SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12443-2023

BETWEEN:

SOLICITORS REGULATION AUTHORITY LTD Applicant

and

RONALD GEORGE PATERSON Respondent

Before:

Ms A Horne (in the chair)
Ms T Cullen
Ms L Fox

Date of Hearing: 11 – 13 July 2023

Appearances

Tetyana Nesterchuk, counsel of Fountain Court, Middle Temple Ln, Temple, London EC4Y 9DH instructed by Robin Horton, solicitor in the employ of the Solicitors Regulation Authority Ltd, The Cube, 199 Wharfside Street, Birmingham B1 1RN for the Applicant.

Giles Wheeler KC, counsel of Fountain Court, Middle Temple Ln, Temple, London EC4Y 9DH instructed by Tom Wild, solicitor of RPC, Tower Bridge House, St. Katharine's Way, London E1W 1AA for the Respondent.

JUDGMENT

Allegations

1. The allegations made against Mr Paterson by the Solicitors Regulation Authority Limited ("SRA") were that by secretly listening in to a meeting held over Zoom, from which Mr Paterson had specifically been excluded, Mr Paterson breached any or all of the following of the 2019 SRA Principles ("the Principles"):

    1.1. principle 2, as he did not uphold the public trust and confidence in the profession;

    1.2. principle 5, as he did not act with integrity.

2. He also breached the Code of Conduct as follows:

    2.1. paragraph 1.2, in that he abused his position, by taking advantage of a third party (the company whose meeting it was);

    2.2 paragraph 1.4, in that he misled a third party by his act (in attending the meeting) and omission (in not revealing his presence).

Executive Summary

3. The Tribunal did not find that the Applicant had proved its case to the required standard for any of the matters alleged. Accordingly, the Tribunal found all matters not proved, and dismissed all allegations. The Tribunal made no order as to costs.

Documents

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

    - Rule 12 Statement and Exhibit RH1 dated 2 March 2023
    - Respondent's Answer and Exhibits dated 20 April 2023
    - Applicant's Reply to the Respondent's Answer dated 18 May 2023
    - Applicant's Schedule of Costs dated 3 July 2023
    - Respondent's Schedule of Costs dated 3 July 2023
    - Applicant's and Respondent's Skeleton arguments both dated 4 July 2023

Factual Background

5. Mr Paterson was admitted to the Roll in October 1982. He was a director in Eversheds Sutherland (International) LLP (Eversheds) and had been a director at the firm since its founding in 2003. He had previously been a partner or director in its predecessor firms since 1987. Mr Paterson held a current unconditional practising certificate.

Witnesses

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

    - Mr Reddington – Member of Travers Smith LLP

- Mr Paterson – Respondent

7. The written and oral evidence of the witnesses is quoted or summarised in the Findings of Fact and Law below. The evidence referred to will be that which was relevant to the findings of the Tribunal, and to facts or issues in dispute between the parties. For the avoidance of doubt, the Tribunal read all of the documents in the case and made notes of the oral evidence. 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.

Findings of Fact and Law

8. The Applicant was required to prove the allegations on the 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 Mr Paterson's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Integrity

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

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

10. **Allegation 1 - by secretly listening in to a meeting held over Zoom, from which Mr Paterson had specifically been excluded, Mr Paterson breached any or all of Principles 2 and 5 of the Principles.**

Allegation 2 - He also breached paragraphs 1.2 and 1.4 of the Code of Conduct.

The Applicant's Case

10.1 The conduct in this matter came to the attention of the SRA on 15 June 2020 when Travers Smith reported the matter to the SRA. Eversheds also made a report on 18 June 2020.

10.2 The alleged conduct took place on 22 May 2020 and involved Mr Paterson secretly listening in to meetings from which he had been barred.

10.3 One of Mr Paterson's clients was a Mr Davidson, a director and shareholder in a company called Stratospheric Platforms Limited (an Isle of Man company), and the company's chairman. Mr Davidson had sought to remove the CEO and finance director of the company, and, in May 2020, the company considered removing Mr Davidson as chairman.

10.4 On 14 May 2020, the company called a board meeting for 22 May 2020, to be held remotely via Zoom. Mr Davidson told Mr Paterson about the meeting.

10.5 At 12.11pm that day, Mr Davidson updated Mr Paterson, saying that the company had called two board meetings; one to remove Mr Davidson as chairman and the other "to agree certain business". Mr Davidson also raised some issues arising from those meetings.

10.6 On 18 May 2020, Mr Paterson sent to Mr Davidson his firm's engagement letter, promising a draft letter of advice to follow.

10.7 On 19 May 2020, Mr Davidson asked Mr Paterson if he could be present, by Zoom, at the board meetings, scheduled to take place between 12pm and 2pm on 22 May 2020. At some point, Mr Paterson received the Zoom invitation from Mr Davidson, and at 7.37pm on 21 May 2020 he accepted the invitation. The invitation was not sent to Mr Paterson by the company.

10.8 At 10.16am on 22 May 2020, i.e., on the day of the meeting itself, the company's CEO, Mr Deakin, emailed Mr Paterson (with Mr Davidson copied in), stating:

> "I note that you have received and accepted a Zoom invitation sent to you by Mr Davidson to attend the Board meeting later today…the Company's articles of association 24.3 state that the Directors may regulate their proceedings as they see fit. Accordingly, attendance at (sic) Board meeting is a matter of the Board and the Board has not authorised your attendance.
>
> **Please do not attempt to join the Board meeting in question.**" (**Applicant's emphasis added**)

10.9 Ms Nesterchuk submitted that it was therefore clear to Mr Paterson that the company's CEO was stating that the Board was not allowing Mr Paterson to attend the meeting.

10.10 At 10.32am, Mr Davidson replied to the email, including Mr Paterson in the response, stating that:

- there had been no poll of directors to bar Mr Paterson from the meeting;
- the Board had not "disallowed attendance"; and
- Mr Davidson wanted the same right of access to legal advice as the other Board members.

10.11 Mr Davidson therefore asked to call for a formal poll of directors at the start of the meeting. Article 20.1 of the company's articles of association allowed the directors to conduct meetings in such manner as they considered appropriate and article 24.5 allowed any director to call a meeting by giving notice to other directors; there was no automatic permission for lawyers to be present.

10.12 Ms Nesterchuk submitted that from this stance, it was apparent to Mr Paterson that the Board did not want his presence at its meeting, and that Mr Davidson intended to raise the issue.

10.13 The meeting started at 12pm or 12.01pm. At the start of the meeting, there was a discussion as to whether Mr Paterson should attend. The Board resolved that he was not permitted to attend.

10.14 The company was not aware that Mr Paterson was already attending, in secret, and heard the discussion.

10.15 On 23 May 2020 at 11.57am (before the meeting started) Mr Davidson emailed Mr Paterson, stating:

> "I will ring you. Don't say anything."

10.16 At 12pm exactly, Mr Davidson sent a text to Mr Paterson, stating:

> "Ring me to get on the call".

10.17 Ms Nesterchuk submitted that Mr Davidson was arranging for Mr Paterson to attend the meeting, by listening in, by telephone, to the discussions. The other Zoom attendees did not, and could not reasonably have been expected to, know that Mr Davidson had done so.

10.18 Mr Paterson accepted that he immediately rang Mr Davidson on receipt of that email, as Mr Davidson had asked him to do.

10.19 Mr Paterson accepted that he heard at least part of the discussions, including the passing of the resolution that he could not attend the meeting.

10.20 The Board discussed at this meeting the dispute between Mr Davidson and the other directors. Mr Paterson was able to listen to all of those discussions but did not alert anyone to his presence. despite:

- the company having explicitly told him he was not allowed to attend;
- the company confirming by email that he should not even attempt to join the meeting;
- his hearing the company – without knowing about his presence – at the start of the meeting resolving that he was not allowed to attend.

10.21 The meeting finished at around 12.28pm. The company's legal advisers left the meeting, and the remaining directors then had a meeting that dealt with commercial matters that were behind the dispute between Mr Davidson and the other directors. Mr Paterson claims that he was not aware that the company's advisers had left, although of course the company's legal advisers were not making any comments.

10.22 Mr Paterson continued listening in to that meeting until 1.25pm, i.e., for over an hour. Mr Paterson provided advice to Mr Davidson by email during the second meeting, including, at the close of the first meeting, that "removal as chair is a repudiatory breach".

10.23 As Mr Davidson had been using a company telephone for the meetings, the company had a record as to the telephone calls, and their length. On 27 May 2020, the company's legal adviser, Mr Reddington, wrote to Mr Paterson to ask if he had indeed been listening in to the meetings.

10.24 Mr Paterson responded that:

> "Mr Davidson had asked me to call him on his mobile to join the meeting. I immediately rang him, expecting that he had obtained agreement for me to participate in the meeting. However, when I rang I heard the board debating whether I should be allowed to participate. I acknowledge that ultimately the board voted not to allow me to participate."

10.25 This was Mr Paterson's description of the opening comments. The company's solicitors characterised it as a discussion as to whether Mr Paterson should be allowed to join.

10.26 Ms Nesterchuk submitted that even if one took Mr Paterson's comment that he thought he had consent to attend the meeting at face value, it was obvious right from the start of the meeting that the Board was not allowing Mr Paterson to take any part in the meeting.

10.27 Mr Paterson went on in his response to Mr Reddington to say:

> "At the time, I drew a distinction between being able to participate in the meeting (and to address the directors) and being able to advise my client privately on the issues to be discussed…in the circumstances, I decided to stay on the call to be able to advise my client. This was a split-second decision, which I recognise now was an error of judgment."

10.28 Ms Nesterchuk submitted that Mr Paterson had therefore admitted that he listened in to a meeting from which he had been excluded, and did so in secret, as he did not alert anyone to his presence, in order to give legal advice to his client in secret.

10.29 Although Mr Paterson stated this was a split-second decision, he continued to listen for an hour and a half, and he had been first told not to attend 2 hours previously.

10.30 Mr Paterson sought to draw a distinction between listening to a meeting and speaking at a meeting. He seemed to have decided that "participating" in a meeting meant actually speaking, rather than being present.

10.31 In his letter to the SRA dated 1 October 2020, Mr Paterson takes this further by stating that:

- he was doing the right thing by not alerting anyone to his presence. Had he said that he was listening in to a meeting from which he had been barred, he would have been "participating in the meeting", which the company had not permitted; and that;

- alerting anyone to his presence "would have disrupted the meeting".

10.32 In essence, Mr Paterson implies he had no choice but to stay on the line for 90 minutes. Taking a moment to tell others that he was there would have been "participating", and disruptive, even though the only disruption would have been due to the other attendees dealing with his unpermitted presence. At no point does Mr Paterson seem to have considered simply hanging up.

10.33 Mr Paterson did not address the email he received under two hours before the meeting started which stated that he was not allowed to "attend" and that he was asked not to "attempt to join". Mr Paterson did not seek to join using the Zoom invitation Mr Davidson had sent him; doing so would have been obvious to the company as his presence would have been evident on the meeting screen.

10.34 Mr Paterson further justifies his presence by stating that having a meeting without him was "improper and inequitable", and that his leaving Mr Davidson without advice would have been "a dereliction of duty". Mr Paterson did not comment on the other measures which he could legitimately have taken, such as advising his client not to attend the meeting, or whether there was any legal action he could have undertaken to preserve his client's position.

10.35 On 15 June 2020 the company's solicitors reported Mr Paterson's conduct to the SRA. Mr Paterson's firm did so 3 days later, repeating Mr Paterson's comments on participation.

10.36 Ms Nesterchuk submitted that Mr Paterson's conduct amounted to a breach by Mr Paterson of the requirement to behave in a way which maintains the trust placed by the public in him and in the provision of legal services. He knew he was not permitted to attend a meeting; the company knew he had accepted a meeting invitation and told him by email he should not attend. His client secretly involved him in the meeting and Mr Paterson heard the company state that he should not attend. Nevertheless, Mr Paterson kept listening in, on the pretext that he was not 'participating' in the meeting.

10.37 The company's intention was plain, and its conduct afterwards in questioning Mr Paterson's involvement demonstrated how plain its intention was. Mr Paterson deliberately kept silent so that the company could not know that he was attending in secret. It was the equivalent of listening outside the door, or standing under an open window to hear what was going on in a meeting from which one has been barred. It was not conduct which a solicitor should encourage, let alone undertake.

10.38 The general public would find such conduct from a solicitor shocking – perhaps even tantamount to espionage. Public confidence in Mr Paterson, in solicitors and in the provision of legal services was likely to be undermined by such conduct. Mr Paterson therefore breached Principle 2 of the Principles 2019.

10.39 Mr Paterson failed to act with integrity, i.e., with moral soundness, rectitude and steady adherence to an ethical code. He deliberately listened in to a meeting from which it was clear that he was excluded. He did so in secret without alerting anyone to his presence, despite being told he could not attend, and seeking to justify it with a cheeseparing difference between "attend" and "participate" – even though he had been told the night before that he could not attend.

10.40 Acting with integrity required Mr Paterson either to hang up when the company specifically said, in the meeting, that he was not permitted to be at the meeting, or to ask the company to clarify whether he could simply listen. In failing to do so, Mr Paterson's conduct breached Principle 5 of the Principles 2019.

10.41 Paragraph 1.2 of the Code required solicitors not to not abuse their position by taking unfair advantage of clients or others. Mr Paterson did so by secretly listening in to two meetings in order to advise his client. By doing so he gave his client an advantage over the other Members of the Board, who did not know that their discussions were being overheard and that Mr Davidson was receiving legal advice.

10.42 Ms Nesterchuk submitted that, even if it was assumed that the first meeting would otherwise have had Mr Davidson at a disadvantage, in that he would not have had legal advice while the company did, Mr Paterson's conduct misled the company. Mr Davidson could have left the meeting, or refused to discuss anything without a lawyer, but of course he did secretly have one listening in, and the company did not know this.

10.43 At the second meeting the other members of the Board did not have the benefit of legal advice (because their lawyers left the Zoom call) so the fact that Mr Paterson continued to listen gave his client an advantage. Mr Paterson stated that he did not know the company lawyers had left the meeting – Mr Davidson could, of course, have told Mr Paterson that they had, but doing so would have alerted the company to Mr Paterson's presence. Mr Paterson would not have heard the company's lawyers in the second meeting – nevertheless he continued to advise Mr Davidson.

10.44 Paragraph 1.4 of the Code of Conduct stated that solicitors should not mislead clients, the court, or others, by acts or omissions, or being complicit in acts or omissions. Mr Paterson misled the company both by listening into its board meetings, and by omitting to tell it that he was listening in to its board meetings. The company had told him he could not attend and, without knowing he was listening in, confirmed that this was the position at the start of the first meeting. The company could not know that Mr Paterson was listening, and by continuing to listen without warning the company, Mr Paterson misled the company.

10.45 Ms Nesterchuk submitted that Mr Paterson was complicit in his client misleading the company. The client had asked Mr Paterson to telephone him, and Mr Paterson did so, whereupon the client had him listening in without telling the company. The client therefore misled the company – had Mr Paterson not listened in, then the client's misleading would not have taken place.

The Respondent's Case

10.46 Mr Paterson denied all matters. He explained that he was aware that the Board were attempting to pass resolutions at the meeting that would be contrary to Mr Davidson's interests. He was aware that the Board had refused the request for him to attend the meeting. He considered the refusal to be improper and inequitable.

10.47 Having received the email and text from Mr Davidson, he called Mr Davidson as requested. He remained on the phone with Mr Davidson. This was a split-second decision. He had not considered or discussed with Mr Davidson what would happen in the event that the Board refused to allow him to attend the meeting. Mr Paterson explained that he drew a distinction between participating in the meeting and remaining on the phone to advise Mr Davidson while Mr Davidson participated in the meeting.

10.48 In his response to Mr Reddington, he stated that his conduct was a "split-second decision" and was an "error of judgement". This did not in fact reflect his true opinion, but was said as a means of defusing the situation. Mr Paterson did not consider then, nor did he consider now, that it was an error of judgement for him to listen to the meetings. He was, at all times, acting in his client's best interests and on his client's instructions.

10.49 Mr Wheeler KC submitted that there was very little factual dispute between the parties. It was common ground that Mr Paterson was not permitted to attend the meetings, and that he listened to them.

10.50 It was the Applicant's case that listening to a meeting was the same as attending. Mr Wheeler KC submitted that this was incorrect, both as a matter of language and substance. It was noted that the meetings took place on Zoom; Mr Paterson was not a party to that Zoom call, and had no means by which he could address the participants in the meeting. Further, the draft minutes prepared which recorded the discussions did not list Mr Paterson as an attendee. It was not therefore correct to say that Mr Paterson was in attendance.

10.51 The notion of attendance at a board meeting carried with it a degree of formality. As he was listening to the meeting by means of his phone call with Mr Davidson, Mr Paterson could not be considered to be in attendance. The Applicant's submission that Mr Paterson breached the prohibition on his attendance by attending upon his client was mis-directed. Whether or not Mr Paterson attended the meeting as alleged by the Applicant could not be decided by the dictionary definition of 'attendance'; any attempt to do so was unhelpful. Mr Wheeler KC submitted that the Applicant had failed to evidence that, by listening to the meetings in order to provide his client with advice, Mr Paterson was himself in attendance at the meetings in contravention of the prohibition.

10.52 As to the Applicant's complaint that Mr Paterson remained at the meeting when the other legal representatives were no longer in attendance, and thereby abused his position by taking unfair advantage of others, Mr Wheeler submitted that Mr Paterson did not realise that the other lawyers had left. He was not alone in this error, as the minute taker had listed the other lawyers as being in attendance at the second meeting, when by their own account they were not.

10.53 Mr Wheeler KC noted that the Applicant did not level any criticisms at Mr Paterson for the advice that he had given to his client during the meetings, and there were no allegations against him in that regard. The criticism made by the Applicant was that Mr Paterson did not refer to "the other measures which he could legitimately have taken, such as advising his client not to attend the meeting, or whether there was any legal action he could have undertaken to preserve his client's position". Mr Wheeler KC submitted that this did nothing to advance the Applicant's case; the question was not what Mr Paterson could have done differently, but rather it was whether his conduct amounted to professional misconduct.

10.54 The Applicant's case contained a number of assertions that Mr Paterson's conduct was improper or wrong, but failed to particularise why his conduct was improper or wrong. What Mr Paterson did was to take instructions from his client in order to advise his client.

10.55 It was obvious and uncontroversial that Mr Davidson was free to obtain legal advice. The other Board members were not entitled to restrict or prevent him from doing so. If Mr Paterson had not been listening to the meeting, he would not have been able to provide that advice. If it was accepted, as it had to be, that Mr Davidson was entitled to the take legal advice, then there could be no restriction on Mr Paterson providing that advice in private, in circumstances where legal advice was subject to privilege, and Mr Davidson was under no obligation to inform the Board members that he was taking legal advice. Likewise, Mr Paterson was under no obligation to inform the Board members that he was providing his client with legal advice.

10.56 Mr Wheeler KC submitted that the Board had no power to restrict Mr Davidson from obtaining legal advice, or from sharing information with Mr Paterson for the purposes of obtaining that advice. Had the Board stated that Mr Paterson was not permitted to be made aware of exactly what was being said in the meetings, this would have been of no effect as legal professional privilege was not subject to limitation, and there was no power to restrict client-solicitor communications.

10.57 There could be no suggestion that Mr Davidson was prohibited from giving Mr Paterson a full note of what was said at the meeting, once it had concluded. Given that that was so, there could be no restriction on Mr Paterson hearing what was taking place at the meeting in real time. Similarly, Mr Davidson could have provided Mr Paterson with an audio recording of the meeting, and so there could be no legitimate objection to Mr Paterson hearing what was said in real-time. Mr Wheeler KC submitted that there could be no principled reason to distinguish between those two positions.

10.58 It was not accepted that Mr Paterson's conduct had been misleading or that he had engaged in subterfuge as alleged or at all. The Board were not aware that Mr Paterson was listening to the meeting, but at no time was the Board told that Mr Paterson was not listening to the meeting. There was no suggestion that Mr Paterson had said anything to anyone that was untrue. Mr Wheeler KC submitted that it was not possible to mislead people by conduct of which they were unaware. As to his conduct, Mr Paterson had listened to the meeting. The only representation that could be formed was that he listened to the meeting. The Applicant, it was submitted, had made no attempt to explain what the misrepresentation was, or how such misrepresentation had

been conveyed. The real complaint was one of non-disclosure, in circumstances where there was no duty of disclosure.

10.59 Further, and in any event, the Board was aware that Mr Paterson was advising Mr Davidson, so it was impossible to allege that there had been any subterfuge. Mr Paterson had listened to the meetings as a means of being informed by his client of what was transpiring in order that he could provide his client with legal advice, in circumstances where Mr Davidson was entitled to seek and receive such advice.

10.60 As to the prohibition on Mr Paterson attending the meetings, he did not attend the meetings. Mr Wheeler KC re-iterated that the Board had no power to prevent Mr Davidson from obtaining legal advice, or from informing his solicitor of exactly what was being said and by whom, for the purposes of obtaining that advice. The Applicant had suggested that Mr Paterson (or Mr Davidson) should have informed the Board that Mr Paterson was listening to the meetings. Mr Wheeler KC submitted that it was difficult to see any circumstances whereby an opposing party's consent would be required before a solicitor could advise his own client.

10.61 Mr Wheeler KC submitted that the secrecy as to the fact that advice was being sought and provided should not be the subject of any criticism. The Applicant had suggested that, had Mr Davidson secretly recorded the meeting, and let Mr Paterson listen to the recording subsequently, for the purpose of obtaining his advice, that would equally be improper. However, Mr Wheeler KC took the Tribunal to a number of cases in which evidence had been covertly recorded, and the Court found that there was nothing improper in a solicitor seeing/hearing such covert recording and advising upon it.

10.62 It was unrealistic to suggest that Mr Paterson should have advised Mr Davidson of what could be done in the event that permission for him to attend the meeting was refused. Mr Wheeler KC repeated the submission that the matters to be determined by the Tribunal related to the actual conduct and not what Mr Paterson could or might have done.

10.63 The Applicant alleged that Mr Paterson had taken unfair advantage of others in breach of Paragraph 1.2 of the Code. Taking unfair advantage required a conscious act. In Anderson v SRA [2013] EWHC 4021 (Admin) LJ Treacy stated at paragraph 67:

> "It seems to me that the wording of Rule 10 prohibiting the use of a solicitor's position to take advantage of another must involve an element of consciously taking unfair advantage. This gives a natural meaning to the words used. It is not in my judgment sufficient, as Mr Dutton QC contended, for the solicitor to have taken deliberate action which in fact had the consequence of taking unfair advantage of the client. To look at the end result is not, in my judgment, enough. The phrase "you must not use your position to take unfair advantage" clearly imports a degree of purpose underlying the use of position."

10.64 The subjective element of a breach of this prohibition had not been alleged by the Applicant. Nor had it been put to Mr Paterson that he had any intention of taking unfair advantage. Whilst in the Applicant's skeleton argument it had been suggested that Mr Paterson had formed an intention to listen to the meetings, this did not form part of the pleaded case and, further, did not evidence that Mr Paterson intended to take an

unfair advantage. The only intention that was evidenced, was that Mr Paterson intended to advise his client. There was nothing said by Mr Paterson that could be categorised as abusive or taking unfair advantage. Mr Paterson had listened to the meetings in order to advise his client. His actions were an ordinary part of the proper activity of providing advice to his client.

10.65 The allegation that Mr Paterson had misled others or had been complicit in the misleading of others in breach of Paragraph 1.4 of the Code was bound to fail as (as is detailed above), Mr Paterson did not attend the meeting. It was striking, it was submitted, that the Applicant had made no attempt to identify the false message or statement that Mr Paterson was said to have conveyed. To prove that Mr Paterson had been misleading, the Applicant needed to evidence that Mr Paterson had led (or attempted to lead) others into believing something that was not true. In opening, Ms Nesterchuk submitted that the Board had no reason to think that Mr Paterson was listening to the meetings. In his oral evidence Mr Reddington stated that he did not think Mr Paterson was listening to the meetings. It was of note that Mr Reddington did not say that Mr Paterson had done or said anything to cause him to think that. Even if, which was not accepted, there was a disclosure obligation, there was no reason to regard Mr Paterson as being subject to an obligation to correct an incorrect assumption. Further, there was no evidence that Mr Paterson was aware of Mr Reddington's beliefs, or any assumptions made by Mr Reddington, or any of the other participants in the meeting.

10.66 It did not amount to professional misconduct for a solicitor to fail to correct an incorrect assumption. Still less was it professional misconduct for a solicitor to fail to correct an incorrect assumption <u>of which he was not aware</u>. Accordingly, the allegation that Mr Paterson had breached Paragraph 1.4 of the Code was unsustainable.

10.67 It was alleged by the Applicant that Mr Paterson's conduct amounted to a breach of the requirement to behave in a way which maintains the trust placed by the public in solicitors and in the provision of legal services.

10.68 The basis for that allegation was that Mr Paterson "heard the company state that he should not attend [the Meetings]. Nevertheless, he kept listening in, on the pretext that he was not 'participating' in the meeting".

10.69 Mr Wheeler KC submitted that this allegation was difficult to follow. The Board did state that Mr Paterson should not attend the Meetings, but, as set out above, he did not do so. Mr Paterson did not adopt a "pretext" of non-participation; he did not participate in the Meetings in any way (and no such participation was alleged). The allegation that Mr Paterson's non-participation was merely a "pretext" made sense only if "listening in" and "participating" (or "attendance") were properly regarded as equivalents which Mr Paterson had artificially attempted to distinguish. That was very plainly not the position: the distinction between the three actions was real as a matter of substance and as a matter of ordinary language.

10.70 In any event, Mr Paterson did not listen to the Meetings on a "pretext" of any kind: he did so on his client's instructions for the purpose of giving him legal advice. There was no pretext, but a legitimate and proper purpose.

10.71 The Applicant contended that Mr Paterson's involvement in the Meetings was "the equivalent of listening outside the door or standing under an open window to hear what is going on in a meeting from which one has been barred". However, that analogy was flawed because the premise of the Applicant's example was a situation in which the eavesdropping listener has no right to overhear a private discussion. This situation was entirely different because Mr Davidson was fully entitled to attend the Meetings and to hear what was being said. Equally, Mr Davidson was fully entitled to convey to Mr Paterson what was being said for the purposes of obtaining legal advice. Mr Paterson was not receiving that information as an eavesdropper but as a legitimate recipient of information from Mr Davidson about what was being said at the Meetings, when Mr Davidson was entitled both to have that information and to relay it to Mr Paterson.

10.72 As such, the (tentative) comparison that the Applicant drew with espionage in its Rule 12 Statement ("perhaps even tantamount to espionage") was wholly unjustified. The public would not find it in any way shocking that someone in Mr Davidson's position should be permitted to seek and obtain legal advice, and to communicate to his solicitor exactly what had been said at the meetings for the purpose of doing so. On the contrary, it would be far more shocking if (as the Applicant effectively contended) Mr Davidson could be barred from doing so by virtue of the decision of the other directors of the company, whose interests were opposed to Mr Davidson's.

10.73 It was significant that evidence obtained from covert surveillance was regularly admitted in evidence and regarded as being of real value. In Singh v Singh [2016] EWHC 1432 (Ch), Judge David Cooke accepted evidence of covert recordings taken by one party to a discussion, noting at [11] that:

> "It is true to say that these must be approached with some caution, as there is always a risk that where one party knows a conversation is being recorded but the other does not the content may be manipulated with a view to drawing the party who is unaware into some statement that can be taken out of context. But there can be great value in what is said in such circumstances, where the parties plainly know the truth of the matters they are discussing and are talking (at least on one side) freely about them".

10.74 Similarly, in the context of covert surveillance evidence relied on in a personal injury claim, Judge Moloney QC in Purser v Hibbs [2015] EWHC 1729 permitted the recovery on the indemnity basis of the unbudgeted costs of obtaining surveillance evidence, noting at [6B] that:

> "…some degree of cunning is required in the administration of surveillance, for entirely legitimate and understandable reasons… The court would not, I think, wish to do anything to discourage the judicious use of surveillance evidence or to alert actual or prospective fraudsters to the likelihood of it".

10.75 Mr Wheeler KC submitted that in neither of those cases were the solicitors involved criticised for listening to or viewing and seeking to deploy such evidence. It would be remarkable for such evidence to be admissible in Court, but for it to be improper for a solicitor to rely on a similar recording (or hearing the same material live rather than via a recording) for the purpose of giving legal advice.

10.76 Accordingly, Mr Paterson's conduct did not amount to a breach of Principle 2. That allegation was not sustainable and should be dismissed.

10.77 Integrity required Mr Paterson to act with moral soundness, rectitude, and steady adherence to an ethical code. Mr Paterson was also required to act in the client's best interests (Principle 7) and to maintain confidentiality in the client's affairs (Paragraph 6.3 of the Code). Mr Wheeler KC submitted that both of those professional obligations indicated that Mr Paterson was correct to act as he did. Furthermore, the answers given to the other allegations against Mr Paterson also demonstrated that he did not act with a lack of integrity. At the very worst, he made an error of judgment.

10.78 The Applicant suggested that Mr Paterson ought to have hung up his phone call with Mr Davidson when the Board concluded that Mr Paterson could not attend the Meetings, or alternatively he should have asked the Board to "clarify whether he could simply listen". It was inferred that the SRA's position was that, if Mr Paterson had sought such clarification, Mr Paterson should not have continued to listen to the Meetings if the Board had not permitted it.

10.79 The effect of the Applicant putting its case in that way was that it had treated the Board's decision that Mr Paterson could not attend the Meetings as also amounting to a decision that Mr Paterson could not even listen to the Meetings. As a result, Mr Davidson could not have received legal advice from Mr Paterson during the Meetings without the permission of the other directors (with whom Mr Davidson was in dispute) for him to do so. There was, of course, little doubt that such permission would not have been forthcoming.

10.80 That position had been adopted by the Applicant notwithstanding that it did not identify any basis on which the Board had the power to prevent Mr Paterson from listening to the Meetings at the request of Mr Davidson; nor was it suggested that Mr Paterson acted in any way unlawfully in listening to the Meetings on Mr Davidson's instructions. Mr Paterson himself believed he was entitled to listen to the Meetings on the instructions of Mr Davidson, who was properly attending the Meetings, fully aware of what was being said at them, and under no restraint in conveying the substance of the discussions to Mr Paterson as his solicitor. Such belief was correctly (and reasonably) held by Mr Paterson.

10.81 The Applicant, it was submitted, was wrong in its contention that integrity demanded that Mr Paterson should act in a manner that involved subordinating Mr Davidson's best interests, and his right to obtain legal advice, to the requirements of those who were opposed to Mr Davidson's interests. On the contrary, integrity required that Mr Paterson should act in Mr Davidson's best interests, and do what he could to ensure that he was provided with the legal advice that he sought.

10.82 That Mr Paterson acted with integrity was clear from his written and oral evidence. Mr Paterson's objective was to support his client in a very difficult situation, and to provide advice as he had been instructed to do. The alternative course, which would have deprived Mr Davidson of the advice which he sought, would have seriously disadvantaged Mr Davidson in a way that may well have been irreversible. There was nothing discreditable at all in Mr Paterson seeking to protect his client's interests as he did.

10.83 Accordingly, the Applicant had failed to show that Mr Paterson's conduct lacked integrity in breach of Principle 5 and thus should be dismissed.

The Tribunal's Findings

10.84 The Tribunal did not find that Mr Paterson had been in attendance at the meetings. He was not listed as an attendee in the draft minutes, and had been unable to participate in the meetings. He had no means of communicating with anyone present at the meetings other than his own client. He could not see who was present on the Zoom call, nor who was speaking at any particular time. He could not intervene and make representations on behalf of his client, as he had intended to do, had his client's request that he be allowed to attend been acceded to. The Tribunal did not consider that the ability to hear what was being said at the meetings, amounted to attendance at them.

10.85 It was the Applicant's case that the secrecy deployed amounted to professional misconduct. The Tribunal accepted (as had been submitted) that Mr Paterson was under no obligation to inform anyone that he was providing advice to his client, or of the instructions he had received in order to do so. Indeed, were he to have done so, he would have been in breach of the obligations of privacy and confidentiality owed to his client.

10.86 The Tribunal found that Mr Davidson was entitled to receive legal advice and was entitled to receive that advice in real time. The Tribunal considered that there could be no criticism of Mr Paterson if he had, immediately following the meeting, listened to an audio recording of the meeting in order to advise Mr Davidson. The Tribunal determined that there was no discernible difference between listening to a recording in order to advise, and hearing what was said in real-time for the same purpose. The Applicant's suggestion that this amounted to misconduct was therefore not accepted.

10.87 The Tribunal accepted Mr Wheeler KC's submission that as Mr Davidson was entitled to attend the meetings, and to relay to Mr Paterson exactly what had been said at them, Mr Paterson's action in listening in to the meetings could not be characterised as 'eavesdropping'; Mr Paterson was entitled to know what was said and to take his client's instructions in that way.

10.88 Whilst the Board might have been entitled to refuse Mr Paterson's attendance (in the sense of participation at the meeting on Mr Davidson's behalf), it was not entitled to prevent Mr Davidson from taking legal advice, and Mr Davidson did not require the Board's permission to take such advice.

10.89 The Applicant, it was determined, had failed to prove, to the required standard, that in listening to the meetings, Mr Paterson had abused his position as a solicitor by taking unfair advantage of the other participants in the meeting. The Tribunal noted the findings in Anderson. It determined that the Applicant had failed to show any subjective intent on the part of Mr Paterson to take unfair advantage by the abuse of his position as a solicitor.

10.90 Similarly, the Applicant had failed to prove that Mr Paterson had misled, or was complicit in the misleading, of others. There was no evidence that by not revealing that he was listening to the meetings at the time they were taking place, any of the

participants had been misled. The Tribunal agreed with the analysis of Mr Wheeler KC on this point detailed in his submissions above. In short, in order to have misled any of the participants of the meeting, Mr Paterson would have needed to have said something that caused the participants to believe that something was true when it was not. He did not in fact say anything; nor did he hear any misrepresentation and fail to correct it.

10.91 The Tribunal noted that whilst the concept of a solicitor listening to a meeting from which they knew they had been excluded might be uncomfortable, in the circumstances of this case, it did not amount to professional misconduct. Mr Paterson had listened to the meeting on his client's instructions in order to provide him with the legal advice he had been retained to provide, and to which his client was entitled.

10.92 Accordingly, having determined that Mr Paterson's conduct did not amount to professional misconduct, the Tribunal dismissed the allegations.

Costs

11. Mr Wheeler KC applied for costs in the sum of £101,740.20. The Tribunal was referred to the case of CMA v Flynn Pharma [2022] UKSC 14 in which it was held that the usual costs order should be no order as to costs due to the chilling effect on the regulator where it had acted reasonably. Similarly, in Baxendale-Walker v Law Society [2007] EWCA Civ 233, it was held that there should be no order as to costs against the regulator unless the proceedings had been improperly brought.

12. Mr Wheeler KC submitted that the proceedings had been improperly brought on the basis that to proceed against Mr Paterson was unreasonable. There was little difference between the parties on the facts, the issues to be determined were whether Mr Paterson had acted improperly. The Rule 12 Statement failed to divulge why it was that his conduct was said to have been improper. The allegations had been based on assumption and innuendo, with reference to Mr Paterson acting in secret, with his conduct being tantamount to espionage. The omission in the Rule 12 Statement of any proper analysis was remarkable given the matters in dispute. The Applicant had alleged that Mr Paterson had misled others but had provided no evidence of any misleading acts or statements.

13. It was the Applicant's role to ascertain what Mr Paterson had done, and then particularise why that conduct amounted to professional misconduct. Mr Wheeler KC submitted that the Applicant's failure to do so evidenced that the prosecution was unreasonable. It was accepted that the proceedings were not shambolic, however it was unreasonable to bring the case against Mr Paterson without setting out why his conduct was considered to be misconduct.

14. Mr Housego, a solicitor member of the Tribunal, had considered whether the case could be certified when it was issued. Mr Housego had initially refused to certify the matter, giving detailed reasons for that refusal, and this ought to have given the Applicant pause for thought. In a letter dated 8 June 2023, the Respondent invited the Applicant to reconsider its position in light of Mr Housego's reasoning, making the point that advising a client in secret was entirely ordinary. In its reply dated 15 June 2023, the Applicant confirmed that it would keep the matter under review, but the prosecution

carried on regardless. Mr Wheeler KC submitted that the 8 June 2023 letter provided the Applicant with the opportunity to take another look at the matter; it failed to do so.

15. As to the quantum of costs claimed, Mr Wheeler KC submitted that the Respondent's costs were entirely reasonable. Whilst the costs were higher than those claimed by the Applicant, it was unreasonable to expect Mr Paterson to replicate those lower costs. The hourly rates claimed by the Respondent's solicitors were reasonable. Accordingly, Mr Paterson should be awarded his costs in full.

16. Ms Nesterchuk resisted that application for costs. Flynn Pharma made it clear that Baxendale-Walker remained good law. The Tribunal was referred to the following passages in Baxendale-Walker:

> "Absent dishonesty or a lack of good faith, a costs order should not be made against such a regulator unless there is good reason to do so. That reason must be more than that the other party had succeeded. In considering an award of costs against a public regulator the court must consider on the one hand the financial prejudice to the particular F complainant, weighed against the need to encourage public bodies to exercise their public function of making reasonable and sound decisions without fear of exposure to undue financial prejudice, if the decision is successfully challenged."
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> …..
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> "Our analysis must begin with the Solicitors Disciplinary Tribunal itself. This statutory tribunal is entrusted with wide and important disciplinary responsibilities for the profession, and when deciding any application or complaint made to it, section 47(2) of the Solicitors Act 1974 undoubtedly vests it with a very wide costs discretion. An order that the Law Society itself should pay the costs of another party to disciplinary proceedings is neither prohibited nor expressly discouraged by section 47(2)(i). That said, however, it is self-evident that when the Law Society is addressing the question whether to investigate possible professional misconduct, or whether there is sufficient evidence to justify a formal complaint to the tribunal, the ambit of its responsibility is far greater than it would be for a litigant deciding whether to bring civil proceedings. Disciplinary proceedings supervise the proper discharge by solicitors of their professional obligations, and guard the public interest, as the judgment in Bolton's case [1994] I WLR 512 makes clear, by ensuring that high professional standards are maintained, and, when necessary, vindicated. Although, as Mr Stewart maintained, it is true that the Law Society is not obliged to bring disciplinary proceedings, if it is to perform these functions and safeguard standards, the tribunal is dependent on the Law Society to bring properly justified complaints of professional misconduct to its attention. Accordingly, the Law Society has an independent obligation of its own to ensure that the tribunal is enabled to fulfil its statutory responsibilities. The exercise of this regulatory function places the Law Society in a wholly different position to that of a party to ordinary civil litigation. The normal approach to costs decisions in such litigation - dealing with it very broadly, that properly incurred costs should follow the "event" and be paid by the

> unsuccessful party-would appear to have no direct application to disciplinary proceedings against a solicitor."
>
> …
>
> "Unless the complaint is improperly brought, or, for example, proceeds as it did in Gorlov's case [2001] ACD 393, as a "shambles from start to finish", when the Law Society is discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs follow the event. The "event" is simply one factor for consideration. It is not a starting point. There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow. One crucial feature which should inform the tribunal's costs decision is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage."

17. The Applicant, it was submitted, was obliged to bring cases before the Tribunal so that the Tribunal could make a ruling as to whether conduct amounted to professional misconduct. All of the allegations had been properly brought and reasonably pursued. Both Eversheds and Travers-Smith had made reports to the Applicant regarding Mr Paterson's conduct. Indeed, in his response to the Applicant, Mr Paterson stated that he had made an error of judgement and that he should not have continued to listen to the Board meetings after they had resolved that he could not attend them. It would have been surprising, Ms Nesterchuk submitted, if in light of the complaints, the Applicant had not investigated the matter. The decision to refer Mr Paterson to the Tribunal was carefully considered by the Applicant and the propriety of the allegations were considered and kept under review throughout.

18. Ms Nesterchuk submitted that it was entirely reasonable for the Applicant to bring the allegations; lack of success did not mean that the case was unreasonably or improperly brought.

19. As to the quantum claimed, this was excessive. The time spent on preparation of the case was unreasonable and disproportionate. Ms Nesterchuk noted that, as Mr Paterson had failed to provide any evidence of his means, it was not open to him to argue that he would be prejudiced if there was no costs order made in his favour.

The Tribunal's Findings

20. The Tribunal noted, as the parties accepted, that the starting position where a Respondent had successfully defended proceedings was one of no order as to costs in line with the principles derived from Flynn Pharma and Baxendale-Walker.

21. The Tribunal considered whether the proceedings had been unreasonably or improperly brought. The Tribunal did not find that it was improper or unreasonable for the Applicant to bring the case. There were proper matters of principle that it was right

should be ruled upon by the Tribunal. Both Eversheds and Travers Smith had reported Mr Paterson to the Applicant as a result of his conduct. Mr Paterson, whether or not it was his true view, had accepted in correspondence that by remaining at the meeting, he had erred in his judgement. Whilst the Tribunal had found in the particular circumstances of this matter that there had been no professional misconduct, there were a number of cases where an error of judgement did amount to professional misconduct.

22. The Tribunal did not accept that, having been asked to review the matter, the Applicant had unreasonably continued with the proceedings. Nor was there any evidence that, having been asked to review the matter, the Applicant had failed to do so. The case, the Tribunal determined, had not proceeded as a shambles from start to finish.

23. Having determined that it was not established that the matter was improperly brought or maintained, the Tribunal did not find that there was any reason to depart from the starting position that there should be no order for costs against the Applicant. Accordingly, the Tribunal made no order as to costs.

Statement of Full Order

24. The Tribunal Ordered that the allegations against RONALD GEORGE PATERSON be DISMISSED. The Tribunal further Ordered that there be no Order as to costs.

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

A Horne

A Horne
Chair

JUDGMENT FILED WITH THE LAW SOCIETY
18 SEPT 2023