJ Russen QC on 3 October 2018.

28.3 Further, on 11 October 2018, the Respondent received a without prejudice costs offer from the Second Defendant's representative which stipulated an expiry time/date of 4pm on 15 October 2018. The Respondent failed to refer this offer to his client until 16 October 2018; after the offer had expired.

28.4 It was the Applicant's case therefore that the Respondent, in failing to (a) refer important correspondence from the First and Second Defendants to his clients at all, or within stipulated time frames; and (b) take instructions from his clients on all matters outlined above, he failed to provide a competent service to his client in a timely manner, accounting for their needs. The Respondent therefore failed to achieve Outcome 1.5 of the SRA Code of Conduct 2011.

28.5 A solicitor acting in the best interests of their client refers substantive communications to their clients in a timely manner and obtains instructions from them as the position in a case changes. The failure to do so adversely effects the client's interests. By failing

to refer the 'agreed' costs sum, and the without prejudice costs 'offer' the Respondent breached Principle 4 of the SRA Principles 2011.

28.6 For the same reasons, the Respondent failed to provide a proper standard of service to his clients and therefore breached Principle 5 of the SRA Principles 2011.

28.7 Principle 6 of the SRA Principles 2011, require solicitors to behave in a way that maintains the trust the public places in them and in the provision of legal services. That trust is undermined by a solicitor who fails to communicate effectively with his clients or take instructions from them in the circumstances outlined above. The Respondent therefore breached Principle 6 of the SRA Principles 2011.

Dishonesty

29. The test applied for dishonesty is that formulated by the Supreme Court in Ivey v Genting Casinos (UJ) Ltd t/a Crockfords [2017] UKSC 67:

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

30. In respect of Allegation 1.1 it is the Applicant's case that the Respondent represented to his clients in a letter dated 4 November 2016, that pre action protocol letters had been sent to the three prospective defendants in a civil claim, when they had not.

31. Throughout the events set out above, the Respondent was aware that no letter had been sent to the three defendants prior to 3 January 2017.

32. Given this state of knowledge and belief, the Respondent acted dishonestly by the standards of ordinary decent people. Ordinary decent people would consider it dishonest for a professional man knowingly to make misleading statements to his client. The Respondent positively misled them by stating something had been done when it had not.

33. The position of whether a pre action protocol letter has been sent is simple, straightforward, and not one that can be easily confused. Nevertheless, the Respondent stated a position that was false in a letter. It is inconceivable, particularly given the early stages of the clients' instruction that he genuinely believed that a letter had been sent previously.

Recklessness

34. In the alternative, Allegation 1.1 is advanced on the basis that the Respondent was reckless. Allegation 1.2 and 1.3 is advanced on the basis that the Respondent was reckless.

35. The Applicant relied upon the test for recklessness which was set out in the case of Brett v SRA [2014] EWHC 1974. At paragraph 78 in that case, Wilkie J said that for the purposes of the Brett appeal, he adopted the working definition of recklessness from the case of R v G [2004] 1 AC 1034. He said that the word recklessly is satisfied: with respect to (i) a circumstance when (the solicitor) is aware of a risk that it exists or will exist and (ii) a result when (the solicitor) is aware that a risk will occur and it is, in circumstances known to them, unreasonable for them to take the risk.

36. Alternatively, the facts and the matters in the Respondent's case demonstrate that the Respondent was reckless in relation to Allegation 1.1. At the very least, the Respondent did not check (a) the client file; or (b) with other fee earners on the file, to confirm the pre action protocol letters had been sent prior to drafting the letter to his clients in November 2016.

37. The Respondent must have been aware of the risks associated with providing misleading information to his client and the need to safeguard against that by checking information being provided in the client letter was accurate. As the file handler, and an experienced solicitor at the Firm, he ought to have carried out checks to ensure that the content of his letter was correct before sending it to them. The letter consists of one page and addresses the work that has been conducted on the file in a limited timeframe.

38. It was unreasonable for him to take the risk of not investigating the client file prior to drafting the letter.

39. In respect of Allegation 1.2 the Respondent was reckless. The Respondent consistently failed to respond to communications received from both the First and Second Defendants' representatives. The nature of the communications received from the First and Second Defendants' representatives made it clear what information and documentation was required to achieve compliance with the respective Unless Orders.

40. Instead, the Respondent chose to repeatedly provide inadequate responses which resulted in the claims against the First and Second Defendants being struck out. As an experienced solicitor, the Respondent would have been aware of what needed to be provided and the risk of failing to comply with Unless Orders. It was unreasonable for the Respondent to fail to comply with the Unless Order.

41. In respect of Allegation 1.3 the Respondent was reckless. The Respondent received a without prejudice costs offer on 11 October 2018. Despite this offer expiring at 4pm on 15 October 2018, he did not refer this to his client until 16 October 2018. In communicating this offer to his clients, he demonstrated his awareness of the offer having expired and the fact that it was a possibility that the offer could not be revived.

42. The Respondent therefore chose not to refer this offer to his clients within the stipulated time frame. As an experienced solicitor he would have been aware of the risks associated with failing to respond to another parties without prejudice offer within the stipulated time frame; it was unreasonable for the Respondent to take such a risk.

43. The Respondent's Position

43.1 Initial contact was made with the Respondent on 19 August 2020. The Respondent informed the Investigation Officer on 12 September 2020, that he was not well enough to deal with the SRA investigation. In response to efforts made by the SRA to establish the nature of the health issues raised, the Respondent indicated on 26 September 2020, that he remained under the care of his medical practitioners. psychiatrist, consultant psychologist and his GP having suffered a breakdown.

43.2 The Respondent was initially asked to provide medical evidence by 13 October 2020. After failing to provide the material by this date the request was made again on 11 November 2020. Again, the Respondent failed to meet this deadline.

43.3 Further attempts were made to contact the Respondent on 27 May 2022, 8 July 2022 and 17 August 2022 by both email and signed for letter. The Royal Mail tracking facility confirms that these letters were delivered and signed for, but no acknowledgement or response was received from the Respondent.

43.4 A further attempt to contact the Respondent was made by email and signed for letter on 28 October 2022. Delivery was attempted on 1 November 2022, but no one was in at the address.

43.5 The item had been available for redelivery or collection since that time. It was returned by Royal Mail on 5 January 2023 marked that Royal Mail had been unable to deliver this item because it was not called for.

43.6 On 14 November 2022 the Investigation Officer attempted to call the Respondent on both mobile and landline numbers. The mobile number was unavailable. The landline call was diverted to an answering service, the message for which identified it as being for the *Burbidge household"*. A message was left asking the Respondent to call the Investigation Officer or, if he preferred, to email her. Details of her phone number and email address were left. To date the Respondent has not returned this call.

The Respondent's Case

43.7 The Respondent had not engaged at any stage his in the proceedings and his position with respect to each allegation was not known.

44. The Tribunal's Findings

44.1 The Tribunal reminded itself with respect to all the allegations that the Applicant must prove its case on the balance of probabilities; the Respondent was not bound to prove that he did not commit the alleged acts and that great care must be taken to avoid an assumption (without sufficient evidence) of any deliberate failure or act on the Respondent's part.

44.2 The Tribunal carefully considered the evidence it had heard and observed that its task in determining the allegations was made more difficult in circumstances where the Respondent had not engaged fully in the proceedings and had presented no evidence in his case.

44.3 The Tribunal approached this, and all the other allegations on the basis that they were denied by the Respondent and by applying the requisite standard of proof, namely the balance of probabilities.

44.4 Further, in circumstances where the Respondent had not given evidence at the substantive hearing or submitted himself to cross-examination the Tribunal was entitled to take into account the position that the Respondent had chosen to adopt and to draw such adverse inferences from the Respondent's failure as the Tribunal considered appropriate in accordance with Rule 33 of SDPR 2019.

45. Allegation 1.1

45.1 The Tribunal spent time considering the wording of the Respondent's letter dated 4 November 2016 to Client A and B:

> *"I write further to the above and enclose an interim note of my firm's charges for your kind attention.*
>
> *I now await a further response from your legal expense insurers at to policy cover.*
>
> *I have had further discussions with Stefan regarding the planning point for remedial works and a copper roof and will revert to him shortly with my suggestions in this respect.*
>
> *I will copy you in on these so that you can be satisfied with the same and our approach to the planning condition and that part of the remedial works.*
>
> *We also now await a response as to various protocol letters in relation to M, A and H.*
>
> *As and when replies to these are received, I will of course inform you."*

45.2 The Tribunal considered this letter to be the key document in providing it with an insight on the Respondent's thinking at the relevant time, the two last paragraphs of which were crucial and particularly the Respondent's use of the word *"now"* in the penultimate paragraph.

45.3 The use of the word *"now"* appeared to be a definite and positive statement indicating to the casual reader that an event in the past had taken place and that the author was waiting for the next stage in a process that had been initiated.

45.4 The Tribunal considered whether the Respondent had drafted this letter on the basis of a misconception on his part that the pre-action protocol letters *had* been sent. If this was the case then his failure would have been restricted to not double checking the position

with reference to the file, and/or careless and imprecise drafting but perhaps not misconduct as alleged by the Applicant.

45.5 This was raised with Mr Edwards, during his setting out of the Applicant's case. He informed the Tribunal that if this had been case then there was no later correcting letter sent to the clients pointing out the error he had made. Also, if he had believed that the pre-action protocol letters had been sent then he would have been alerted that they had not when the requisite time limits for the defendants to respond had passed with no response from them.

45.6 Mr Edwards said that the inescapable inference to be drawn was that not only had the pre-action protocol letters not be sent but that the Respondent would have known this when he sent this particular letter to Client A and B.

45.7 The Tribunal noted that the Respondent had not engaged with the proceedings and therefore he had given no indication of his position on the matter. The Respondent had been warned in earlier memoranda as to the operation of Rule 33 SDPR 2019 and the Tribunal considered that in the circumstances it was able to draw an adverse inference from the Respondent's failure to meet the Applicant's case. The obvious inference was that the Respondent had no defence to the allegation or not one which would bear close scrutiny.

45.8 The Tribunal found the factual matrix proved on the balance of probabilities.

45.9 The Tribunal next considered the most serious part of the allegation, dishonesty, in accordance with the test set out in Ivey.

45.10 The Tribunal was satisfied that the Respondent knew that when he represented to his clients in a letter dated 4 November 2016, that pre action protocol letters had been sent to the three prospective defendants, they had not been.

45.11 The Respondent would have known that his letter to the clients would have only been read in one way by them i.e., their case was being progressed and from which they would no doubt have taken comfort. The Tribunal adopted the reasoning given by the Applicant as a sound one, namely that the position of whether a pre action protocol letter has been sent was simple, straightforward, and not one that can be easily confused. Nevertheless, the Respondent stated a position that was false in a letter. It was inconceivable, particularly given the early stages of the clients' instruction that he genuinely believed that a letter had been sent previously.

45.12 The Tribunal found that given the Respondent's state of knowledge and belief, the Respondent acted dishonestly by the standards of ordinary decent people. Ordinary decent people would consider it dishonest for a professional man knowingly to make misleading statements to his client.

45.13 The Tribunal was satisfied on the balance of probabilities that the Respondent positively misled his clients by stating something had been done when it had not and that by doing so, he had been dishonest.

45.14 Having found the Respondent to be dishonest it did not need to go on to consider whether his conduct had been reckless.

45.15 It followed therefore that having found the Respondent dishonest his conduct would necessarily have been lacking in integrity and a failure to behave in a way which maintains the public trust and confidence in solicitors and in finding a breach of Principle 2 and 6 of the 2011 Principles.

45.16 Integrity:

> *"connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty… a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse".*

45.17 A solicitor of integrity would ensure that all information he provided to his clients was true and accurate, and a member of the public would expect a solicitor to ensure that he always acted fairly and not to mislead or attempt to mislead his clients. A member of the public would also expect all information provided to his client was true and accurate.

45.18 The Tribunal found Allegation 1.1 proved in full on the balance of probabilities, including breaches Principle 2 and 6 of the Principles 2011 and dishonesty.

46. Allegations 1.2 and 1.3

46.1 The Tribunal found the facts in each allegation proved to the required standard, namely on the balance of probabilities.

46.2 In relation to Allegation 1.2 the strike out and costs order was definitive proof that notwithstanding any purported compliance by the Respondent he had not in fact done so.

46.3 With respect to Allegation 1.3 that the Respondent had not, amongst other things, notified his client of the 3 October 2018 hearing and that he had only informed his client of a costs offer from the Second Defendant the day after that offer had expired.

46.4 The Tribunal proceeded to consider whether on the basis of its factual findings the Respondent had breached any, or all, of Principles 4, 5 and 6 of the SRA Principles 2011 and failed to achieve Outcomes 1.2 and 5.3 of the SRA Code of Conduct 2011 in relation to Allegation 1.2 and any or all of Principles 4, 5 and 6 of the SRA Principles 2011and failure to achieve Outcome 1.5 of the SRA Code of Conduct 2011.

46.5 Again, having found the facts made out the Tribunal adopted the reasoning set out by the Applicant. For those reasons therefore it found on the balance of probabilities, the Respondent's conduct to have been a breach of the cited Principles and failure to achieve the pleaded outcomes.

46.6 As to the allegation of recklessness pleaded as an aggravating feature in Allegations 1.2 and 1.3 the Tribunal found on the balance of probabilities that the Respondent had been reckless in his conduct in both allegations.

46.7 In respect of Allegation 1.2 the Respondent consistently failed to respond to communications received from both the First and Second Defendants' representatives. Instead, the Respondent chose to repeatedly provide inadequate responses which resulted in the claims against the First and Second Defendants being struck out.

46.8 In respect of Allegation 1.3 the Respondent received a without prejudice costs offer on 11 October 2018. Despite this offer expiring at 4pm on 15 October 2018, he did not refer this to his client until 16 October 2018. In communicating this offer to his clients, he demonstrated his awareness of the offer having expired and the fact that it was a possibility that the offer could not be revived. The Respondent therefore chose not to refer this offer to his clients within the stipulated time frame.

46.9 As an experienced solicitor he would have been aware of the risks associated with failing to respond to communications from the other side in on-going litigation and court hearings and of failing to respond to another parties without prejudice offer within the stipulated time frame; it was unreasonable for the Respondent to take such risks.

46.10 The Tribunal found Allegation 1.2 proved in full on the balance of probabilities, including breaches Principles 4, 5 and 6 of the Principles 2011; failure to achieve Outcomes 1.2 and 5.3 of the SRA Code of Conduct 2011 and recklessness.

46.11 The Tribunal found Allegation 1.3 proved in full on the balance of probabilities, including breaches Principles 4, 5 and 6 of the Principles 2011; failure to achieve Outcome 1.5 of the SRA Code of Conduct 2011 and recklessness.

Previous Disciplinary Matters

47. There were no previous findings.

Mitigation

48. The Respondent had not engaged with proceedings and had provided the Tribunal with no information as to mitigation which the Tribunal could factor into its decision.

Sanction

49. The Tribunal considered the Guidance Note on Sanction (10th Edition June 2022) ("the Sanctions Guidance"). The Tribunal assessed the seriousness of the misconduct by considering the level of the Respondent's culpability and the harm caused, together with any aggravating or mitigating factors.

50. In assessing culpability, whilst the Respondent's motivation for the misconduct was not entirely clear the Tribunal found it was likely that the Respondent had attempted to cover the lack of activity on his clients' case which he had not progressed, and things which should have been done in his clients' interests were not done. Thereafter, matters spiralled away from the Respondent to the detriment of his clients.

51. The Respondent's actions were not spontaneous, this had been a continuum of inaction or inadequately progressed work on the Respondent's part, spread over many months, essentially 'too little too late'.

52. The Tribunal considered that the Respondent had had direct control and responsibility for the circumstances giving rise to the misconduct in which he had knowingly misled his clients and chosen to pursue their case without the rigour it had required, or indeed at all.

53. The Respondent had been a solicitor for 25 years, since 1995 and he was therefore viewed as an experienced solicitor. He would, for example, have been aware of the risk of failing to comply with Unless Orders. It was unreasonable for the Respondent to fail to comply with the Unless Order. As an experienced solicitor he would have been aware of the risks associated with failing to respond to another parties without prejudice offer within the stipulated time frame; it was unreasonable for the Respondent to take such a risk.

54. A solicitor of any level of experience would know that misleading a client was unacceptable.

55. The Tribunal considered that whilst the Respondent had not actively misled the Regulator, he had failed to co-operate with the Regulator in any way which the public would expect of a regulated professional.

56. Overall, the Tribunal assessed the Respondent's culpability as high.

57. The Tribunal next considered the issue of harm.

58. Harm was clearly caused to his clients by his failure to comply with the Unless Order, and upon whom a costs order was imposed in circumstances where they had not expected it and which he had done nothing to mitigate. They had been shocked by the costs order. He let his clients down and also left them exposed to pay a costs order in a significant sum.

59. The consequential damage to the reputation of the profession by the Respondent's misconduct was significant as the public would trust a solicitor not to mislead ~~,~~ their own client.

60. The Respondent had caused serious harm to the reputation of the solicitor's profession by his poor, dishonest and reckless conduct which also represented a significant departure from the complete integrity, probity and trustworthiness expected of a solicitor.

61. The extent the harm was reasonably and entirely foreseeable by the Respondent who had had a clear knowledge of his actions.

62. The Tribunal assessed the harm caused as high.

63. The Tribunal then considered aggravating factors. The Tribunal, in its finding of fact, had found that the Respondent had acted dishonestly.

64. The misconduct had persisted over a period approaching 2 years. The fact that he had written a letter to his clients in terms found to have been dishonestly misleading was naturally indicative of concealment on the Respondent's part.

65. The Tribunal noted that the Respondent had no previous findings against him. However, he had not given any account of actions and the Tribunal had no information regarding potential mitigation, without which it could not say that there was evidence of any genuine insight. There had been no open or frank admissions, and no co-operation with his Regulator.

66. Given the Tribunal's findings of dishonesty the Tribunal considered the seriousness of the misconduct to be high. In addition, the Respondent's conduct had been found to have lacked integrity and he had failed to uphold public trust in the provision of legal services.

67. The Tribunal considered that to make No Order, or to order a Reprimand, a Fine or Suspension (either fixed term or indefinite) would not be sufficient to mark the seriousness of the conduct in this case for the reasons set out above.

68. In the Judgment of the Divisional Court in SRA v Sharma [2010] EWHC 2022 (Admin) it had been held that:

> *"save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the roll….that is the normal and necessary penalty in cases of dishonesty... There will be a small residual category where striking off will be a disproportionate sentence in all the circumstances… In deciding whether or not a particular case falls into that category, relevant factors will include the nature, scope and extent of the dishonesty itself; whether it was momentary… or over a lengthy period of time …whether it was a benefit to the solicitor, and whether it had an adverse effect on others."*

69. In SRA v James, MacGregor and Naylor it was said that exceptional circumstances must relate in some way to the dishonesty and that as a matter of principle nothing was to be excluded as being relevant to the evaluation, which could include personal mitigation.

70. In evaluating whether there were exceptional circumstances justifying a lesser sanction in this case the focus of the Tribunal was on the nature and extent of the dishonesty and degree of culpability and then to engage in a balancing exercise as part of that evaluation between those critical questions on the one hand and matters such as the Respondent's personal mitigation and health issues on the other.

71. In this case the Respondent had presented no personal mitigation to which the Tribunal could give any consideration and there was nothing before the Tribunal to allow it to conclude that the Respondent had not known the difference between honesty and dishonesty or that he may have acted '*in blind panic'*. The Respondent had indicated that at certain points along the timeline of this case he had been ill, however, there had been no evidence to suggest that his poor health had been a contributing factor or of a degree and nature which had prevented him from knowing that his conduct had been dishonest.

72. The Tribunal observed that this had not been a fleeting or momentary lapse of judgment but had been a course of conduct over 2 years.

73. The Tribunal could find no exceptional circumstances within the meaning of Sharma and James in the Respondent's case.

74. The Respondent's misconduct was very serious and this fact, together with the need to protect the reputation of the legal profession, required that Strike Off from the Roll was the only appropriate sanction.

Costs

75. Mr Edwards stated that as the Applicant had proved its case to the required standard it was entitled to its proper costs. The quantum of costs claimed by the Applicant was in the sum of £18,328.56 which he submitted was not excessive but was a reasonable and proportionate sum of costs for a case of this nature in which dishonesty had been pleaded by the Applicant and found by the Tribunal.

76. That said, Mr Edwards said it was a matter for the Tribunal to assess the costs. However, given that the case had originally been set down for a 2-day hearing, but concluded in less than 1 day, effectively on a non-contested basis, this would afford some reduction in the claimed costs.

77. Mr Edwards said that having made the appropriate reduction for the time the case had not taken up the total costs should be reduced by £1074 to bring the total amount claimed to £16,624.56.

The Tribunal's Decision on Costs

78. The Tribunal found that it was right for the Respondent to be subject to a costs order, the case had been properly brought by the Applicant and it was entitled to its costs. The public would expect the Applicant to have prepared its case with requisite thoroughness and, in this regard, it had properly discharged its duty to the public and the Tribunal.

79. On the face of it the costs claimed by the Applicant were neither unreasonable nor disproportionate and there was nothing within the way it had conducted its case to prevent an order being made.

80. As to the Respondent's means, the Respondent had chosen not to submit a statement of means or provide any information as to his means. The Tribunal therefore had no information upon which make any realistic assessment of his means but given its finding that the Applicant was entitled to its costs there was no basis upon which to reduce further the Applicant's costs beyond the concession it had made due to the hearing concluding after less than 1 day instead of lasting 2 days as listed.

81. The Tribunal therefore ordered the Respondent to pay the Applicant's costs in the sum of £16,624.56.

Statement of Full Order

82. The Tribunal ORDERED that the Respondent, PHILIP JOHN BURBIDGE, solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £16,624.56.

Dated this 3rd day of April 2024
On behalf of the Tribunal

D Green

JUDGMENT FILED WITH THE LAW SOCIETY
03 APRIL 2024

D Green
Chair