SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11818-2018

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

LEVENT HALIL CHETINKAYA First Respondent
TRACEY CURABA Second Respondent

Before:

Mr A. N. Spooner (in the chair)
Mr P. Booth
Mr P. Hurley

Date of hearing:
15-17 January 2019, & 15 April 2019

Appearances

Mr Yash Bheeroo, Counsel of 3 Verulam Buildings, Gray's Inn, London WC1R 5NT instructed by the Solicitors Regulation Authority of The Cube, 199 Wharfside Street, Birmingham B1 1RN for the Applicant

Mr Jonathan Goodwin, Solicitor Advocate of Jonathan Goodwin, Solicitor Advocate Ltd, 69 Ridgewood Drive, Pensby, Wirral CH61 8RF for the First Respondent

The Second Respondent did not appear and was not represented

JUDGMENT

Allegations

First Respondent

1. The allegations against the First Respondent, Mr Levent Halil Chetinkaya, formerly of Bishop & Sewell Solicitors LLP ("the firm"), are as follows:

1.1 On 30 May 2017, he instructed the Second Respondent to create and backdate a letter dated 6 April 2017 in order to create a misleading version of events on a conveyancing file. In doing so he:

- breached all or alternatively any of Principles 2, 4, 5 and 6 of the SRA Principles 2011

1.2 Despite knowing that his client's signed documents had been lost, on 19 April 2017, he instructed the Second Respondent to send out fabricated documents to MTG Solicitors, in circumstances when he knew or ought to have known that the documents had been fabricated and did not contain the genuine signature of his client.

By seeking to rely upon documents containing a signature he knew or ought to have known had been fabricated, he:

- breached all or alternatively any of Principles 2, 4, 5 and 6 of the SRA Principles 2011.

1.3 He failed to inform his client that her documents had been lost and instead deliberately misled his client as to the whereabouts of the documents in an attempt to conceal the loss. In doing so he:

- breached all or alternatively any of Principles 2, 4, 5 and 6 of the SRA Principles 2011.

1.4 He reviewed, approved and confirmed that the contents of a letter, dated 31 May 2017 and from the firm to his client, were true in circumstances in which he knew or ought to have known that the contents of the letter were false and misleading In doing so he:

- breached all or alternatively any of Principles 2, 4, 5 and 6 of the SRA Principles 2011.

Second Respondent

2. The allegations against Second Respondent Ms Tracey Curaba, formerly of Bishop & Sewell Solicitors LLP ("the firm"), are as follows.

2.1 On 30 May 2017, on the First Respondent's instructions, she created and backdated a letter dated 6 April 2017, knowing that it would create a false and misleading account of events on a conveyancing file. In doing so she:

- breached all or alternatively any of Principles 2, 4, 5 and 6 of the SRA Principles 2011

2.2 Despite knowing that the client's signed documents had been lost, on 19 April 2017, she sent out fabricated documents to MTG Solicitors, in circumstances when she knew or ought to have known that the documents had been fabricated and did not contain the client's genuine signature.

By seeking to rely upon documents containing a signature she knew or ought to have known was forged, she:

- breached all or alternatively any of Principles 2 and 6 of the SRA Principles 2011.

Allegations against both the First and Second Respondents

3. In relation to allegations 1.1-1.4 (against the First Respondent), and 2.1-2.2 (against the Second Respondent), above, it is alleged that the First and Second Respondents acted dishonestly. However, proof of dishonesty is not an essential ingredient of the allegations of misconduct.

Documents

4. The Tribunal reviewed all the documents including:

Applicant

- Rule 5 Statement dated 27 April 2018 with exhibits JED1 and JED2
- Emails from Mr Alistair Willcox of the Applicant to the Second Respondent dated 11 December 2018, 14 December 2018 and 19 December 2018
- Witness statement of Mr Michael Gillman dated 13 December 2017 with exhibit MJG1
- Email from Mr Gillman to Ms Jennifer Dunlop of the Applicant dated 14 June 2018 timed at 13.30 with attachment
- Email from Ms Dunlop to Mr Gillman dated 14 June 2018 timed at 14.41
- Email from Ms Dunlop to Mr Jonathan Goodwin dated 15 June 2018 timed at 13.05
- Email from Ms Dunlop to Mr Goodwin dated 15 June 2018 timed at 13.16
- Email from Mr Willcox to the Second Respondent dated 14 January 2019 timed at 15.38
- Decision of an Adjudicator regarding the First Respondent dated 12 July 2018 with attached decision of Adjudication Panel dated 16 November 2018
- Witness statement of Mr Michael Gillman dated 13 December 2018
- Judgment in the case of GMC v Adeogba GMC v Visvardis [2016] EWCA Civ 162
- Judgment in the case of SRA v Wingate and another, Malins v SRA [2018] EWCA Civ 366
- Judgment in the case of Ivey (Appellant) v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67
- Applicant's schedule of costs as at date of issue 27 April 2018
- Applicant's schedule of costs as at 8 January 2019 amended by hand

First Respondent

- Answer of the First Respondent dated 30 May 2018 with attachment
- Email from Ms Ruth King of the Applicant to Mr Goodwin dated 23 October 2017 timed at 10.48
- Email from Ms King to Mr Goodwin dated 26 October 2017 timed at 14.33
- Skeleton argument of the First Respondent (relating to sanction) drafted by Mr Goodwin dated 24 January 2019
- Judgment in the case of Donkin v The Law Society [2007] EWHC 414 (Admin)
- Judgment in the case of Burrowes v The Law Society [2002] EWHC 2900 (Admin)
- Judgment in the case of SRA v Sharma [2010] EWHC 2022 (Admin)
- Judgment in the case of SRA v Waddingham, Smith and Parsonage [2012] EWHC 1519 (Admin)
- Judgment in the case of SRA v Imran [2015] EWHC 2572 (Admin)
- Judgment in the case of SRA v James and others [2018] EWHC 3058 (Admin)
- Personal Financial Statement dated 10 December 2018

Second Respondent

- Answer of the Second Respondent dated 28 June 2018
- Email to Mr Willcox dated 14 January 2019 timed at 15.27
- Note dated 14 January 2019 with medical information attached
- Personal Financial Statement dated 10 January 2019

Preliminary and Other Issues

5. Evidence

5.1 The Tribunal noted that the First Respondent had not given a witness statement and his Answer did not bear a statement of truth. The deadline in the Standard Directions for filing witness statements was 14 December 2018. Mr Goodwin informed the Tribunal that the First Respondent would give evidence on oath. For the Applicant, Mr Bheeroo raised no objection.

5.2 A hearing bundle had been filed by the Applicant on 11 January 2019 which contained documents already provided for the Tribunal save for the completed Personal Financial Statement of the Second Respondent which she had sent to the Applicant under cover of an email and a copy of the client file to which the allegations related. The client file had not been circulated in advance of the hearing and neither the Applicant's nor the First Respondent's advocates referred to it during the hearing.

5.3 There was reference in the papers to the First Respondent offering to have his handwriting examined by an expert. Mr Goodwin confirmed to the Tribunal that the offer had not been taken up. For the Applicant, Mr Bheeroo submitted that as there was no allegation that the First Respondent had forged any document it had not been thought relevant to take this forward.

6. Application to proceed in the absence of the Second Respondent

6.1 The Second Respondent was not present. Mr Bheeroo submitted that over the last month or so the Second Respondent had been in email communication and had submitted a Note dated 14 January 2019 the day before the commencement of this hearing. He referred the Tribunal to a bundle provided by the Applicant which related to contact with the Second Respondent. On 19 December 2018, Mr Willcox of the Applicant emailed the Second Respondent confirming when the hearing would take place. The Second Respondent was told of her options and what route she should proceed down in terms of evidence to be provided if she intended to apply for an adjournment on health grounds. At 15.27 on 14 January 2019, the Second Respondent replied to Mr Willcox including:

> "I can confirm that I do not wish to make an application to adjourn the hearing and feel it is in all the partie's (sic) interests for this matter to be concluded. I am sure [the First Respondent] will not wish for the matter to be adjourned and I have taken that into consideration. I do not wish to adduce any further medical evidence other than the attached consent form…"

The Second Respondent then referred to an impending medical procedure and the impact of her health problems. The Second Respondent continued:

> "It has always been my intention to face [the First Respondent] in Court as I dispute very much a lot of what has been said and I am vehement about clearing my name, but after a great deal of discussion with my husband, we do not feel at this time that I can bring further stress to myself. I am happy for the Hearing to proceed in my absence.
>
> I would be grateful if the attached Note dated 14 January is produced at the Hearing (albeit this email has been copied to [the First Respondent's] solicitors) and read in my absence…"

Mr Bheeroo submitted that while the information indicated that the Second Respondent was undergoing serious medical problems, it did not raise a concern about her ability to participate in the proceedings. Mr Bheeroo referred the Tribunal to the cases of R v Jones [2002] UKHL 5 and of GMC v Adeogba, GMC v Visvardis [2016] EWCA Civ 162. He submitted that the Court of Appeal had said that where there was a deliberate decision not to engage in the proceedings, the Tribunal was entitled to proceed in absence. Mr Bheeroo referred to paragraphs 61-63 regarding Adeogba:

> 61. "Third, the judge appears to have put emphasis on the fact that this was the first hearing and that an adjournment was unlikely to be highly disruptive or inconvenient to attending witnesses. To suggest that the practitioner must be allowed one (or perhaps more than one) adjournment is to fly in the face of the efficient despatch of the regulatory regime. In addition, an adjournment was highly disruptive: the members of the Panel, the legal assessor, the staff and the accommodation had been set up. There is no suggestion that there was any back up work (which in any event would have been inconvenient to others) and 20 days' time would have been lost. Even if witnesses were

not attending, it is inevitable that they will have been alerted to the date and, until they were stood down, will have suffered all the well-known anxiety associated with any forthcoming trial. Organising another hearing would have been both disruptive and inconvenient. No regulatory system can operate on the basis that failure to attend should lead to an adjournment on the basis that the practitioner might not know of the date of the hearing (rather than having disengaged from the process or even adopted an 'ostrich like attitude'): any culture of adjournment is to be deprecated.

62. Finally, I recognise the real significance of the fact that the Panel did not have the practitioner's input in relation to the facts, the question of impairment, or the ultimate decision of sanction (which always carried the risk of erasure). Whenever a practitioner does not attend, however, that is the position and, in this case, the Panel was very well aware of the difficulty which that created and made it clear that it would take all necessary steps to ensure that the hearing was fair to all. This difficulty cannot override all other considerations for, if it did, it would provide a premium on non co-operation.

63. The high-water mark of the criticism that can be made of the decision of the Panel is the reference to voluntary waiver of his right to attend and be represented on the basis that such represents a conscious decision. Bearing in mind the professional obligation to maintain the register (and thus the means of contact) and based on the evidence before the Panel, it was legitimate to conclude that, at the very least, the practitioner had deliberately chosen not to engage with his regulator. In my judgment, in the context of this type of case (whatever the position might be in criminal proceedings), that is sufficient. If it was otherwise, the system simply could not operate efficiently or effectively and although attendance by the practitioner is of prime importance, it cannot be determinative."

6.2 Mr Goodwin submitted that the decision on Mr Bheeroo's application to proceed was a matter for the Tribunal; the Second Respondent could not be compelled to attend. The Tribunal could proceed in her absence provided it was satisfied that she was aware of the hearing and had been served with the papers. If the Tribunal decided to proceed, Mr Goodwin urged it to exercise caution in relying on the Second Respondent's evidence as she would not be present to be challenged in cross examination.

6.3 The Tribunal considered carefully the exchange of emails between Mr Willcox of the Applicant and the Second Respondent and the submissions of the parties. The Tribunal noted that Mr Willcox had written to the Second Respondent on 14 December 2018 by email at 14.43 asking her to confirm whether she intended "to attend the Tribunal hearing 15-17 January 2019". He emailed her again on 19 December at 07.35 and set out the details of what was necessary if she wished to apply for an adjournment. Mr Willcox had quoted to her from the judgment in Ellis-Carr v SRA [2014] EWHC 2411 (Admin) about the type of medical evidence which would be required. The Tribunal also noted the Second Respondent's own

email of 14 January 2019 which set out her medical position and ongoing investigations into her condition and her intentions regarding the hearing as quoted above. The Second Respondent also referred to her Note. The Tribunal noted that the Second Respondent had engaged in the process to this point and determined that she had made a carefully considered decision that she wished the Tribunal to proceed in her absence. The Tribunal therefore considered it appropriate to do so, exercising its discretion under Rule 16(2) of the Solicitors (Disciplinary Proceedings) Rules 2007:

> "If the Tribunal is satisfied that notice of the hearing was served on the respondent in accordance with these Rules, the Tribunal shall have power to hear and determine an application notwithstanding that the Respondent fails to attend in person or is not represented at the hearing."

7. Application by the Applicant to adduce additional documents

Decision of an Adjudicator

7.1 Mr Bheeroo applied to adduce into evidence a decision of 12 July 2018 made by an Adjudicator of the Applicant – a redacted document which had been provided to Mr Goodwin. It was a decision to impose conditions on the First Respondent's practice arising out of the allegations in this case. Mr Bheeroo mentioned that the Tribunal had seen reference to a Regulatory Settlement Agreement ("RSA") relating to an earlier matter. No conditions had been imposed on the First Respondent's practising certificate relating to that matter. Mr Bheeroo submitted that the decision went to the relevance of what the Applicant had done in the course of this case regarding the First Respondent being a risk to the public.

7.2 Mr Goodwin invited the Tribunal to reject the application on the basis that the documents were irrelevant and of no probative value. The decision had been overtaken by a decision of the Adjudication Panel on 16 November 2018 which upheld the imposition of conditions. Mr Goodwin invited the Tribunal to note that in the preceding eight or nine years since the RSA, the First Respondent had had an unconditional practising certificate. Mr Goodwin also submitted that the application was far too late. The Tribunal noted that the Standard Directions required documents to be served by 4 p.m. on 15 June 2018. Mr Goodwin submitted that there was a distinction between the decision of this Tribunal upon conduct issues not informed by the Adjudicator or Adjudication Panel and the Adjudication process which addressed regulatory issues. As to the timing of the application to admit, Mr Bheeroo submitted that the decision to dismiss the appeal was made sometime after the deadline in the Standard Directions. Mr Bheeroo acknowledged that possibly the documents should have been disclosed earlier but disclosure was made once it came to the attention of the caseworker on the file. The Tribunal retired for a short time to deliberate. The conditions were a matter of public knowledge and the Tribunal could attach what weight to their existence that it saw fit in the light of submissions made for the parties. The documents post-dated the deadline for filing material in the Standard Directions. The Tribunal would therefore admit the documents.

8. Email dated 9 June 2017 from the First Respondent to Ms H-W for Mr G

8.1 At the commencement of the hearing the Tribunal enquired as to the whereabouts of an email dated 9 June 2017, which was referred to in the papers, from the First Respondent to Ms H-W a Legal Secretary of the firm (variously referred to in this judgment as "PA" or "secretary to Mr Gillman ("Mr G"), senior partner of the firm) confirming the First Respondent was content with a letter dated 9 June 2017 to the client Ms HL's new solicitors. Mr Goodwin explained that the letter of that date was in the hearing bundle. He had asked the Applicant for enquiries to be made about the email. Ms Jennifer Dunlop of the Applicant had indicated in an email dated 15 June 2018 that it could not be located. At the conclusion of Mr G's evidence, the Tribunal requested that the Applicant check the position regarding the email. The Tribunal asked that any email correspondence, telephone notes or any other form of contact between the Applicant and the firm be made available on the morning of 16 January 2019. Mr Bheeroo advised the Tribunal on 16 January 2019, that Ms Dunlop of the Applicant had been sent the email on 14 June 2018 by the firm in which the First Respondent confirmed his approval of the 9 June 2017 letter. Disclosure of the email had been made to Mr Goodwin overnight. This meant the email sent by Ms Dunlop on 15 June 2018 was not correct. The Tribunal was concerned to have an explanation from Ms Dunlop who was also the author of the Rule 5 Statement.

8.2 Mr Goodwin referred to his letter to the Applicant dated 16 October 2017 responding to the Applicant's Explanation With Warning ("EWW") letter of 14 September 2017 in which he raised the issue of the 9 June 2017 email. Mr Goodwin submitted that it appeared that the enquiry had not been taken up but now an email had been produced timed at 13.30 on 14 June 2018 sent on behalf of Mr G by Ms H-W replying to a request from Ms Dunlop and attaching an email from the First Respondent to Ms H-W, timed at 12.41 on 9 June 2017 including: "The letter is accurate and for the record I am happy to sign this off as requested". This confirmed what the First Respondent said was true. Mr Goodwin submitted that Ms Dunlop had the email he had been asking for since 14 June 2018 and clearly knew this was an issue raised by the First Respondent but the following day she wrote to Mr Goodwin saying the email could not be located. He submitted that the regulator had made inaccurate and misleading representations about the email.

8.3 Mr Bheeroo submitted that what had happened was regrettable but the 9 June 2017 email did not help the First Respondent regarding the 31 May 2017 letter, the subject of allegation 1.4. No allegation had been made about the 9 June letter. The Tribunal felt that it would be better to resolve what had occurred in case it affected the way the parties wished to present their cases. Mr Goodwin indicated that if Ms Dunlop were called as a witness, he would also wish to enquire of her about the drafting of paragraph 16 of the Rule 5 Statement which Mr Goodwin said was inaccurate, misleading and untrue. It said:

> "On 2 June 2017, a report was received from Miss [HL], a former client of the Firm, who stated that her solicitor, the First Respondent, had forged her signature on a conveyancing document. A copy of her Report is at pages 13 - 20."

8.4 The Tribunal retired to deliberate. The Tribunal considered the position and the disclosure by the Applicant, and Ms Dunlop's email dated 15 June 2018 to Mr Goodwin in the light of the disclosure. The Tribunal's preliminary view was that it would be assisted by hearing from Ms Dunlop. However the Tribunal was conscious that Mr Bheeroo would need to take instructions and that Ms Dunlop would need to refresh herself about the case and the points that had been made. She needed to be up to speed and have sufficient time to prepare and it must be a decision of Mr Bheeroo as to whether or not to call Ms Dunlop as a witness. That decision needed to be made before the Applicant's case was closed.

8.5 Mr Bheeroo informed the Tribunal that Ms Dunlop could be available by video link later that morning. He was not contemplating calling her as a witness to deal with the whole case and he could decide if Mr Goodwin made clear what point he wanted to cover. Mr Goodwin confirmed that the only points he wished to explore were paragraph 16 of the Rule 5 Statement and her email of 15 June 2018. Mr Bheeroo indicated that he would be content to withdraw paragraph 16. He accepted that it was inaccurate as to how Ms HL's complaint was put. However there was no allegation against either Respondent that they forged a document. He considered that it did not take the case any further. Mr Goodwin submitted that there was a statement of truth on the Rule 5 Statement and it was inaccurate, misleading and untrue. Mr Bheeroo responded that the report made by Ms HL was attached to the Rule 5 Statement and it was therefore clear that paragraph 16 was wrong. He considered that it was a complete distraction but he would call Ms Dunlop.

Factual Background

9. The First Respondent, was born in 1975 and was admitted to the Roll of Solicitors on 1 September 2000.

10. At the time of the alleged misconduct, the First Respondent was a (member) partner at the firm. The First Respondent resigned from the firm on 19 June 2017.

11. The Second Respondent was born in 1966. She was employed as a legal secretary by the firm and was an unadmitted person. She terminated her employment with the firm on 21 June 2017.

12. On 2 June 2017, the Applicant received a report from Miss HL a former client of the firm about the First Respondent. Her report referred to "Provision of documents with forged signatures" and "loss of documents including signed confidential documents…"

13. On 16 June 2017, a further report was received from Mr G, the firm's Compliance Officer for Legal Practice ("COLP") in respect of the complaint received from Miss HL. The Report raised issues regarding the conduct of both the First and Second Respondents.

14. The First Respondent acted for Miss HL in the sale of her property in Essex. As part of the sale, Miss HL hand-delivered documents to the First Respondent on 5 April 2017, including signed TA6 and TA10 forms dated 4 April 2017.

15. The First Respondent went on holiday from 5 to 19 April 2017. It appeared Miss HL's documents were lost/mislaid at some point between 5 and 6 April 2017.

16. On 6 April 2017, the First Respondent emailed the Second Respondent to ask her to send the documents delivered by Miss HL to MTG the solicitors for the purchaser.

17. On 7 April 2017, the Second Respondent emailed some documents to MTG, but the documents were for an incorrect property.

18. On 12 April 2017, the Second Respondent confirmed to the estate agents C, that Miss HL's documents had been lost.

19. On his return from holiday on 19 April 2017, the First Respondent emailed the Second Respondent a copy of the completed but unsigned TA6 and TA10 forms. Those documents had been emailed to him by Miss HL on 2 April 2017 for his comments prior to her signing the forms.

20. The forms were printed by the Second Respondent at 08:56 on 19 April 2017. The forms were then scanned onto the computer by the Second Respondent at 09:48. The forms that were scanned were signed and dated 19 April 2017.

21. At 10:57 on 19 April 2017, the Second Respondent (on behalf of the First Respondent) sent the TA6 and TA10 forms to MTG by email.

22. The First Respondent then attempted to replace Miss HL's documents. On 19 May 2017, he told Miss HL in a phone call that he had mislaid her Party Wall Notice, and she provided another copy. Between 23 and 25 May 2017, he re-ordered copies of the documents/certificates previously provided by Miss HL.

23. On 27 May 2017, Miss HL received a duplicate copy of one of the certificates the First Respondent had ordered ((a FENSA (Fenestration Self-Assessment Scheme) certificate)). She therefore contacted the First Respondent on the same day to ask who had re-ordered her certificates. In this email she set out the documents she had delivered to the firm and asked the First Respondent to confirm the location of each separate document.

24. From 28 to 30 May 2017 the First Respondent and Miss HL exchanged several emails about her documents.

25. In response to further queries from Miss HL on 30 May 2017, the First Respondent sent Miss HL a copy of the TA6 and TA10 forms signed and dated 19 April 2017.

26. Miss HL immediately replied stating that the signatures on these documents were not hers. She complained to the firm later that evening and terminated her retainer with the firm.

27. Mr G responded to Miss HL's complaint on 31 May 2017. He told Miss HL that the other side had lost her documents and denied Miss HL's suggestion that someone at the firm had forged her signatures.

28. Miss HL refused to accept the firm's explanation and on 2 June 2017 she responded to the firm and reported this matter to the Applicant.

29. The firm undertook an investigative process with each of the First and Second Respondents and then produced an Investigation Report in respect of each of them. The First Respondent was interviewed on 8 and 9 June 2017 and underwent a Disciplinary Hearing on 20 June 2017. The Second Respondent was interviewed on 8 and 15 June and underwent a Disciplinary Hearing on 21 June 2017.

Applicant's Investigations into the Allegations

30. On 14 September 2017, Explanation with Warning ("EWW") letters were sent to both Respondents by a supervisor at the Applicant requesting an explanation and warning them as to the prospect of disciplinary proceedings.

31. The First Respondent replied by emails dated 16 and 24 October 2017. He denied the allegations. He stated he was experiencing significant amounts of stress at the time of the alleged misconduct due to the breakdown of his marriage, and subsequent need to be the sole carer for his children. He also had a very heavy workload. Finally, (from late May 2017 onwards) he was fasting for Ramadan. He stated that these factors might have affected his judgement.

32. The Second Respondent replied by letter dated 4 October 2017 and email dated 17-18 January 2018. The Second Respondent stated that she was only doing what she was told by the First Respondent who was her boss. She admitted that she knew the actions she was being asked to take were wrong and that she was naïve simply to follow the First Respondent's instructions. She apologised for her actions.

33. On 27 November 2017 an Authorised Officer of the Applicant decided to refer the Respondents' conduct to the Tribunal.

Witnesses

34. **Mr Michael Gillman** gave evidence. He adopted his witness statement as his evidence in chief. In cross examination, the witness stated that he did not think his letter of 31 May 2017 to the client had accompanied his Report to the Applicant; he did not think it was part of the firm's HR investigation. He had not taken any part in that process. Two errors were drawn to the witness's attention; in his Report to the Applicant he referred to his letter to the client being dated 30 instead of 31 May 2017 and in that letter he said that it was apparent from the file that on 6 May 2017 instead of 6 April the documents were forwarded to MTG. In the context of mistakes being made without intent to mislead, the witness stated that no one was infallible.

35. In respect of allegation 1.4, the witness could not remember whether the First Respondent had approved the contents of the 31 May 2017 letter. It was the witness's usual practice in dealing with complaints to show the letter to the fee earner to see if the letter was correct. The First Respondent stated at the Disciplinary Hearing that the letter had been sent to him by email. The witness stated that he had not been asked for that email or to search his system for it. The witness dictated his letters and it was highly probable he would have asked his PA to send the letter to the First Respondent

for approval. His witness statement was not drafted from memory; he went through the file and set out what happened as best he could from what he could recall. The witness agreed there was no email in evidence either to the First Respondent, or from him giving sign off. The First Respondent had seemed scrupulously honest and competent until that point. The witness felt copious emails stifled communication and the First Respondent would come to see him for example if he had a point to raise about money laundering matters. While there was no evidence the First Respondent had reviewed or approved the letter, the witness believed that he would have done.

36. The witness was referred to his letter to FMG the client's subsequent solicitors dated 9 June 2017 sent following investigations into the file and in the firm's IT system. The witness could not recall providing the letter to the Applicant. He did not refer to it in his Report to the Applicant dated 16 June 2017. It probably did not occur to him that it should go to the Applicant. The letter was not on the point about which he was reporting to the Applicant; he was trying to give the client's solicitors an account to enable the transaction to progress. He did not intend not to be transparent. It was for the Applicant to decide what to do with his Report. He discharged his duty to make the facts known to the Applicant and so far as the witness was concerned the job was done. If the letter was required it could have been provided. He could not recollect being asked for a copy of the email which the First Respondent sent to his PA approving the 9 June 2017 letter. His attention was drawn to an email from Ms Jennifer Dunlop of the Applicant to Mr Goodwin dated 15 June 2018 which included:

> "3f) We requested a complete copy of the client file along with the firm's investigation papers and the email referred to (from the First Respondent to Mr Gillman's secretary confirming his agreement to the further letter dated 9 June 2017) cannot be located. We have contacted the Firm to clarify the position regarding that email. Should that be located, we will provide a copy to you."

The witness agreed he could not challenge the First Respondent's position that he sent an email to the witness's secretary approving the letter of 9 June 2017; he could not recollect being asked for the email and thought if he had been asked to carry out a search he would have remembered it so it could be assumed he did not.

37. Mr Goodwin asked the witness to clarify between what he said in his witness statement and what he said in his Report. In his witness statement he said:

> "When the documents came to light subsequently, they had been signed by the client and dated 4 April 2017. Having reviewed my initial Report to the SRA, contained in Exhibit MJG1 (page 4 sixth paragraph), and with the benefit of hindsight, I can see that what I stated there was in fact incorrect, though that was not apparent to me…"

The witness explained that in his Report he said:

> "On 5 April 2017 the client delivered at the office an envelope of documents, which included the original TA6 and TA10 forms completed by her but unsigned and undated."

The witness stated that he only found out later that the lost documents which had been delivered on 5 April were those signed by the client. The witness thought the lost papers came to light after his Report, at the end of June or early July 2017 when work was finalised on the file on which they had mistakenly been placed. It was not his department and so he did not take an active interest. Mr Goodwin referred to the Investigation Report which recorded what the First Respondent said about the papers being located:

> "It subsequently transpired that these documents have been found. Where were they found? They were found not in an envelope, where he had expected them to be but they had been misfiled on a file called [S]. He believes this file relates to a property called [W Apartments] and these documents were found approximately two weeks ago."

The witness stated that he knew nothing of it. He took no part in the disciplinary process so that there would be complete transparency. If there was an appeal he would be available to deal with it. The process was dealt with by two other partners. The investigation was kept confidential so there would be no tainting of the appeal process.

38. Mr Goodwin asked the witness about secretarial arrangements. He stated that as the First Respondent was computer literate a one to one secretary did not apply. The Second Respondent's primary source of work was the First Respondent but she did work for others too.

39. The witness was asked about the First Respondent's offer to take a handwriting test, the witness stated that they (the firm) never took a view as to who signed the TA6 and TA10 forms. They accepted that the client had not done so. The witness agreed that in his Report he expressed the view that the Second Respondent had signed. He accepted the First Respondent's word that he had not signed. (In his witness statement he said he took the view someone had copied the signature on the client's driving licence when signing the documents sent to the other party on 19 April 2017). It seemed to the witness that the Second Respondent had pulled down the documents emailed in by the client on 2 April 2017 and then sent them off signed by someone. She was an experienced secretary who took a bit more initiative than she should on occasion. The metadata showed the First Respondent took no part in it and it was a reasonable assumption that she put the signature on the documents. The witness confirmed that in his Report he stated that the Second Respondent accepted that she might have dated the forms. The witness stated that sadly the documents did not need to be signed but probably she signed them too. The witness had no reason to doubt that the First Respondent had offered to take a handwriting test on 8, 9 and 20 June 2017. There was a statement in the Report:

> "Subsequently, on 5 June, it appears that she [the Second Respondent] also signed a letter in the name of an Assistant Solicitor in the firm, using what purported to be the Assistant Solicitor's signature, without authority and without signing the letter in her own name and pp'ing it on behalf of the solicitor."

The witness stated there were no other issues about the Second Respondent signing documents for other people. Mr Goodwin put to the witness that the note of the Disciplinary Hearing recorded:

> "It was put to him [the First Respondent] that EHW has found files where [the Second Respondent] has signed [EHW's] names rather than PPing the file and he said that he was aware of some issues between [the Second Respondent] and EHW."

The witness could not speak to that. So far as he was aware that issue was completely tangential to these proceedings.

40. The witness stated that he had looked at the conveyancing file but not the disciplinary process before giving evidence. The witness had not read the file note of the interview with the Second Respondent on 8 June 2017 which referred to:

> "the fact that [the Second Respondent] had admitted to signing EW's name on some letters".

The witness stated he just knew about an investigation relating to Miss HL's complaint letter. He read that interview note for the first time today. He did not read the file regarding the Second Respondent; he had no knowledge about her signing.

41. The witness stated that he had been the COLP since the inception of the role because he dealt with regulatory issues and it seemed to go with what he did in the firm. Also others were fairly reluctant to take it on. He rarely had any dealings with the Applicant. He had tried to understand the factual matrix which was complex because backdated letter[s] were put on the file. The witness made the Report to the Applicant without reference to the investigation because he was obliged to report timeously by his duty as COLP. In the context of the witness saying he did not look at the investigation documents, he was questioned about the fact his Report did not say that the matter had been reported to the police while the 8 June 2017 note of the interview with the Second Respondent included a reference to the client reporting the matter to the police and the Applicant. The witness stated that he did not think the matter ever was reported to the police; it could be sloppy English in the 8 June 2017 note. He accepted the note was inaccurate and had the potential to mislead. The note was not intended to be read by anyone else. If the issue of signing other documents came up in the disciplinary process and it was agreed the Second Respondent would leave and she did so, it was not brought to the witness's attention. He was the senior partner but not the managing partner. The witness heard there was a compromise agreement and she left. He was probably very busy and moved on. At a later stage in his evidence, the witness was referred to the client's report to the Applicant dated 2 June 2017. She said:

> "31st May: I had no response by mid-afternoon so another solicitor I have now appointed chased it up for me.
>
> As I hadn't received a reply I contacted the police who suggested I go to the police station where they filed a crime report and gave me a crime number. The PC tried to contact [SB] at Bishop & Sewell by phone but he was not

> available and did not call him back. The issue has now been formal, referred by the police to CID, although it is not currently known if and when they will investigate.
>
> I received a response from Bishops (sic) & Sewell at 16.24 denying that the documents had been lost and denying that documents had been signed by someone else and stating they won't release the files until I pay the invoice attached to their letter."

The witness stated that the client must have reported to the police and the Applicant before the 8 June 2017 note was written.

42. The witness was asked about the allegations in the Investigation Report concerning the Second Respondent which referred to the allegations she was asked to deal with including "That she forged a client's signature and dated TA6 and TA10 forms". The witness accepted the client did not say that the Second Respondent had signed the forms. His Report to the Applicant said:

> "The allegations against [the Second Respondent] relate to her signing the Forms TA6 and TA10 in the name of the client…"

The witness stated that what he said about the allegations in his Report was based on his own suspicions; he was not told she had signed and she denied it. He was not an expert but it was a likely explanation. As to the fact the client matter file would not have provided the witness with the allegations against the Second Respondent, the witness stated it would have been what he thought at the time on the basis there was no other explanation. The witness agreed his Report was based on the client matter file and his speculative conclusions. He was hugely upset at the time about having to make the Report and disappointed with the conduct of the Respondents. He made the Report with a heavy heart. It was about a prima facie case; it was his duty to put the facts before the Applicant. He was hugely saddened and today felt sympathy for the First Respondent on a human level. He tried to report with the care and attention required. The investigation was still ongoing when he made the Report. The firm took advice at the time as to how it should handle the matter. His duty as COLP was independent of the employment enquiry. That was the reason he made the report to the Applicant before the investigation was concluded. He thought he might be criticised for not doing it timeously.

43. In his witness statement, the witness said:

> "I made or caused to be made (but cannot recall the exact date, although this was certainly after the event) enquiries of the firm's receptionist as to when the documents were received."

The witness stated that he did this because the client said she had handed the documents in; the First Respondent did not have them and they were not on the file. The witness asked the receptionist if she could recall and she did. He didn't write down the date when he enquired; he did not live in a bureaucratic world. The client said she delivered the documents and they had become lost and he made enquiries. The witness agreed he had been qualified for 39 or 40 years and a Judge for 15 to

20 years; he was just trying to understand what happened; he was not engaged in a bureaucratic process. He used the phrase "it appears" in his statement when setting out what happened. The witness stated that he was trying to be fair and give a truthful account. He also said in the statement:

> "I understand that the documents were found by another fee earner when working on the file but do not know the exact date or the identity of that fee earner."

A fee earner must have told him. A client complained and was not satisfied and went to another firm to complete the transaction. He was concerned that the new firm should have full knowledge of what went on and he co-operated fully with them. Tangentially the documents came to light at a later date. With the benefit of hindsight the witness supposed it would have been good practice and helpful to record the enquiries he made. He was trying to satisfy the client and move things forward and be fair to the Respondents. He was not thinking in other terms.

44. The witness's statement said:

> "The metadata further showed that [the First Respondent] created two versions of the letter dated 6 April."

The witness stated that he knew that from the IT person in the firm. When taken to the metadata the witness agreed it did not say that the First Respondent created a letter to MTG on the day in question. The entry referred to the Second Respondent. The witness agreed there was no direct entry that would say the First Respondent created two letters. The witness stated that he believed the facts and matters in his statement to be true as stated in the statement. He understood that the First Respondent admitted he had backdated and placed letters on the file. The witness did not know what allegations the First Respondent faced. How the Applicant chose to put the allegations was a matter for it. He had been asked to prepare a statement to his best recollection. The witness accepted that his reference to the First Respondent creating two letters and what he said in his report to the Applicant were now to his knowledge inaccurate, misleading and untrue. The letter of 6 April 2017 was on the file and the witness could not make sense of how it got there. He understood the First Respondent had backdated the letter. His Report to the Applicant was what he understood when he made the Report. His witness statement was written from his recollection at the time. He understood the First Respondent had admitted it. He relied on information given to him and what the First Respondent said to him at the time. He was not computer literate (in terms of the metadata).

45. The witness was referred to the final page of his Report dated 16 June 2017 where above his signature appeared the words:

> "I enclose copies of the Investigation Reports prepared by the firm's HR Department into the actions of [the First Respondent] and [the Second Respondent]."

The witness stated that he enclosed these documents but he did not see them. He rejected the suggestion that it was inconceivable that he had not read them; he was trying to keep apart from that process; they could have been put in the bundle without him seeing them. He rejected the suggestion he could only make the Report by reference to the investigation documents because he had spoken to the Respondents. He was sure he had not seen them or read them prior to doing the Report. He could have instructed staff to add the documents to the Report. The witness agreed the Report to the regulator was about serious matters; if he had not thought so the hearing would probably not be taking place. The first time he saw the documents was at this hearing.

46. Mr Goodwin put it to the witness that in the Applicant's email of 15 June 2018, he, Mr Goodwin had been told the Applicant was in touch with the firm in June 2018. The witness replied that it was not with him. Mr Goodwin explained that the contact related to an email sent by the First Respondent to the witness's PA approving the letter of 9 June 2017. The witness had no recollection of contact until he was asked to prepare a witness statement and in October 2018 the witness was asked to make himself available for these proceedings.

47. In re-examination, the witness was referred to the first paragraph on the Report form which said:

> "This form is to help you make your report about the professional conduct or regulatory concerns about a person or firm regulated by the SRA. The information that you provide will assist us to regulate in the public interest and deal with your concerns quickly."

The witness was asked if, when the 31 May 2017 letter was prepared there were concerns about the professional conduct of the First Respondent. He replied "No". He said in the letter:

> "I can see no evidence to suggest that the documents have been lost or have been replaced on our files by documents signed by someone else. I have made enquiries of [the First Respondent] and his secretary, who both confirmed to me that they have not signed any documents on your behalf. I would be most surprised if that were the case in any event. "

The witness stated that he understood this to be the case and subsequently found out it was not so. The witness stated that by the time of the 9 June 2017 letter he had quite a lot of concern about the First Respondent's conduct. The purpose of the letter was to correct inaccuracies, to put right inconsistencies and misunderstandings in previous correspondence. He did not consider it appropriate to include references to his COLP activities and the investigation. There was nothing in the 9 June 2017 letter which he now considered misleading.

48. **Ms Jennifer Dunlop** gave evidence. For technical reasons the witness agreed to give evidence by video link although she could not see the courtroom and the audio connection was by telephone. She was not in the Applicant's office and did not have access to the paper file but had access to email. Regarding her email to Mr Goodwin of 15 June 2018 at paragraph 3f) where she said that the email from the

First Respondent to Mr G about the 9 June 2017 letter could not be located, it was clear to her going back to the email that she had made an error. She had prepared a draft and sent it to Mr Willcox (who was sitting behind Counsel) at 9.09 on 14 June 2018 prior to the email coming in from Mr G. She accepted that she responded to Mr G's email on 14 June. Early on 15 June 2018, she saw that Mr Willcox had approved her reply and she sent it and made an error. She was too hasty and did not consider the emails that had come in subsequent to Mr Willcox viewing her response. Mr Willcox was a senior legal adviser and had viewed the Rule 5 Statement and it was right for him to review the response and she was in the process of handing conduct of the file over to him because of a change of role. He would have day to day conduct and control of the file and was in the process of reading in properly to the file. The witness was not aware of what had happened until contacted in the morning before giving evidence. The witness confirmed she had drafted the Rule 5 Statement. There was no allegation in it relating to the 9 June 2017 letter.

49. The witness stated that paragraph 16 of the Rule 5 Statement was incorrect. It referred to the report made by Miss HL in which she referred to the use of forged signatures on documents but the witness accepted that nowhere in the report did the client say the First Respondent forged the signatures. Paragraph 16 could be withdrawn if appropriate.

50. In cross examination, the witness stated that perhaps she should have applied to amend the Rule 5 Statement; she thought she had clarified the position in her 15 June 2018 email:

> "3a) Whilst the Report states "someone else" must have signed the document in question, Ms [HL] refers to your client, the First Respondent, only and the facts complained of are in respect of his conduct. Ms [HL] specifically complains of "provision of documents with forged signatures". For the avoidance of doubt, the Applicant does not allege that the First Respondent forged his client's signature and that is clear from the allegations the SRA has made."

The witness confirmed she had regard to Miss HL's Report when drafting the Rule 5 Statement. She accepted it was a serious error but stated that it did not impact on the allegations as drafted. She agreed it could be adverse to the First Respondent's position but only if someone took it in isolation.

51. The witness was referred to the First Respondent's Answer dated 30 May 2018 at 3f):

> "The First Respondent denies that he "approved and confirmed" that the letter dated 31 May 2017 from the firm to HL was true. The First Respondent was contacted by the SRA in 14 September 2017 seeking his explanation…The response is dated 16 October 2017… In relation to the First Respondent's involvement in the letter dated 31 May 2017 it is said on behalf of the First Respondent…"

The Answer went on to quote from the 16 October 2917 response already quoted in the Preliminary and Other Issues section of this judgment. The witness agreed she would have seen the Answer dated 30 May 2018 and the 16 October 2017 response.

The witness was also referred to an exchange of emails; Ms K of the Applicant dated 23 October 2017 acknowledging receipt of the 16 October 2017 email:

> "In your email below you refer to a letter sent to Miss [HL] after 31 May 2017 which was checked by [the First Respondent] before being sent. I have attached a letter dated 9 June 2017 which I believe may be this letter. Can you please confirm whether this is the letter referred to in your response below?"

On 26 October 2017, Ms K again emailed to Mr Goodwin acknowledging an email from him dated 24 October 2017 and responding to his queries:

> "The letter dated 9 June
> I was provided with this letter on 21 July 2017 by Miss [HL] (who also made a report to the SRA)…
>
> I did not disclose this letter (dated 9 June 2017) to [the First Respondent] with my letter dated 14 September 2017 [the EWW letter] because I was not aware that [the First Respondent] had contributed to this letter. I therefore did not think it had any bearing on [the First Respondent's] actions…"

The witness did not recall seeing the 23 October 2017 email from Ms K of the Applicant but agreed that more likely than not she would have seen it. She would have read the Report from the firm and seen the 9 June 2017 letter. She did not believe that there had been any disclosure other than the letter or any enquiry of the firm regarding the First Respondent's email to Mr G's secretary. If she had known of the email it would have been taken into account in respect of the Rule 5 Statement. It might have informed her approach.

52. As to where the information came from to say that the 9 June 2017 email could not be located, the witness had requested it previously and it had not been received. She could not recall when she drafted the 15 June 2018 email. On that day she had been in a training session until 1pm. On 14 June 2018, she had asked the firm for a response and received it that day. She did not draft the 15 June email after receiving the response from the firm but accepted she received the firm's response before the 15 June 2018 email was sent to Mr Goodwin. She agreed that in the email to Mr Goodwin she said that if the email "from the First Respondent to Mr [G's] secretary confirming his agreement to the further letter dated 9 June 2017" should be located the Applicant would provide a copy to him. She said there was no excuse for the error but it was at the time she was handing the file over. Mr Goodwin suggested that someone taking over the file would review it and see the email. The witness stated that the email would not have sat in her inbox; she filed all her emails. She could not say exactly when the file was taken over by Mr Willcox. She agreed it was around June 2018. She had overlooked the firm's email; it was a genuine mistake for which she apologised.

53. In re-examination, regarding her contacts with the firm, as far as she could see the witness contacted Mr G on 8 June 2018 by email to say she was dealing with the matter and then on 14 June 2018 at 9.02 she wrote including:

> "I have received the email from [the First Respondent] but have not received the email from you dated 9 June 2017 setting out your concerns. I would be grateful for a copy of that email."

The witness might possibly have spoken to Mr G but could not say from her emails and could not recall. She only had access to her emails while giving evidence not to the whole file. The witness did not believe that she would have relied on the 9 June 2017 email in the allegations against the First Respondent. She was satisfied at the time that the allegations were supported by the evidence; just because the First Respondent provided an Answer was not a basis for not pursuing the allegations.

54. The witness clarified for the Tribunal that she would have still received emails and correspondence from parties whom she had not yet notified that she had reallocated the file. After that she would not have had anything to do with the file other than if Mr Willcox came to her with queries. She believed she would have forwarded any correspondence received to Mr Willcox while the handover was taking place. From the end of June 2018 correspondence would have been sent to Mr Willcox direct. The witness stated that the Applicant had a case management system which anyone could access and onto which staff would move correspondence so Mr Willcox would have had access to it as well. His access however depended on whether the witness had uploaded documents to the system. The mistake regarding the email was hers. She did not check and it might have been she did not upload it to the system. She hoped that it would not have happened often or at all that she would miss an email. This might have been one she missed entirely.

Findings of Fact and Law

55. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondents' rights to a fair trial and to respect for their private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
(The submissions below reflect those in the Rule 5 Statement and those made orally.)

Allegation against the First Respondent

56. **Allegation 1.1 - On 30 May 2017, he instructed the Second Respondent to create and backdate a letter dated 6 April 2017 in order to create a misleading version of events on a conveyancing file. In doing so he:**

- **breached all or alternatively any of Principles 2, 4, 5 and 6 of the SRA Principles 2011**

Allegation against the Second Respondent

Allegation 2.1 - On 30 May 2017, on the First Respondent's instructions, she created and backdated a letter dated 6 April 2017, knowing that it would create a false and misleading account of events on a conveyancing file. In doing so she:

- **breached all or alternatively any of Principles 2,4,5 and 6 of the SRA Principles 2011**

Allegation against both the First and Second Respondents

Allegation 3 - In relation to allegations 1.1–1.4 (against the First Respondent), and 2.1-2.2 (against the Second Respondent), above, it is alleged that the First and Second Respondents acted dishonestly. However, proof of dishonesty is not an essential ingredient of the allegations of misconduct.

56.1 The SRA Principles 2011 upon which the Applicant relied, in respect of allegations 1.1 and 1.2 against the First Respondent and allegations 2.1 and 2.2 against the Second Respondent, were as follows: You must:

- Principle 2 act with integrity
- Principle 4 act in the best interests of each client;
- Principle 5 provide a proper standard of service to your clients;
- Principle 6 behave in a way that maintains the trust the public places in you and in the provision of legal services;

56.2 For the Applicant, Mr Bheeroo submitted that the allegations related to acts and omissions by the First and Second Respondents following an initial mistake which if dealt with sensibly would have brought a close to the matter. The client Miss HL had delivered documents to the firm which were lost on receipt. Forged documents purportedly signed by the client were sent to third party solicitors for the buyer in a conveyancing transaction. Mr Bheeroo agreed there was no allegation of forgery against either Respondent; the focus was on certain acts after the documents were lost. After Ms Dunlop gave evidence, Mr Bheeroo submitted that he withdrew paragraph 16 of the Rule 5 Statement in that he asked the Tribunal to disregard it completely.

56.3 Mr Bheeroo submitted that the First Respondent had considerable experience having been admitted in 2000. The Second Respondent was unadmitted but a legal secretary of 30 years' experience of which 15 to 20 years was in property matters. She had been employed at the firm from 6 September 2014 to 7 July 2017. Subsequently and as at October 2018 she was employed by an organisation regulated by the Council of Licensed Conveyancers. (The Second Respondent's Personal Financial Statement indicated that as at 10 January 2019, that remained the position). The allegations arose out of two reports to the Applicant; one from the client Miss HL dated 2 June 2017 and one from the firm in the person of Mr G dated 16 June 2017.

56.4 The client delivered forms TA6 and TA10 and other documents to the office reception of the firm on 5 April 2017. The First Respondent confirmed to the client by email the same day that he had received them. This was his last day in the office before annual leave. On 6 April 2017, the purchaser's solicitors MTG emailed enquiring after the "protocol form". The First Respondent emailed the Second Respondent: "They are in my desk top right hand corner, can u send them across". The next morning 7 April 2017, the Second Respondent emailed the First Respondent:-

> "I have hunted all over your desk and on the top right hand corner and in the [HL] sale file. There are no TA forms on the desk or in the file."

They exchanged further emails which Mr Bheeroo submitted showed that the First Respondent knew how the documents were delivered, he emailed: "They are in an

A4r (sic) envelope" and when the Second Respondent emailed that she had "found scanned copy in the K drive of each and have sent them over", he replied "…I think the hard copies are different versions" which showed that he knew that what had been delivered was different from what the client had sent earlier (by email). Mr Bheeroo submitted that on 12 April 2017, the Second Respondent knew that the documents were still missing as she emailed the estate agents including:

> "I am so sorry but between you and me these have been mislaid…a big hunt is on for them in the office!
>
> [The First Respondent] remembers them coming in... that's it…will send them over asap"

The First Respondent returned from leave on 19 April 2017 and picked the matter up. The envelope was still missing. Mr Bheeroo submitted that at that point there was a divergence of evidence. The firm's note of the Disciplinary Hearing with the First Respondent on 20 June 2017 recorded:

> "He said that on return from holiday he had been keen to get things progressed and to make things happen on this file. He had asked [the Second Respondent] if the envelope had been found. She said no it had not. She then said that she had the signed back pages on the file. He said that in relation to this these should be matched and sent. So send the two TA forms over to the other side, which had then been done.
>
> He said in retrospect this had not made sense given that it was known at this time that the envelope was missing, but he was so busy and had no time to think about this properly."

56.5 Mr Bheeroo understood that the Disciplinary Hearing was conducted by senior members of staff of the firm including Ms LM who provided a report of the firm's investigation dated 15 June 2017 to the First Respondent. The initial meetings with the First Respondent were on 8 and 9 June. The Second Respondent separately went through the same process. It was recorded in the notes of her Disciplinary Hearing on 21 June 2017 that she said that on 19 April 2017, the First Respondent forwarded to her an email he had received on 2 April 2017 from the client with draft forms:

> "On 19th April [the First Respondent] returned from holiday. We discussed then how matters had progressed concerning the Hl file and other matters.
>
> They then had their normal "catch up" meeting to discuss actions arising on his return. One of the items at the top of the list had been the HL file and the need to get the documents sent out. [The First Respondent] had forwarded to [the Second Respondent] the email he had received originally from the client with the PDF versions of the forms unsigned. He had asked her to print these out. She had done so and then she said to [the First Respondent] they are not signed.
>
> This was in mid-morning. A little later on [the First Respondent] had come to her and said to send the forms to the other side, here are the signed back pages,

> please collate these and send them out. She had not thought to ask him where the signed pages had come from. She did not remember how they had got there. She did not see him sign the forms."

Mr Bheeroo submitted that aside from the lost forms, the unsigned versions of 2 April 2017 were the only other set which the First Respondent had. The metadata showed that the unsigned versions were forwarded to the Second Respondent at around 08.31 on 19 April 2017 and printed out by her about 20 minutes later at 08.56. Signed versions were scanned by the Second Respondent at 10.48 and at 10.57 were sent to the buyer's solicitors by email by the Second Respondent. There was a gap of about two hours which was unexplained and there was a question as to who signed the forms.

56.6 Mr Bheeroo submitted that there was then a delay until 17 or 18 May 2017 when the First Respondent raised some additional points with the client because of queries made by the purchaser's solicitors. The client emailed on 19 May at 08.36 including "I replied by email yesterday. You have most of the documents requested already. I have emailed you a couple more…" She emailed again at 16.56. The same day at 17.17 the First Respondent emailed, including:

> "I did speak to the solicitor after we spoke this morning, she is dealing with some outstanding points on her sale file.
>
> I informed her that we have the replies to her enquiries…
>
> [The Second Respondent] is away at present and I am trying to find and scan over the Party Wall notice [the Second Respondent] must have put it in a safe, I cannot find this on the file, it is here somewhere but can you scan me a copy so I can sent (sic) to the lawyer over the weekend."

Emails continued to come from the client chasing the First Respondent about information sent to the other side. On 27 May 2017, the client emailed including:

> "**FENSA Certificates**
> I provided those to you in March together with the guarantees. Did you pass them onto the buyer? For some reason someone seems to have ordered a new certificate which has been delivered to this address."

Mr Bheeroo submitted that this document had been ordered by the First Respondent and sent to the client. On 28 May 2017 at 13.06, the client emailed again including:-

> "…I am concerned that you may have mislaid other documents as well as the Party Wall Notice.
> The documents that I have provided you with are as follows:
> …
> **By hand to your office on 5th April (you confirmed receipt by email on the same day)**
> - Windows and doors – warranties and Fensa certificates
> - Gas Safe certificate for installation of cooker November 2010

- NICEIC Electrical work certificate of compliance for replacement of consumer unit and wiring in kitchen etc November 2010
- Building Regulations Compliance Certificate Installation of two gas fires. November 2010.
- Building Regulations Compliance Certificate Installation of boiler November 2010
- Boiler service record
- Party Wall Act notice, Award and Award for compensation. [which Mr Bheeroo submitted the First Respondent had asked her for again]"

…

If you don't have any of them and would like me to provide them again please let me know ASAP to avoid any further delays."

56.7 Mr Bheeroo submitted that the client was becoming agitated. At the point when the First Respondent asked for the Party Wall Notice again on 19 May 2017, saying that the Second Respondent had put them in the safe, the documents were still lost and this was an opportunity for him to tell the client they had been mislaid. The list of documents in the client's email of 28 May 2017 was important. The client offered five times to provide documents and did so here. The First Respondent had ample opportunity to inform her they were lost and if he had told her and taken up her offer to provide them again he would not be before the Tribunal. On 30 May 2017, the client chased again:

> "Please answer my specific queries in the first of the two emails below"

Two minutes later at 08.40, the Second Respondent sent an email around the firm to all staff:

> "[The First Respondent] has recently received a large A4 white envelope with his name written across the front but (sic) has now disappeared from his desk.
>
> The envelope contains important documentation for a client [Miss HL], and needs to be located as soon as possible. Could you please all check your desks to see if it has somehow made its way up to you or has been picked up by mistake when visiting our room!"

At 09.00, the client emailed asking for a response to her 28 May 2017 email of 13.06 including "My focus is on making sure the buyer has received the documents he needs so we can proceed." At 09.31, she emailed that she had just called FENSA and found out the firm had ordered the FENSA certificate. She continued:

> "If you have since [4th April when she hand-delivered it] mislaid it please let me know and I will forward you another copy so that the buyer has it this morning.
>
> Please confirm that you have the other documents that I hand delivered to you including electrical and gas certificates and that you have not reordered those also. Please confirm that you have sent them to the buyer. Please also confirm that you Have (sic) the other documents e.g. Boiler service record that you can't order another copy of and that you have also now provided those to the

> buyer. And the window and door warranties. If you need me to provide documents to you again please let me know this morning."

Mr Bheeroo submitted that the First Respondent finally replied on 30 May 2017 at 09.57:

> "… I reordered the FENSA cert as I could not locate the original documents that you sent me while [the Second Respondent] was away so I re ordered this for (sic) just to be on the safe side."

Mr Bheeroo submitted that the Second Respondent was on annual leave from 17 to 24 May 2017 so what the First Respondent said was untrue; he knew that the documents were lost more than a month before. At 10.11 on 30 May 2017 the client repeated her offer:

> "Please confirm by return of email this morning what the status is with each of the other documents. I have requested that information from you several times now.
>
> …If you need me to provide documents to you again please let me know this morning…"

56.8 The emails continued. At 11.04, the client repeated her offer to provide documents and asked the First Respondent "Please refer to the specific list of documents below when you reply to me…" Eventually at 16.40 on 30 May 2017, the First Respondent replied after more chasers from the client, including:

> "The draft contract was issued on the 24th March although we did not have all of the completed forms. This was forwarded to avoid any delays in the transaction and we informed the buyer's solicitors that there was further documentation to follow. In terms of the documentation that was provided by you on the 5th April, I can confirm that this set of documentation was sent out by my office on the 6th April…"

Mr Bheeroo submitted that this last statement was entirely untrue. The email also said:

> "I cannot confirm exactly when all of these documents have been received as some have been emailed and some have been sent by post however they have been received at my office over the last several days. I can specifically confirm that the following was received on these dates:
>
> 1. FENSA certificate – 24th May 2017
> 2. NICEC-24 May 2017
> 3. Gas Safe – 24 May 2017"

Mr Bheeroo submitted that the envelope was still missing and the Second Respondent had sent her email to all staff enquiring after it on 28 May 2017 and the First Respondent was re-ordering documents from that pack. Mr Bheeroo submitted that the First Respondent was saying that the documents were not in the office

because they had been sent to the other side but that was untrue; they were lost in the office and on the same day 30 May 2017, two letters dated 6 April 2017 were created, the date on which the First Respondent told the client the documents had been sent out.

56.9 Mr Bheeroo submitted that one of the "6 April" letters (at page 29) of the bundle read:

> "I write further in the above matter.
>
> My client has provided various documents including the following:
>
> 1. Gas Safe certification documents
> 2. NICEIC documentation/certificate
> 3. Boiler service papers
> 4. Party Wall Documentation
> 5. Fensa and related papers.
>
> Please confirm if there are any further enquiries you wish to rise in light of the above.
>
> Yours sincerely"

At page 28 of the hearing bundle was another letter:

> "We write further to our letter enclosing the draft Contract on 24 March, and our email to you of 19 April enclosing the TA forms.
>
> We now enclose the following:
>
> - Windows and doors – warranties and Fensa certificates
> - Gas Safe certificate for installation of cooker November 2010
> - NICEIC Electrical work certificate of compliance for replacement of consumer unit and wiring in kitchen etc November 2010
> - Building Regulations Compliance Certificate Installation of two gas fires. November 2010.
> - Building Regulations Compliance Certificate Installation of boiler November 2010
> - Boiler service record
> - Party Wall Act notice, Award and Award for compensation.
>
> Yours sincerely"

Mr Bheeroo submitted that the bullets were an exact copy of the client's email sent on 24 May 2017 at 13.06 for example the style of the fourth bullet with "November 2010" as a separate phrase. This letter with the bullets (at page 28 of the bundle) was evidenced by metadata as having been created at 16.03 by the Second Respondent on 30 May 2017. It was placed on the file. The other letter (at page 29) with the numbered points was on the system and printed but not on the file. Mr Bheeroo submitted that it was dictated on 5 April the day before the First Respondent went on holiday and the Second Respondent typed up by the letter

on 6 April 2017 but not it was not sent out because she could not locate the documents. Presumably the First Respondent thought he had the documents on 6 April when he emailed the Second Respondent and asked her to send them out. It was confirmed by the Second Respondent on 7 April that she could not locate them on his desk where he said they were. Whichever letter one looked at it was quite clear that the impression which was sought to be given was that a number of documents had been sent out on 6 April 2017. Nowhere in these letters was it made clear that this was a letter created on 30 May 2017 although it was intended to be a document that showed what the intention was on 6 April 2017.

56.10 Mr Bheeroo submitted that while both Respondents denied the allegation relating to the backdated letter the documentary evidence did not support their denial. Mr Bheeroo referred the Tribunal to the Second Respondent's Note in which he said she was somewhat unequivocal in that at paragraph 2 she said:

> "Regarding the backdating of the letter, I confirm that I did to (sic) this, and have admitted this in previous correspondence. I have also submitted my full explanation and reasons why I did so. I will further state that I appreciate and understand that this was very wrong for me to do so, and would give a false impression of the file and apologise for my actions. I was asked to do this by [the First Respondent] and place the letter on the file and given he was my boss, and a Partner, I did what was asked of me, albeit I knew it was wrong for me to do so…"

As to the First Respondent, Mr Bheeroo submitted that the position he adopted in his Answer was not the position he adopted at the time with other members of the firm. Mr Bheeroo referred the Tribunal to a note of a meeting dated 9 June 2017 which took place after an initial meeting on 8 June 2017. The 9 June meeting was attended by the First Respondent, Mr OS a member of the firm and Ms LM who dealt with HR matters. It included:

> "[The First Respondent] asked to see LM and OS. He admitted that he had backdated the letter on the file dated 6 April 2017. Albeit the intention was for the letter to go out on the 6th or 7th April given that he had asked [the Second Respondent] to undertake this. [The First Respondent] wanted to reiterate that if the envelope had not been misplaced the documents would have been sent. [The First Respondent] could not cater for the fact that they had gone missing. [The First Respondent] was simply confirming his intention at the time given he was not in the office when the documents went missing.
>
> He said he had asked [the Second Respondent] to backdate the letter to put on the physical file. The [Second Respondent] letter was not used and it was actually drafted on 30 May to make it look like the documents were sent out to the other side.
>
> [The First Respondent] asked that if it was thought that he had been dishonest then he would resign that morning. LM said that it wasn't for them to comment they were undertaking an investigation…"

Mr Bheeroo submitted that the First Respondent had admitted to others in the firm that he instructed the Second Respondent to backdate the letter. This meeting note was not challenged by the First Respondent in any way at the time or by a Counter Notice and was relied on in the response sent to the Applicant on 16 October 2017:

> "In addition, I invite your attention to the meeting note dated 9 June 2017 which confirms the circumstances in which the letter of 6 April was created and [the First Respondent's] intention in that regard, that he was fasting at the relevant time and which may have affected his judgment and decision making, and that he was happy to undertake a handwriting test."

The First Respondent again confirmed this position on 20 June 2017 at his Disciplinary Hearing. Mr Bheeroo submitted that he agreed with the supposition that a letter had been created on 30 May 2017 and backdated to 6 April 2017 and this had the consequence of misleading Mr G. The First Respondent now sought to resile from the position he adopted at the time, and in his Answer effectively said the Second Respondent took it upon herself to create and backdate a letter after he had informed her of his intention "to complete the file", whatever that meant, by recording a duplicate of the letter that had been dictated. He had adopted two completely different positions then and now. The Second Respondent was completely unequivocal in her Note that she had created and backdated this letter on the instruction of the First Respondent which was consistent with what he had told the firm. She also confirmed in her Disciplinary Hearing that on or around 30 May 2017 she was by asked the First Respondent to produce and did produce a backdated document for the First Respondent. In her Answer, she still accepted there was a backdating of the letter she had prepared on 6 April:

> "I had typed a letter on the 6th April as this had been dictated for me as [[the First Respondent] went on holiday. However, at the same time I discovered the documents to go with the letter were in fact missing from the office and the letter therefore stayed on the system and was not sent. No file copy was placed on the file either as the letter had not been sent. I strongly deny typing the letter dated 31st May as I have previously said this is not my style of typing as the letter dated 31st May had bullet points, typographical errors and grammar mistakes. …
>
> I have confirmed that I did backdate the letter to replace the one on the 6th April but I was under extreme duress to do so. I would also add that in my whole career as a legal secretary I have never been asked to do this. [The First Respondent] was a Partner, my boss and who I reported to and I am of the mentality that if your boss asks you to do something you do it. I took a staff member to one side …I told her what he had asked me to do…"

The Second Respondent confirmed in her Disciplinary Hearing on 21 June 2017 that she was asked to produce and did produce a backdated document:

> "She could not be sure but she said that she believed that it was on or around 30th May 2017 that she was asked to produce the backdated document."

Mr Bheeroo submitted that the Second Respondent was consistent in her evidence that the First Respondent asked her to create the backdated letter. The First Respondent said that he told the Second Respondent that he was going to make a letter and she went ahead and drafted one herself in addition. Mr Bheeroo submitted that there was no reason why she would do that; she was right; he was her boss and if there was something wrong with the file it was his responsibility.

56.11 Mr Bheeroo submitted that the position began to unravel when on 30 May 2017 at 17.39 the First Respondent sent the client the forms which had been scanned and sent to the buyer's solicitors on 19 April 2017. This triggered the client's complaint that the signature was not hers and effectively these were not the documents she provided. She failed to elicit any form of substantive response from the First Respondent. She contacted the managing partner (copying in Mr G and Mr OS) the same day to make a complaint. Mr G the COLP dealt with the complaint. On 2 June 2017, the client, who by then had instructed other solicitors, complained to the Applicant. She terminated the firm's retainer on 30 May 2017. On 16 June 2017, Mr G submitted his report to the Applicant which included:

> "This report relates to the conduct of [the First Respondent] a Junior Conveyancing Partner in this firm who, it appears, has acted without independence or integrity, has failed to maintain proper standards of work, has not acted in the best interests of his client and has acted dishonestly.
>
> It appears from the facts of the case set out below that he has not acted with the integrity or honesty of a Partner in the firm which seeks to uphold the reputation of the profession…"

Mr Bheeroo referred the Tribunal to the Investigation Report of Ms LM. She met with the First Respondent on 8 and 9 June 2017 along with Mr OS. In her Report she set out three preliminary findings:

> "That he forged a client's signature and dated TA6 and TA10 forms"

In respect of the first finding, Ms LM added amongst other things:

> "[The First Respondent] did forward these unsigned documents to [the Second Respondent] on the morning of 19 April the same morning they were then signed and scanned to the other side…"

The second finding was:

> '"That he produced a letter on 30 May which he dated 6 April and placed it on the file as it if had been sent out on 6 April"

In respect of the second finding Ms LM stated:

> "[The First Respondent] admitted that he did this to try and say that the other side had been sent the documents and may have lost them and to buy more time."

Mr Bheeroo referred the Tribunal to Mr G's Report to the Applicant where he said he set out his conclusions about the Respondents' conduct but it was a matter for the Applicant to determine:

> "[The First Respondent] has admitted that he produced a letter on 30 May which he backdated to 6 April and put it on the file as if it had been sent out on 6 April, which as COLP I regard as an act of Gross Misconduct.
>
> He further admits that in explaining matters to the COLP in the firm, and confirming the contents of a letter dated 30 May sent to [Miss HL] (sic). There were errors in the letter which could not be correct but which on the face of the files appeared to be the case, thus misleading the COLP."

Allegations of Dishonesty and breach of Principles

56.12 The Applicant relied on the judgment in the case of Ivey (Appellant) v Genting Casinos (UK) Ltd t/a Crockfords (Respondent) [2017] UKSC)regarding dishonesty:

> "The test of dishonesty is as set out by Lord Nicholls in Royal Brunei Airlines Sdn Bhd v Tan and by Lord Hoffmann in Barlow Clowes: see para 62 above. 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…"

Mr Bheeroo submitted that dishonesty was still subject to some extent to a two part test as the Respondent's state of knowledge and belief had to be established before dishonesty could be proved. Mr Goodwin agreed but questioned whether the test was set out correctly in the Rule 5 Statement at paragraph 60 where it seemed to be objective only.

56.13 Mr Bheeroo also relied on the judgment in SRA v Wingate and another, Malins v SRA [2018] EWCA Civ 366 regarding integrity (Principle 2) and in respect of breach of Principle 6. He referred to paragraphs 95-101 regarding integrity:

> "95. Let me now turn to integrity. As a matter of common parlance and as a matter of law, integrity is a broader concept than honesty. In this regard, I agree with the observations of the Divisional Court in Williams and I disagree with the observations of Mostyn J in Malins.
>
> 96. Integrity is a more nebulous concept than honesty. Hence it is less easy to define, as a number of judges have noted.

> 97. In professional codes of conduct, the term "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. See the judgment of Sir Brian Leveson P in Williams at [130]. The underlying rationale is that the professions have a privileged and trusted role in society. In return they are required to live up to their own professional standards.
>
> 98. I agree with Davis LJ in Chan that it is not possible to formulate an all-purpose, comprehensive definition of integrity. On the other hand, it is a counsel of despair to say: "Well you can always recognise it, but you can never describe it."
>
> 99. The broad contours of what integrity means, at least in the context of professional conduct, are now becoming clearer. The observations of the Financial Services and Markets Tribunal in Hoodless have met with general approbation.
>
> 100. Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. To take one example, a solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead. Such a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse.
>
> 101. The duty to act with integrity applies not only to what professional persons say, but also to what they do. It is possible to give many illustrations of what constitutes acting without integrity. For example, in the case of solicitors:
>
> i) A sole practice giving the appearance of being a partnership and deliberately flouting the conduct rules (Emeana);
> ii) Recklessly, but not dishonestly, allowing a court to be misled (Brett);
> iii) Subordinating the interests of the clients to the solicitors' own financial interests (Chan);
> iv) Making improper payments out of the client account (Scott);
> v) Allowing the firm to become involved in conveyancing transactions which bear the hallmarks mortgage fraud (Newell-Austin);
> vi) Making false representations on behalf of the client (Williams)."

Mr Bheeroo emphasised paragraphs 96 and 97 and the first two sentences of paragraph 100 and submitted that example vi) of that paragraph was the same thing as misleading your client. A solicitor was expected to display the higher standards which society expected of a professional person and to adhere to the ethical standards of their own profession. Integrity was more than mere honesty. Paragraph 105 covered Principle 6:

> "Principle 6 is aimed at a different target from that of Principle 2. Principle 6 is directed to preserving the reputation of, and public confidence in, the legal profession. It is possible to think of many forms of conduct which would

undermine public confidence in the legal profession. Manifest incompetence is one example… "

Mr Bheeroo submitted that if a solicitor acted without integrity or behaved dishonestly it followed that they failed to maintain the public trust in them and their profession. As to Principle 4, acting in the client's best interests, it included acting in good faith. Principle 5 related to providing a proper standard of service. This involved behaving at all times with competence, skill and diligence. He submitted that the Respondents had also breached these Principles.

56.14 Mr Bheeroo submitted that the First Respondent instructed the Second Respondent (allegation 1.1) and she did what he instructed (allegation 2.1). This also involved dishonesty and breaches of Principles 2, 4, 5 and 6 by each Respondent. Mr Bheeroo suggested that in order to determine the allegations the Tribunal would need to consider the following questions if all the allegations were to be found proved:

- Did the First Respondent instruct the Second Respondent to create and backdate the letter dated 6 April 2017?

- Did the Second Respondent on the instructions of the First Respondent create the letter backdated to 6 April 2017?

- Was the purpose of the backdated letter to create a backdated version of events on the conveyancing file?

The Tribunal inquired whether it could still find an allegation proved if the Applicant fell down on one question. Mr Bheeroo submitted that would potentially affect the breaches of Principles but not the allegation as such because the Tribunal could find part of the allegation proved. If the First Respondent instructed the backdated letter to be created that could be a breach of the SRA Handbook. Mr Bheeroo also confirmed that the questions did not just go to the issue of dishonesty. As to the first two questions, Mr Bheeroo relied on the fact that prior to the commencement of proceedings the First Respondent accepted he had instructed the Second Respondent to create and backdate the letter. The Second Respondent always accepted that he did and that she did so. The meeting note of 9 June 2017 recorded that he admitted it. The admission was recorded in the firm's Investigation Report of 15 June 2017 where Ms LM confirmed it was admitted to her [albeit in somewhat different terms; she recorded that he admitted he had produced a letter on 30 May] and in Mr G's Report to the Applicant. The First Respondent repeated the admission that he asked the Second Respondent "to prepare the letter which was subsequently backdated to the 6 April letter and this was put on the file" at his Disciplinary Hearing. The Second Respondent admitted what she had done at her Disciplinary Hearing, in her Answer and her Note.

56.15 Mr Bheeroo submitted that the First Respondent's position had changed in the response to the EWW letter dated 16 October 2017 where there was a new explanation:

> "[The First Respondent] did not attempt to create a misleading account of events. [The First Respondent] did not ask [the Second Respondent] to create a letter, but rather he informed [her] that he was going to create a duplicate letter [cross reference], which [the Second Respondent] misunderstood and who also produced a duplicate letter, but which was not used ….
>
> The intention of [the First Respondent] was to complete the file record by creating a duplicate of a letter that he had dictated prior to going on holiday. The letter was not sent."

This new position was maintained in the First Respondent's Answer dated 30 May 2018. Mr Bheeroo submitted that this version was entirely at odds with the documents and his account given at the time to the firm. At no stage during his interview with the firm or when meeting notes were provided did he correct the firm's position, and provide this version of events particularly when he wrote his letter of resignation to the managing partner on 19 June 2017:

> "The back dating of the letter '6th April 2017' was undertaken to confirm my intention at the time the papers were received. I had intended that the papers be sent out on that date. It was not a dishonest act, but was intended to insulate me against any future complaint that the papers had been sent out later than originally stated."

Mr Bheeroo submitted that what the First Respondent described, the reference to insulating himself was designed to mislead. Mr Goodwin interjected that the First Respondent accepted what he did; that he backdated a letter (singular) but he did not concede that he instructed the Second Respondent to do so; there was a very careful and subtle distinction. Mr Bheeroo responded that he was not saying that the First Respondent backdated the letter but that he instructed the Second Respondent to do so. The first point at which the First Respondent actually said he instructed the Second Respondent was on 9 June 2017, 10 days before his resignation letter, when following his meeting with the firm the day before, he requested a meeting to explain what had happened; he had instructed the Second Respondent.

56.16 As to the third question, was the purpose of the backdated letter to create a backdated version of events on the conveyancing file? Mr Bheeroo submitted that the purpose was to create a misleading impression that the documents had been sent out on 6 April 2017 when they had not been. Whatever the First Respondent claimed his intentions were at the time, the Applicant said it was the First Respondent who instructed the Second Respondent to produce a letter and that he was seeking to create a misleading impression on the file as he said at the 9 June 2017 meeting. He wanted it to appear that the other side lost the documents.

56.17 In respect of the allegation of dishonesty against the First Respondent, Mr Bheeroo submitted that the First Respondent's state of knowledge was that he knew and accepted on 9 and 20 June 2017 that he had given instructions to the Second Respondent to backdate a letter because he knew it would create a false impression with the reader so that it would seem the documents had been sent to and lost by the other side and the same applied to his intention to create a misleading letter sent by Mr G (allegation 1.4). Based on the First Respondent's state of knowledge and belief,

ordinary decent people would think it dishonest to instruct a subordinate to create a backdated document to give a misleading impression that documents had been sent out when they had not been. As to the Second Respondent, she admitted in her Note that she engaged in the act and knew it was wrong when she did it; she knew the documents were lost and had not been sent on 6 April 2017. She confirmed on 7 April 2017 to the First Respondent that Miss HL's documents could not be found.

56.18 As to the breaches of Principles, for the above reasons Mr Bheeroo submitted that both Respondents had failed to act with integrity (Principle 2), the First Respondent by instructing the Second Respondent and she by acting on his instructions with the purpose of creating a misleading impression as to when the documents were sent out. This was not meeting the ethical standards the public expected of the profession and thereby breached Principle 6. People of integrity did not backdate and put such documents on the file (failure to provide a proper standard of service (Principle 5). It was also not in the best interests of the client (Principle 4); it was intended to mislead others and the client as well. The Respondents were not acting in good faith.

Submission for the First Respondent regarding Allegation 1.1

56.19 Mr Goodwin submitted that it was hugely important for the Tribunal to bear in mind that the First Respondent fairly acknowledged that he created a document on 30 May 2017 (at page 29, the letter with numbers) which he backdated to 6 April 2017. The explanation for that was in his Answer. It was not part of allegation 1.1 and there was no freestanding allegation against the First Respondent that he backdated a letter. Mr Bheeroo had acknowledged that in open court. Allegation 1.1 was about the letter at page 28 of the bundle; the letter with bullets. The allegation was not "and/or", the Tribunal must be satisfied that he instructed the Second Respondent to create and backdate the letter. Mr Goodwin submitted that even if the Tribunal was satisfied that there was an instruction it must also find proved that it was done in order to create a misleading version on the file. The First Respondent's evidence was that he had not instructed the Second Respondent to create and backdate a letter. In the 16 October 2017 response and in his Answer, he said he informed the Second Respondent that he would create a duplicate letter which she misunderstood and she proceeded to produce a duplicate letter. If the First Respondent wanted the two letters at pages 28 and 29, bearing in mind he fairly acknowledged and admitted at an early stage that he did create a letter dated 6 April 2017, he would have created them both. Mr G conceded in respect of his Report to the Applicant dated 16 June 2017 that it was wrong when he referred to the metadata stating that the First Respondent created two versions of the letter. The metadata showed the only letter created on 30 May 2017 was that created by the Second Respondent.

56.20 Mr Goodwin submitted that the Tribunal would recall from Mr G's report to the Applicant in June 2017 and he confirmed it on oath; that it was his belief and the firm's belief that Forms TA6 and TA10 were signed by the Second Respondent. If so, the Second Respondent would have every reason to protect her position and implicate the First Respondent in what occurred and that would explain her untrue assertions to the Applicant and the Tribunal that the First Respondent instructed her to create the letter. Mr Goodwin referred to Mr Bheeroo's submission that in dealing with her case in her absence and with her failure to give evidence the Tribunal might draw an

adverse inference under its Practice Direction No. 5. It extended to someone who was not a solicitor as it referred to "respondent". In any event the Second Respondent's absence prevented Mr Goodwin from questioning her on her written representations, and on what the First Respondent said was untrue about them. In her Answer, she said she acted under duress and that if her boss told her to do something she would do it. Contrary to the impression that might give, the Second Respondent was not shy; she was no "shrinking violet" in reporting matters to her superiors. She would have stood up to the First Respondent in clear terms. She was also sent the EWW letter and responded on 4 October 2017. She disagreed that her conduct made it undesirable for her to be involved in legal practice. Events seemed to occur when the First Respondent was on holiday. She stated:

> "During my time at [the firm], [the First Respondent] was acting for a staff member, Miss [X] who was selling her property. She was divorced from the co-owner of the property Mr [Y]. the file was called [X&Y] [the First Respondent] was on holiday during the time this file was due for completion and it was down to me as was the usual practice to oversee his files and deal with his completions despite having a senior Partner in the office [Mr AS*] who never assisted me. I felt capable of dealing with matters due to my experience and never called upon Mr [AS*] (he shared an office with [the First Respondent] and myself).Upon preparing the file, I was very strict about completion checklists as I had worked in previous firms where this worked very well to ensure nothing was missed and it was a procedure I brought with me to [the firm] as they did not, and still do not have one. I checked the TR1 and noticed that Mr [Y's] signature and Miss [X's] signature appeared to me to look very alike, and then I noticed that [Z] who was a Secretary in the firm had appeared to have witnessed both signatures. I knew this could not be correct as I knew from personal knowledge of the file that Mr [Y] worked nights and had never been into the office. I therefore immediately took the TR1 to [Z] and showed the document to her and asked her categorically if she had witnessed both signatures. She said "no". She said [X] had brought the TR1 in and she had merely added her signature. I left the room and knowing full well that this document had therefore been forged, I took this straight to [AS*] and informed him that I could not deal with the completion as I knew that the TR1 was not signed in accordance with legal practice. He called Mr [Y] who confirmed the same. He then spoke to the staff member Miss [X] and told her to get this signed again. From memory, completion was delayed by a day. I consider that I used my integrity and responsibilities in an excellent manner and drew this to the attention of a partner…"

(* also referred to elsewhere as Mr OS)

Mr Goodwin submitted in the light of the above quotation that when faced with such a situation the Second Respondent referred it to a partner. It was inconceivable that she would "roll over" under duress if the First Respondent asked her to backdate a letter. She said she acquiesced to such a request. It was untrue, wholly improbable and a self-serving attempt to protect her position. Mr Goodwin submitted that it was the compelling, calm and measured evidence of the First Respondent that he did not instruct the Second Respondent to create and backdate the letter as alleged. The

burden of proof was not discharged as pleaded and the allegation should be dismissed in which case the allegation of dishonesty also fell away.

56.21 Mr Goodwin submitted that the Tribunal had the First Respondent's evidence as to why he did not challenge the meeting notes (see below). Mr Goodwin also submitted that the case was littered with inaccuracies and misrepresentations. Mr Goodwin had limited himself to the Applicant's documents; Mr G's Report to the Applicant and witness statement, the Rule 5 Statement and the Applicant's reply email of 15 June 2018. He submitted that the Applicant would probably say why did he not ask for handwritten notes of the meetings? The defence were not provided with any handwritten notes of any of these meetings. They had not asked and did not know if such notes existed but having regard to the Applicant's obligation of disclosure, if it did have them, they would have been disclosed. Mr Goodwin submitted that whatever the notes said it would be inappropriate to rely on them to meet the very high standard of proof the Applicant had to meet to satisfy the Tribunal so that it was sure. Handwritten notes could be different from typed notes. The Tribunal should not rely on notes in the absence of any extraneous evidence to support the allegations.

56.22 Mr Goodwin submitted that a CEA Notice had been served by the Applicant on 18 December 2018 whereas the proceedings were served in May 2018; the CEA Notice could have been served at any time and (by the standard directions) no later than 21 days before the hearing. A Counter Notice had to be served no later than 10 days before the hearing. He reminded the Tribunal of the Christmas holiday when some firms including his closed for the whole period. He asked why the Applicant had left it so late to serve the Notice. It went back to the key point when one pared it back; what evidence was there that the First Respondent instructed the Second Respondent. If the only evidence was meeting notes, absent handwritten notes, the Tribunal should be cautious about relying on them alone. Mr Goodwin also submitted that the CEA Notice gave notice of the Applicant's intention to rely on the documents numbered 1-260 in the bundle attached to the Rule 5 Statement. The Applicant did not seek to exclude any documents and so it relied on the response from Mr Goodwin dated 16 October 2017.

<u>Evidence of the First Respondent regarding Allegation 1.1</u>

56.23 In cross examination, the First Respondent stated that he was currently working for the estate agent which previously made referrals to him. He helped to progress their property files. It had not been easy for him to secure employment over the last months; it was a bit of a lifeline to earn a little bit of money. In the firm, he had occupied a role below that of equity partner as a designated partner (Mr G had described him as a junior partner). Prior to his employment at the firm in 2014 he had run his own firm which he started in 2006 with a colleague and developed it to a five director firm. It closed in 2014. The First Respondent had enjoyed working for the firm but was not sure he would have remained there permanently; it was in the process of a merger. The First Respondent reported to Mr OS head of conveyancing, in whose room he and half a dozen other people worked. He interacted with Ms LM over HR matters; occasionally there would be an issue with the Second Respondent in respect of other members of staff which he had to report to Ms LM. These matters were not at the level of official complaints. The First Respondent did not have much dealing with Mr G and went to Mr G mainly when he had issues about money

laundering such as regarding the source of monies. He trusted Mr G as a colleague and COLP. The First Respondent reported to Mr OS, an equity partner as head of conveyancing and sat in his room with other people. The Second Respondent sat in Mr G's room and only worked in Mr OS's room for his last eight months in the firm. The Second Respondent was a secretary for Mr OS's team; principally she undertook the First Respondent's work but Mr OS as the equity partner was her boss not the First Respondent. He considered her to a good assistant overall to the limit of her knowledge; he felt she did not have much leasehold knowledge and often would struggle with it and get frustrated. He would say she needed to improve. They had a good working relationship save for a few issues. The First Respondent had not known about her signing another solicitor EW's (also referred to as EHW) documents prior to a disciplinary issue occurring between the Second Respondent and the firm about it. He viewed the Second Respondent as a competent legal secretary which she had been all her working life. She was a capable property secretary but not to the extent of being more like a paralegal. She could have reached that stage; she was willing to learn.

56.24 The First Respondent stated that the Second Respondent created the letter with the bullet format at page 28 of the bundle dated 6 April 2017 as far as he was aware; he did not create it. It seemed that it effectively copied the client's email. It was not sent to the addressee so far as he was aware. He agreed that he created the letter at page 29 dated 6 April 2017 on 30 May 2017. The First Respondent was taken to the email exchanges he had with the Second Respondent about the lost or misplaced documents while he was away. He accepted that no documents were sent out on 6 April 2017 to MTG and that it was clear on 7 April 2017 that the documents had been misplaced. The First Respondent rejected the suggestion that the two letters dated 6 April 2017 created a misleading impression about what had happened on that day. The letter he created on 30 May 2017 was not misleading because he intended to complete the file. He dictated documents to go out prior to going on holiday. If an independent person read the file they would see the documents went out but he agreed they would not see the letter was written on 30 May 2017. He stated that they might be misled by the letter. He should have said "with effect from" or "dictated prior to going on holiday".

56.25 The First Respondent confirmed that his position before the Tribunal was that he said he did not instruct the Second Respondent to create and backdate this letter. He was referred to his Answer where he referred to his intention to create a duplicate letter. As to what the First Respondent meant by "duplicate", he stated that the purpose of the letter at page 29 (with numbered paragraphs) was to show that a letter was to go out while he was on holiday. He agreed he had created a duplicate. He rejected the suggestion that his Answer was different from what he said when going through the disciplinary proceedings in the firm. He was asked if he recalled asking to see Mr OS and Ms LM on 9 June, they having interviewed him on 8 June 2017. The First Respondent stated that he wanted to clarify the position, having thought about it when he went home, that he had placed the letter on the file. It was put to him that the note of the 8 June 2017 meeting recorded:

> "[The First Respondent] said that he would have dictated the letter before 6 April in preparation. LM said the system showed that the letter was actually typed on 30 May. [The First Respondent] answered that he couldn't explain how this had come about. LM said the letter had been backdated, [The First

> Respondent] said he may have gone into mimecast to look at the letter, but not to "doctor" it."

This was different from what the First Respondent was recorded as saying on 9 June 2017. The First Respondent stated that the 9 June note was incorrect; his Answer gave his position. As to no Counter Notice having been served about this evidence, the First Respondent stated that he was here to give evidence and he did not know what was meant by a Counter Notice. (He had said, when presented with an example of what might constitute dishonesty in the conduct of litigation, that litigation was not his area of work.) At the time that he was being disciplined he did not know what to do; he took employment advice.

56.26 The First Respondent was referred to the report of his Disciplinary Hearing. He responded that it was so long ago he had no reason to challenge it. It was put to him that the note recorded:

> "He did ask [the Second Respondent] to prepare the letter which was subsequently backdated to the 6 April 2017 letter and that this was put on the file. He thought this may have been dictated on 31 May, although he then says before HL's email of 30 May regarding signature."

The First Respondent stated that this was not correct.

56.27 The First Respondent was referred to his resignation letter date 19 June 2017. He said that he had emailed it to the managing partner of the firm that day. Unfortunately he did not pick up the email and when the First Respondent went into the office several weeks later, the managing partner apologised for not responding. The First Respondent stated that after the hearing on 20 June 2017 he had been at home for nearly two weeks and phoned Ms LM about what was happening with the disciplinary process. He referred to the absence of a response to the resignation letter and she said "What letter?" Even though he had resigned he could not pull himself out of the disciplinary process. He was at home on suspension. It was put to the First Respondent that the report of the Disciplinary Hearing recorded:

> "He asked for the firm and for the panel to show him consideration as the person that "we know that he is" and suggested that we should take into account matters he had raised during the course of the meeting with us as part of coming to any decision."

He was asked about not telling Ms LM and Mr OS that he had resigned the previous day. The First Respondent stated that he did not know whether they would accept his resignation. He said if they were not happy they should accept his resignation. When he saw the managing partner several weeks later the latter said he wished it had not come to this. It was put to the First Respondent that in his resignation letter he referred to the notice provision so that it was not a case of "if they accepted his resignation" if he was able to terminate his employment (by resignation) on three months' notice. He responded that they could said "Please don't do this". He was referred to the note of the meeting on 9 June 2017 which recorded:

> "[The First Respondent] asked that if it was thought that he had been dishonest then he would resign that morning."

The First Respondent did not recall that.

56.28 It was put to the First Respondent that on 9 June he accepted that he instructed the Second Respondent to backdate the letter to put on the physical file and now he denied it and that the first time he set out his position that the Second Respondent created something by herself on the basis of her misunderstanding was in the response letter of 16 October 2017. The First Respondent stated that the notes were inaccurate; he did not instruct her, also Mr G was inaccurate. The First Respondent maintained that what he had told the Tribunal was correct; his version of events in the October 2017 response was the correct version of events.

56.29 The First Respondent was challenged as to why he had not filed a witness statement. He responded that according to Standard Directions it was not needed. A response had been given already. He rejected the suggestion that he would not put in a statement because he would not sign a statement of truth. He responded that his reply was his reply because of the work done with his solicitor advocate.

56.30 It was put to the First Respondent that the Second Respondent had no incentive to lie when she said in her Note that she accepted she backdated the letter and it was wrong and that she did so under his instruction. The First Respondent replied that she was not present and had lost the documents in the first instance while he was away, one would assume. No one really took over his work when he away and she took it on herself to do as much of his work as possible. If she had an incentive, it was to make the file look as good as it could be. He did not instruct her to put the letter on the file. As to there being no incentive for the Second Respondent effectively to admit acting dishonestly if he had created a separate letter and she had not been asked to do it, the First Respondent said he accepted he had written the letter at page 29 and so why would he instruct her to do it.

Submissions for the First Respondent regarding Allegation 3 Dishonesty regarding Allegation 1.1

56.31 Mr Goodwin submitted that Mr Bheeroo had properly put the allegation of dishonesty according to the test in Ivey but it had not been fairly and fully particularised in the Rule 5 Statement which did not refer to the first part of the test relating to the knowledge and belief of the Respondent. Knowledge and belief of the Respondent could be determinative so that it was not necessary to apply the second part of the test relating to the standards of ordinary decent people. Mr Goodwin also referred to paragraph 60 of Ivey which gave as an example a person who had not acted dishonestly as someone who came from a country where public transport was free and therefore did not pay a bus fare; such a person would escape conviction based on the state of his knowledge and belief.

56.32 Mr Goodwin also challenged paragraph 77 of the Rule 5 Statement where it said of the First Respondent in respect of dishonesty:

> "He made a deliberate decision to provide misleading, untrue information to his client and he sought to rely upon a document which he knew, or ought to have known was not genuine and contained a forged signature."

Mr Goodwin submitted that to use the phrase "ought to have known" was acceptable regarding the pleaded allegation but could not be applied to the allegation of dishonesty. In support of his submission, Mr Goodwin referred to the case of Donkin v the Law Society [2007] EWHC 414 (Admin) which included:

> "14.When he was opening for the Law Society before the Tribunal, the appointed advocate referred to Twinsectra and the two-stage objective/subjective test. His first reference was unobjectionable. However, when he next referred to it in the context of the present case he said:
>
> "...we submit that the person knowing of the facts would consider it would be wholly wrong for a solicitor to act as Mr Donkin did, and we submit that subjectively Mr Donkin knew or ought to have known that what he was doing was wrong, but proceeded regardless.
>
> 15. A little later he said:
> "It is sufficient for a solicitor to be found to have acted with conscious impropriety if he takes funds in circumstances where he knew or ought to have known that he couldn't have done."
>
> 16. Before us, Mr Geoffrey Williams QC (who did not appear in the Tribunal) properly acknowledges that, by using the words I have emphasised, the advocate for the Law Society was misleading the Tribunal. Mr Williams invites us to accept that the misleading was unintentional and I am entirely content to do so…"

The case had been remitted back to the Tribunal in part based on the use of that phrase.

56.33 Mr Goodwin also referred to errors and inaccuracies in the Rule 5 Statement and the omission from the hearing bundle of a document which was attached to his email to Ms K of the Applicant dated 20 November 2017 elaborating his view about the Applicant's approach to the test in Ivey. He had submitted it five months before the proceedings began. The document was not included in the documents submitted to the Tribunal when the application was lodged.

56.34 Mr Goodwin drew the attention of the Tribunal to the case of SRA v Waddingham, Smith and Parsonage [2012] EWHC 1519 (Admin) regarding the standard of proof. In that case it was said:

> "It would be impermissible in my view in a case to which the criminal standard of proof applied to infer that the person accused had acted dishonestly without being sure that he had done so."

And:

> "I conclude that Mr Smith and Mr Parsonage probably did act dishonestly, both parts of the Twinsectra test being met to that standard. However, I have also taken into account the counterbalancing factors on which Messrs Smith and Parsonage rely… I am not able to be sure that either Mr Smith or Mr Parsonage acted dishonestly. Having regard to the criminal standard of proof, I conclude, as indeed did the Tribunal, that the allegations of dishonesty have not been made out"

Mr Goodwin also referred to paragraph 16 of the Rule 5 Statement quoted above. Mr Bheeroo had accepted the criticisms made of the paragraph and had withdrawn it. It was a matter of concern that it was not withdrawn when the errors and inaccuracies were drawn to the attention of the Applicant after service of the First Respondent's Answer on 30 May 2018. The allegation was referred to in the EWW letter:

> "By conspiring with [the Second Respondent] to send a misleading document without informing Miss [HL], you:
>
> a) Breached Principle 2, 4 and 6 of the Principles."

Mr Goodwin had picked it up in the response dated 16 October 2017:

> "[the First Respondent] denies conspiring with [the Second Respondent] to send a misleading document containing a forged signature to [MTG]…"

Mr Goodwin submitted that it was no answer to say that the solicitor member of the Tribunal who certified the Rule 5 Statement would have had the case documents. The Tribunal and any reader was entitled to rely on the scrupulousness and accuracy of the Rule 5 Statement particularly because it was signed off with a statement of truth. Ms Dunlop in evidence said the paragraph could be withdrawn but she did not say that in her email of 15 June 2018 at paragraph 3a). Mr Goodwin submitted that Ms Dunlop used paragraph 3a) to support and justify paragraph 16. It took a bit of teasing out for her to accept that the paragraph was inappropriate and misleading which Mr Goodwin submitted was seriously so. A solicitor in private practice who drafted such a Rule 5 Statement would be at the end of an Applicant letter which made the Applicant's failure to correct it the previous day even more surprising.

56.35 Mr Goodwin submitted, regarding what he said was lack of evidence, that it was inherently improbable that the First Respondent had acted as alleged. Save for his being subject to an RSA with the Applicant nine years previously he was of good character. The allegations had been hanging over him for a period of time and if they were not found proved, the imposition of conditions on the First Respondent's practising certificate in relation to them would have been wholly unfair. The case of Donkin set down that the Tribunal could and should have regard to character evidence in relation to propensity. The hearing bundle included a small number of testimonials which had been attached to the response dated 16 October 2017. They spoke highly as to the First Respondent's character, integrity and trustworthiness. Both individually and collectively they were compelling and consistent regarding his probity and honesty. They supported the submission that he had no propensity to act as alleged and lent credibility to his evidence to the Tribunal.

Response of the Second Respondent to Allegations 2.1 and 3

56.36 As the Second Respondent was not present, the Tribunal asked Mr Bheeroo to go through the points she had made in answer to the allegations. Mr Bheeroo referred the Tribunal to the Second Respondent's response of 4 October 2017 to the EWW letter of 14 September 2017 regarding allegations which equated to allegations 2.1 and 2.2 in these proceedings; her Answer to the Rule 5 Statement quoted above and the Note she had produced immediately before the hearing setting out her position. It appeared that the Second Respondent was not represented and so the Tribunal did not have a document with a signed statement of truth. The Second Respondent replied to the EWW letter in respect of allegation 2.1 as follows:

> "I do recall [the First Respondent] asking me to create a letter and backdate it but I am unsure of the dates. I actually told [the First Respondent] that he should not do this because if we did not send that letter it should not be on our file and [Mr G] who was our senior partner would question it. I do not agree I helped [the First Respondent]. As part of my meeting with [KB*] and [MCV*] (see notes attached) I questioned whether it was in fact me who had backdated the letter I do not tend to use bullet points but rather numbers, Also I believe I typed the letter on 6th April when asked to do so but this was never sent out because the documents could not be found. It merely sat on our system waiting to be printed to be sent out."

*Partners in the firm

56.37 In her Note, the Second Respondent also admitted "backdating of the letter" and apologised. She said the First Respondent asked her to do it. She admitted that she knew at the time that what she was doing was wrong. Mr Bheeroo submitted that this was her state of mind and so she was acting dishonestly in respect of allegation 1.1. She knew what she did would create a misleading impression on the conveyancing file. In respect of the allegation 3, dishonesty, the Second Respondent stated in her response of 4 October 2017:

> "To answer point 4, I do not consider I acted dishonestly. [The First Respondent] was a partner and my boss and to [go] against him would get me into trouble. I have always had a work ethic that a boss is there to manage and guide you and I did what I was told to do. I feel that I was his secretary and he is a Solicitor and should not have asked me to do such things. I was put in a very difficult position."

Mr Bheeroo referred to the Second Respondent's Answer dated 28 June 2018 which was unsigned. It had been received by email. It did not bear a statement of truth but in it the Second Respondent stated "I….declare this to be a true statement of facts." Mr Bheeroo submitted that he did not doubt the Answer was what the Second Respondent believed to be true. Mr Bheeroo had already quoted from what she said in the Answer about typing a letter on 6 April 2017. Mr Bheeroo submitted this showed that only those documents which had been sent out were placed on the file. Her Answer was more or less consistent with her earlier response to the EWW letter but had more detail. She denied that she typed the bullet point letter; it was not her style

but she admitted she did backdate one letter because otherwise she would be in trouble.

Determination of the Tribunal regarding Allegation 1.1 against the First Respondent and Allegation 2.1 against the Second Respondent

56.38 The Tribunal had regard to the evidence, including the oral evidence and the submissions for the Applicant and First Respondent and the documentation put in by the Second Respondent during the investigation and proceedings including her Answer and Note. The Tribunal took this allegation as a whole; there was no "and/or" element. The First Respondent was not alleged to have created and backdated a letter but to have instructed the Second Respondent to do so and place it on the file. There were two letters dated 6 April 2017 in the hearing bundle. The First Respondent admitted creating one of them but denied instructing the Second Respondent to create and backdate a letter. It appeared that the long list-type bullet version of the letter (page 28) was created on 30 May 2017 at 16.03 and that the other version of the letter was created and printed off but not saved onto the system. Mr Goodwin submitted that allegation 1.1 was about the letter at page 28 of the bundle; the letter with bullets. The metadata showed that the only letter created on 30 May was that created by the Second Respondent. The Second Respondent stated in her Answer:

> "I had typed a letter on the 6th April as this had been dictated for me as [[the First Respondent] went on holiday. However, at the same time I discovered the documents to go with the letter were in fact missing from the office and the letter therefore stayed on the system and was not sent. No file copy was placed on the file either as the letter had not been sent. I strongly deny typing the letter dated 31st May as I have previously said this is not my style of typing as the letter dated 31st May had bullet points, typographical errors and grammar mistakes. …
>
> I have confirmed that I did backdate the letter to replace the one on the 6th April…"

The note of her Disciplinary Hearing on 21 June recorded:

> "She could not be sure but she said that she believed that it was on or around 30th May 2017 that she was asked to produce the backdated document. There was some confusion as to what the nature of the backdated document was and two copies of the letter dated 6th April 2017 were put to her, one that contains bullet points and one that contains numbered points. She said that she had thought she had typed the one that contained numbers and that she had prepared this as a result of a dictation given by [the First Respondent] shortly before he went away on holiday and that she typed this originally and it was sitting on the system but not on the file but then she had been asked to update this and change the contents.
>
> Her recollection was that the bullet point letter was the one that had been backdated although it transpires that the one with numbers on is the one that in fact is on the file."

The Tribunal determined that it was not necessary to identify which of the two letters the Second Respondent had created and backdated. The wording of the allegation was that the First Respondent instructed the Second Respondent to create and backdate *a* letter (emphasis added).

56.39 The notes of the interviews conducted with the First Respondent at the firm on 8 and 9 June 2017 and the Disciplinary Hearing on 20 June 2017 had not been the subject of any Counter Notice under the Civil Evidence Acts. The Tribunal found the First Respondent's explanation for this unconvincing. For example, he responded in giving evidence that the note of the Disciplinary Hearing was so long ago he had no reason to challenge it. The contents of the meeting notes had only been challenged during the course of this hearing whereas they could have been challenged on numerous earlier occasions including, in respect of the 8 and 9 June meeting notes when the First Respondent wrote his letter of resignation on 19 June (see below). The notes were written for the purposes of the firm for use in deciding whether to take disciplinary proceedings against the First Respondent. The First Respondent said that he had taken advice about his employment status. He was not an unsophisticated employee. He could easily have found out what his rights were and he chose not to challenge the notes at the time. When asked about his evidence to support what he said, he asserted that it was based on his being present to say so. The First Respondent also chose to offer to resign during the 9 June meeting if found dishonest and chose to write a letter of resignation on 19 June 2017. The Tribunal considered the meeting notes and report of the Disciplinary Hearings and the way the process had been carried out in respect of both Respondents to be thorough and careful and the accuracy of the meeting notes was unchallenged until this hearing in certain regards by the First Respondent. While relying on at least the 9 June 2017 note in part in the response of 16 October 2017 to the EWW letter, the defence now challenged the reliability of these documents based on the First Respondent's word alone and referred to there being no handwritten notes of the interviews but while it had pursued other matters with the Applicant had not seen fit to enquire after the existence of such notes. The Tribunal determined that considerable weight could be attached to the notes of the investigative and disciplinary procedure. The Tribunal noted particularly the note of the meeting on 9 June 2017 and certain paragraphs of the note of his Disciplinary Hearing. The Tribunal was satisfied that they accurately reflected the position as alleged in allegation 1.1. The Tribunal noted that the First Respondent asked for the 9 June 2017 meeting to take place and admitted he had asked the Second Respondent "to backdate the letter to put on the physical file" and "it was actually drafted on 30 May to make it look like the documents were sent out to the other side." The firm's note of his Disciplinary Hearing recorded:

> "He did ask [the Second Respondent] to prepare the letter which was subsequently backdated to the 6 April 2017 letter and that this was put on the file. He thought this may have been dictated on 31 May, although he then says before HL's email of 30 May regarding signature."

In the 16 October 2017 response to the EWW letter, it was stated:

> "…The First Respondent informed the Second Respondent that he was going to create a duplicate letter, but which the Second Respondent misunderstood

> and who proceeded to produce her own duplicate letter, but which was not used…"

56.40 It was relevant here to consider here the Tribunal's assessment of the First Respondent as a witness; he had been described by his advocate as calm and compelling. The Tribunal noted the First Respondent's comments about the accuracy of the notes made of meetings in the process but generally in giving evidence the Tribunal found the First Respondent to be at times unconvincing and at other times to be evasive and on occasions he appeared to be attempting to rewrite the history of what had actually happened. The First Respondent had made admissions during the disciplinary process and now sought to deny what he had said.

56.41 As to the evidence of the Second Respondent, the Tribunal considered the documents which she had put in. In her Answer, the Second Respondent made an unequivocal admission that she had backdated "the letter to replace the one on the 6th April". She also accepted that what she had done "was completely wrong". In her response to the EWW letter the Second Respondent said: "I do recall [the First Respondent] asking me to create a letter and backdate it but I am unsure of the dates…" In her Note the Second Respondent confirmed that she backdated "the letter" and understood "that this was very wrong for me to do". The Tribunal considered that the Second Respondent was unclear in distinguishing the letters dated 6 April 2017 but very clear about the instructions she had received and what she had done.

56.42 It was submitted for the First Respondent that the Second Respondent was a robust person who sometimes acted beyond the limit of her authority and would not have been cowed into acting wrongly by a superior. The Tribunal found that this suggestion, whether or not generally correct, did not displace the evidence of the unqualified admissions which the Second Respondent made during the investigation which was consistent with the evidence of the First Respondent's own admissions as recorded in the notes of the meetings on 9 June, the latter of which he requested to be held, and at the Disciplinary Hearing on 20 June 2017 both of which reversed his earlier position and which he did not challenge until giving evidence at this hearing. The First Respondent clearly had it in mind to create a misleading impression. It was said in the 16 October 2017 response (and essentially repeated in his Answer):

> "The intention of [the First Respondent] was to complete the file record by creating a duplicate of a letter that he had dictated prior to going on holiday. The letter was not sent."

The Tribunal could not see that "to complete the record" in the particular circumstances could be anything other than designed to mislead. He also said in his resignation letter to which Mr Goodwin had referred the Tribunal that it "was intended to insulate me against any future complaint that the papers had been sent out later than originally stated."

56.43 The Tribunal determined that on the evidence it was proved to the required standard that the First Respondent instructed the Second Respondent to create and backdate a letter dated 6 April 2017 and that the purpose of the backdated letter was to create a backdated version of events on the conveyancing file. The Tribunal also found proved that by acting as he did the First Respondent failed to act with integrity (Principle 2),

failed to act in the best interests of the client (Principle 4), failed to provide a proper standard of service (Principle 5) and failed to maintain public trust (Principle 6).

56.44 The Tribunal accepted the Second Respondent's albeit untested but previously unchallenged admissions and found proved, as was supported by the evidence of the metadata, that she had created and backdated a letter dated 6 April 2017. It also found proved that she acted upon the First Respondent's instructions in doing so knowing that the letter would create a false and misleading account of events on a conveyancing file. The Tribunal found that in doing so she also breached Principles 2, 4, 5 and 6. Incidentally this meant that all Mr Bheeroo's questions were therefore answered in the affirmative.

Determination of the Tribunal regarding Allegation 3, dishonesty in respect of Allegations 1.1 against the First Respondent and 2.1 against the Second Respondent

56.45 The Tribunal employed the test for dishonesty in the case of Ivey. It also had regard to the testimonials provided for the First Respondent which attested to his general honesty. The Tribunal had to determine the state of the First Respondent's actual knowledge and belief. This requirement was not spelled out in the Rule 5 Statement but it was a clear requirement of the test and agreed to be so by the advocates for both parties. The First Respondent was informed on 7 April 2017 while he was on holiday that the documents delivered by the client to the firm by hand on 5 April 2017 could not be located. On his return from leave on 19 April he was told that they were still missing. That remained the position on 30 May 2017 when he instructed the Second Respondent to create and backdate a letter. On the basis of those facts he knew the documents could not have been sent to the other side on 6 April 2017. He could not have reasonably held and did not genuinely hold a belief that the documents had been sent out. The First Respondent admitted at the 9 June 2017 meeting that the letter was created "to make it look like the documents were sent out to the other side." In his resignation letter he stated that his act "was intended to insulate me against any future complaint that the papers had been sent out later than originally stated." He also said in his response of 16 October 2017 and his Answer that he intended to compete the file record (by drafting a back dated letter himself) which the Tribunal found an unconvincing explanation to whichever letter it applied. He denied that this constituted dishonesty. The Tribunal found proved on the evidence to the required standard that by the standards of ordinary decent people what the First Respondent had done was dishonest (allegation 3).

56.46 In respect of the Second Respondent, she described her state of knowledge and belief; she knew that the documents were missing; she informed the First Respondent of that fact on 7 April 2017 by email. She informed the estate agents on 12 April that a "big hunt" was going on for them. She knew that they remained missing when the First Respondent returned from holiday on 19 April 2017 and when she created and backdated the letter. She knew that to place it on the file would be misleading and said "I did what was asked of me, albeit I knew it was wrong of me to do so." The Tribunal found proved on the evidence to the required standard that what the Second Respondent had done was dishonest by the standards of ordinary decent people. Whether or not the Second Respondent acted under duress was an issue for mitigation and did not go to the finding. Allegation 3 was therefore found proved on the evidence to the required standard in respect of the Second Respondent also.

57. **Allegation 1.2 - Despite knowing that his client's signed documents had been lost, on 19 April 2017, he [the First Respondent] instructed the Second Respondent to send out fabricated documents to MTG Solicitors, in circumstances when he knew or ought to have known that the documents had been fabricated and did not contain the genuine signature of his client.**

By seeking to rely upon documents containing a signature he knew or ought to have known had been fabricated, he:

- **Breached all or alternatively any of Principles 2, 4, 5 and 6 of the SRA Principles 2011.**

Allegation 2.2 - Despite knowing that the client's signed documents had been lost, on 19 April 2017, she [the Second Respondent] sent out 'fabricated documents to MTG Solicitors, in circumstances when she knew or ought to have known that the documents had been fabricated and did not contain the client's genuine signature.

By seeking to rely upon documents containing a signature she knew or ought to have known was forged, she:

- **Breached all or alternatively any of Principles 2 and 6 of the SRA Principles 2011.**

57.1 Mr Bheeroo submitted that there were four questions for the Tribunal to answer in order to determine the allegations:

- Was the First Respondent aware that the documents had in fact been lost when he instructed the Second Respondent to send documents to MTG? The answer was "Yes" because on his own account on 20 June 2017 on his return from leave he was told that the documents were still missing.

- Did the First Respondent know or ought he to have known that the documents being sent out on 19 April 2017 were fabricated and did not contain the genuine signatures of his client?

- Was the Second Respondent aware the documents were lost at the time of sending the documents to MTG on 19 April 2017?

- Did the Second Respondent send out the documents to MTG in circumstances where she knew or ought to have known the documents had been fabricated and did not contain genuine signatures of the client?

Mr Bheeroo submitted that the answer to the last three questions was also "Yes". The First Respondent was aware from the Second Respondent's communication to him on 7 April 2017 that the documents were lost. He knew from the documents the Tribunal had been taken to that the client had delivered hard copies and he knew the documents sent were different from the documents she had sent electronically and he said as much to her. The Second Respondent knew that the documents were lost and on 12 April 2017 she confirmed that to the estate agents in an email. At his Disciplinary

Hearing on 20 June 2017, the First Respondent confirmed that he had met with the Second Respondent on 19 April 2017 on his return from leave and was told that the envelope with the documents had still not been found. On the First Respondent's case, the Second Respondent said she had signed back pages and he asked her to collate them. Mr Bheeroo submitted that it was inconceivable if he knew the documents had not been found that the First Respondent would not have questioned the Second Respondent if she said she had signed back pages of the forms. It was inconceivable that the Second Respondent would have in her possession signed back pages and not the rest of the documents given how the documents had been delivered and what his knowledge was. He also knew that the client had not come in to sign new documents. He would have been aware if she had done so on 19 April 2017 because he would have been notified by reception as he was the first time she came to the office, which was evidenced by an email from the firm's reception timed at 1.12 pm on 5 April 2017 "by hand in reception for you". Mr Bheeroo submitted that the same applied to the Second Respondent; at her Disciplinary Hearing she confirmed that she printed out the forms and that the First Respondent came to her with signed back pages. She said that she was surprised but had not sought to ask where they came from; she knew all the forms had been lost.

57.2 Taking all the points in the round, Mr Bheeroo submitted that as at 19 April 2017 when documents were sent to MTG, both Respondents knew the documents were still missing and they could not have had a genuine belief in the documents being sent out. The First Respondent had seen only one set of documents signed in hard copy and both knew the documents sent did not bear the client's actual signature. It was not enough to say they did not think to question or were too busy doing other things. The matter was staring them in the face and one would ask where the documents had come from. Ordinary decent people would not send out fabricated documents on behalf of a client to a third party. It followed from sending the documents out where the Respondents knew the signatures were not genuine that they were both acting dishonestly. Mr Bheeroo submitted that they were also failing to act with integrity (Principle 2). It was right that a client would expect a solicitor to act in their best interests (Principle 4). They failed to meet the standards of service expected of the profession by the public and the profession. The profession would not expect them to rely on fabricated documents. Professional standards required that if there was potential risk that the signatures were fabricated they would take extra care (Principle 5). Their actions would also constitute a breach of Principle 6 because public trust would be undermined if they knew members of the profession were sending out fabricated documents.

<u>Submissions for the First Respondent regarding Allegation 1.2</u>

57.3 Mr Goodwin submitted that the Tribunal should look at the words used in the allegation; there was no evidence that the First Respondent knew or ought to have known that the documents sent out on 19 April 2017 were fabricated. It was not alleged that the signatures on the documents were his and that was his position. He believed the signatures to be those of the client. Mr Goodwin referred to a telephone note dated 14 June 2017 made by Ms LM. It included:

> "LM called [the First Respondent] because she recalled when [the First Respondent] had spoken to her previously about the HLC (sic) file on an

> informal basis he had mentioned calling [the Second Respondent] about HL's denial of signing the TA6 and TA10 forms dated 19 April.
>
> [The First Respondent] confirmed that he had called [the Second Respondent] at 7am approx. one morning to say that HL had said that it wasn't her signature on the forms that he had scanned over. [The Second Respondent] had said words to the effect "don't be stupid, of course it's her signature."

Mr Goodwin then referred to the note of the First Respondent's Disciplinary Hearing on 20 June 2017 which he submitted was consistent with Mr G's conclusion that the Second Respondent had signed the forms and Mr G's Report to the Applicant. The note said:

> "We then turned to the events of the 19th again, KB asked what happened – he asked [the Second Respondent] whether we had found the missing forms and the answer was no.
>
> He was then told that she had the signed back pages, he said send these across then and he did not see or approve the email before it was sent.
>
> He was asked specifically whether he had signed the form, he said no he did not.
>
> He was asked who he thought had signed the forms, the possibilities were explained to him which were the client him or [the Second Respondent]. Out of these, on the balance of probabilities who did he think had signed? He said that he thought that [the Second Respondent] had signed the forms."

Mr Goodwin referred to the Investigation Report by the firm relating to the First Respondent. The Overview included:

> "On 6 April 2017 [the First Respondent] who is on holiday asks [the Second Respondent] to send the signed TA6 and TA10 forms to the other side.
>
> [The Second Respondent] replies to say that she can't find them, but has found copies on [the First Respondent's] K drive and has emailed these across. These transpire to be for the wrong property.
>
> On 19 April 2017 [the First Respondent] returns from holiday and the envelope is still missing. At 08.31 [the First Respondent] forwards [the Second Respondent] HL's email of 2 April 2017 with the attached completed but unsigned TA6 and TA10 forms. At 10.48 [the Second Respondent] scans in the now signed TA6 and TA10 forms to herself. At 10.57 [the Second Respondent] forwarded the now signed TA6 and TA10 forms to the solicitors on the other side …"

The narrative evidence of the Report led Mr G to conclude that it was likely that the Second Respondent had signed the forms. Mr G's Report to the Applicant and his witness statement confirmed that.

57.4 Mr Goodwin then referred to the Investigation Report on the Second Respondent which included an allegation that:

> "She forged EW's signature on several items of client correspondence." The findings included "[The Second Respondent] admitted this but said EW was aware that she did this. EW denied this."

Mr Goodwin submitted that this reinforced the point that the Second Respondent's position was not true and was self-serving bearing in mind the instance of the Second Respondent reporting on a matter to a partner while the First Respondent was away which Mr Goodwin referred to below.

57.5 Mr Goodwin referred to the note of a meeting with the Second Respondent on 7 June 2017 when she was asked if she signed the documents sent on 19 April. Mr Goodwin submitted that based on the note there was no way the Second Respondent would "roll over" or acquiesce to a request from any client to do anything wrong. Mr Goodwin submitted that clearly the Second Respondent was not shy in reporting matters to superiors. She would not act under duress and had a propensity to sign documents in the name of others without them being clear that was what was being done. The note included:

> "[The Second Respondent] said she didn't sign and date them. She said that after the [EW] incident "no way would she sign anything".
>
> LM then showed the client letter from [EW] (EW) that EW said was signed in EW's name by [the Second Respondent] without EW's knowledge or consent. [The Second Respondent] said that EW knows that she pp's letters for her and she does it all the time. LM points out that she hasn't pp'd it, she has signed in EW's name."

The First Respondent accepted that there was no evidence that the Second Respondent signed the forms but based on the Report to the Applicant from the firm, the evidence of Mr G and these documents one could understand how the First Respondent came to that conclusion. He accepted that he could be criticised for not making further enquiries but that was not the allegation. Where was the evidence that on 19 April 2017 he knew the documents were fabricated? He relied, and was entitled to rely, on what he was told by his secretary. She was an experienced and competent secretary who was left to deal to a large degree while the First Respondent was on holiday. Until these events the First Respondent had complete trust and confidence in her. He had no cause to doubt anything she said to him and no reason to disbelieve her when she indicated she had the signed documents. It was his first day back. There was no compelling or reliable evidence on which the Tribunal could rely, let alone to the criminal standard. Mr Goodwin invited the Tribunal to dismiss allegation 1.2 and allegation 3 of dishonesty associated with it. He submitted that even if the Tribunal disagreed there was clearly doubt about the position. The Second Respondent was not present so he could not question her. The Tribunal should accept the calm, compelling evidence on oath of the First Respondent. He had not been moved by Mr Bheeroo's valiant attempts. Mr Goodwin also submitted that the Tribunal could only consider the allegations of breach of Principles if the factual matrix was proved - otherwise they fell away and he submitted the facts were not found proved. Regarding all the

allegations Mr Goodwin submitted that even if dishonesty had not been alleged there was no evidence to support the allegations as pleaded. Bringing dishonesty into the mix, there was no evidence or at least a doubt and the First Respondent was entitled to the benefit of that doubt by the standard of proof that applied.

Evidence of the First Respondent regarding Allegation 1.2

57.6 The First Respondent stated in evidence that he could not remember if he took the documents out of the envelope and looked at them before going on holiday. It was his last day before his holiday and he was catching up and then 19 April 2017 was his first day back. He stated that the client sent unsigned documents (by email) and then delivered signed documents to the office. He did not scan the documents when she delivered them nor did he ask the Second Respondent to do so. He could not recall if when the Second Respondent sent the wrong documents (from another file) he spoke to her about it afterwards. Nor could he recall if he had spoken to her before she emailed the estate agents that the documents were lost on 12 April 2017. As to what the Second Respondent said in her Disciplinary Hearing about having a catch up meeting with him on his return – he could not remember but it would be normal to come in and have a chat about "where they were at". He accepted that as he said in his Disciplinary Hearing that it was known that the envelope was not found.

57.7 The First Respondent rejected the suggestion that it was he who misplaced the documents originally. When taken to the email exchange with Miss HL on 5 April 2017, he accepted the words "Thanks I have them to hand" meant they were on his desk. He had earlier said the envelope had been on the top right hand corner of the desk where he put the documents with an elastic band on the file. The First Respondent accepted that he knew of no point when other signed documents were delivered. As to it not being possible that the Second Respondent could have in her possession signed back pages, the First Respondent stated that he came back on 19 April 2017 and did not ask her anything about it; she might have asked Miss HL to come to the office. Would it not be reasonable for the client to come in and sign back pages? It was put to the First Respondent that this was considerably different from what he had said at the Disciplinary Hearing; he was told the envelope was still not found, that she had back pages and he instructed her to collate the forms. The First Respondent stated that the envelope contained all the documents in the case. As to whether it would have been prudent to ask how she had obtained signed back pages, the First Respondent stated that he had just returned from holiday; he did his own filing and so his desk was full of conveyancing files; he had to respond to telephone calls and clients calling his mobile. He did not question the Second Respondent but said if she had them to send the signed pages across. It was put to him that he had accepted it made no sense; in the Disciplinary Hearing note it was recorded:

> "He said in retrospect this had not made sense given that it was known at this time that the envelope was missing, but he was busy and had no time to think about this properly…"

The First Respondent stated that he had no reason to disbelieve the Second Respondent; she was a long standing secretary of the firm. As to whether he had seen the signed pages before they were sent, he stated that there was an email trail; she printed them and sent them across. He stated that if he had asked her of course he

would have been alerted. He had not seen the documents she printed out or what she was doing including in the two hours between the documents being scanned and printed out and sent to MTG. He did not know the documents were not genuine.

57.8 In respect of the meeting note dated 9 June 2017, the First Respondent agreed he had seen it prior to filing his Answer and when he received the EWW letter; he assumed he must have seen it. He accepted he approved the response to the EWW letter sent on 16 October 2017 by Mr Goodwin and which relied on that note. The First Respondent stated that he was confused as to which letter the note referred. He had no intention to mislead.

Response of the Second Respondent to Allegation 2.2

57.9 In respect of allegation 2.2, the Second Respondent stated in the response to the EWW letter:

> "I was totally unaware when I sent the signed forms to [MTG] that Miss [HL] had not signed them. Up until this point, I was aware they were missing and during several telephone conversations with [the First Respondent] it was clear they had been lost. However, [the First Respondent] returned to the office that morning from holiday and from being away from the office. He was in a very edgy and unhappy mood and as I have made clear in meetings with HR, he was not to be approached as he would shout and swear. He gave me the forms to scan over and I did as I was told. I have to say at this point that I was very unsure as to whether or not he had signed them. I did have my suspicions as to how they had suddenly become signed but [the First Respondent] would not enter into conversation with me due to his mood. I did not in any way at all conspire with him. [The First Respondent] was a Partner and was my boss and I was instructed to send them over. You will see during the meeting notes attached that I did think something was wrong and I did think [the First Respondent] had signed them but I do feel I have been very naïve which is my fault entirely. I had an excellent relationship with [the First Respondent] in a work capacity only and it was and still is beyond my wildest thoughts that he would have done this. I feel utterly betrayed and am in disbelief that he could possibly have done such a thing."

Mr Bheeroo submitted that the Second Respondent's position evolved in her Answer quoted above. It was not inconsistent but there was a slight difference. Mr Bheeroo submitted that the sentence was ambiguous where she said:

> "I believe I did ask (but this was a long time ago now) how they had come to be signed before scanning them and he did a nod of his head and said to send them."

It gave the impression the Second Respondent did not ask the First Respondent on that day but then she said she did ask. In her response to the EWW letter she said was not able to have a conversation with the First Respondent and then she said that she at least asked. It was clear she had some form of suspicion as to how the documents had been signed.

57.10 Mr Bheeroo submitted that the Second Respondent was consistent in saying she sent the documents to the other side on the instructions of the First Respondent. In her Note she said:

> "I still have no explanation as to how these came to be signed –and again reiterate that I was simply asked to scan them in on the morning of [the First Respondent's] return from holiday. I assumed he had either located them or had them signed during his 2 week period of holiday (as sometimes clients visited him at home of dropped into the local estate agents where he lived). During his 2 weeks of holiday he repeatedly asked me if I had located them and I repeatedly said no as they were not in our office. On his return from holiday he asked me to scan and sent (sic) them and with great surprise, I asked him where he had found them and he dismissed me with a nod. [The First Respondent] was a moody person at times who swore a lot and got himself in quite a temper and this was one of those days I knew not to ask. I have 3 witnesses…. who will confirm his moods…"

Mr Bheeroo submitted that the Second Respondent made a strong denial about signing the forms herself but there was no allegation about that. What she said was consistent with her Answer of 28 June 2018. There was a difference between the Note and the earlier correspondence but often a reply had more detail than the first response as a Respondent would sit down and look at the documents in between. No doubt if the Second Respondent had been present and cross-examined, Mr Bheeroo would have asked her about it. Regarding both allegations 2.1 and 2.2, the Second Respondent admitted she had carried out the act alleged on the basis of instructions from the First Respondent. Mr Bheeroo submitted that the evidence showed she acted in breach of the Principles cited in the allegations and that she was dishonest in doing so. Mr Bheeroo also submitted that based on the Tribunal's Practice Direction No 5 the Tribunal could draw the appropriate adverse inferences from the Second Respondent not having come to give evidence.

<u>Determination of the Tribunal regarding Allegation 1.2 against the First Respondent and Allegation 2.2 against the Second Respondent</u>

57.11 The Tribunal had regard to the evidence, including the oral evidence and the submissions for the Applicant and First Respondent and the documentation put in by the Second Respondent during the investigation and proceedings including her Answer and Note. Both Respondents did not dispute that on 19 April 2017 they knew that the envelope of papers was still missing (answering Mr Bheeroo's first and third questions). Documents were sent on the undisputed instructions of the First Respondent by the Second Respondent to the other side's solicitors which bore signatures on forms TA6 and TA10 which were not those of the client. The client had delivered signed forms before the First Respondent went on holiday and it was these that were in the missing envelope. The client had emailed unsigned forms for checking by the First Respondent prior to that. Someone at some point signed back pages of the forms and these were sent to the other side. It was not known who signed and it was not alleged that either Respondent had done it. As was set out in the Rule 5 Statement, the metadata showed that the unsigned versions were forwarded to the Second Respondent at around 08.31 and printed out by her about 20 minutes later at 08.56. The signed versions were scanned by the Second Respondent at 10.48 and at

10.57 were sent to the buyer's solicitors by email by the Second Respondent. There was a gap of about two hours which was unexplained. The First Respondent maintained that the Second Respondent told him she had back pages which were signed and he told her to collate them with the rest of the forms and send them off. The Second Respondent maintained that the First Respondent emailed to her signed forms. Each Respondent consistently maintained their positions throughout. The Second Respondent conceded that she might potentially have dated the forms. The First Respondent conceded in his Disciplinary Hearing on 20 June 2017 that what had happened did not make sense. In his Answer the First Respondent said he: "denies that he knew or ought to have known that the documents had been fabricated." The Second Respondent said in her Disciplinary Hearing:

> "She had not thought to ask him where the signed pages had come from. She did not remember how they had got there."

In her Answer she said she believed she asked, received a nod and believed that either the client had come in or delivered the papers to the First Respondent. In her Note she said she still had no explanation and repeated her earlier speculation.

57.12 In the light of the conflicting evidence of the Respondents and the absence of other evidence the Tribunal could not find proved to the required standard that the First Respondent knew the documents had been fabricated and did not contain the genuine signatures. In the particular circumstances where the First Respondent had just that morning returned from holiday the Tribunal did not consider that the evidence was clear enough to find that he ought to have known (answering Mr Bheeroo's second and fourth questions). Allegation 1.2 was found not proved to the required standard on the evidence and the associated allegation of dishonesty therefore fell away.

57.13 In respect of the Second Respondent, the evidence was also unclear and the Tribunal again found allegation 2.2 was not proved to the required standard on the evidence and the associated allegation of dishonesty therefore fell away.

58. **Allegation 1.3 - He [the First Respondent] failed to inform his client that her documents had been lost and instead deliberately misled his client as to the whereabouts of the documents in an attempt to conceal the loss. In doing so he:**

- **Breached all or alternatively any of Principles 2, 4, 5 and 6 of the SRA Principles 2011.**

58.1 The Principles cited in this allegation are the same as those under allegation 1.1.and 1.2.

58.2 For the Applicant, Mr Bheeroo submitted that the Tribunal needed to consider the following questions:

- Did the First Respondent fail to inform Miss HL about the missing documents? Mr Bheeroo submitted that the answer was "Yes"

- Did he attempt to mislead Miss HL?

Mr Bheeroo submitted that the answer was again "Yes" relying on an email dated 30 May 2017. There was no doubt that the First Respondent failed to inform the client about the missing documents. What he did went beyond failing to tell her when the mistake happened. There were numerous opportunities for him to do so; it was particularly shocking that there were five occasions when she gave him a way out; asking him to let her know as soon as possible if he needed copies of the documents. The first opportunity was on his return from holiday on 19 April 2017, having been informed by the Second Respondent of the loss on 7 April when he was on holiday. He could also have told the client on 28 May 2017 when she emailed asking him to confirm he had the documents - that was when she received the FENSA certificate (and enquired why she had received it). On 28 May 2017, she concluded her email:

> "If you don't have any of them and would like me to provide them again please let me know ASAP to avoid any further delays."

This enquiry extended to the documents which she provided on 5 April 2017. On 30 May 2017, the client emailed when she had made her own enquiries of FENSA about who had ordered the replacement certificate including:

> "If you need me to provide documents to you again please let me know this morning."

In replying the same day, the First Respondent said he re-ordered the certificate because he could not locate the original documents while the Second Respondent was away as quoted above in Mr Bheeroo's submissions under allegation 1.1. Rather than accepting the documents were lost he provided a misleading answer. More importantly this was an opportunity to say to the client "Please provide everything." Later that morning at 10.11 on 30 May 2017, the client emailed:

> "If you need me to provide documents to you again please let me know this morning."

At 11.04 the client emailed:

> "If you need me to provide any of the documents to you again please let me know"

Rather than put his hands up and accept a mistake had been made, the backdated letter to MTG was created. Around 40 minutes later at 16.40 the First Respondent emailed and lied about what had happened as quoted above:

> "In terms of the documentation provided by you on the 5th April, I can confirm that this set of documentation was sent out by my office on the 6th April".

58.3 As to whether the First Respondent deliberately misled the client and was dishonest, Mr Bheeroo submitted that his email of 30 May 2017 at 16.40 was quite clear. The First Respondent had no genuine belief that the documents had been sent. This was deliberately misleading and looking at both his knowledge and his actions, a dishonest act by the standards of ordinary decent people.

58.4 Mr Bheeroo also submitted that by the test in Wingate the First Respondent had not adhered to the ethical standards of the profession in not informing his client when she consistently complained about delay and enquired whether he had sent documents to the other party and he was therefore in breach of Principle 2, the requirement to act with integrity. It followed that if the solicitor acted in the best interests of the client (Principle 4) and provided a proper standard of service (Principle 5) the solicitor would not lie to the client and seek to mislead her. His actions would also diminish the trust of the public which had to be able to believe that solicitors would act in good faith with the utmost integrity and honesty (Principle 6).

Submissions for the First Respondent regarding Allegation 1.3

58.5 Mr Goodwin submitted that the Tribunal needed to consider the words used in the allegation; it was not that the First Respondent failed to inform the client but that he also deliberately misled her regarding the whereabouts of the documents so as to conceal the loss of the documents. Mr Goodwin accepted that the First Respondent's email to Miss HL on 30 May 2017 at 16.40 was inaccurate regarding sending the documents on 6 April but Mr G accepted that there were a number of inaccuracies in his Report to the Applicant. The letter of 31 May mentioned the date 6 May 2017 instead of 6 April. The Tribunal had heard submissions about the inaccuracies in the Rule 5 Statement and the Applicant's email of 15 June 2018. This all went to show that errors could be made without misconduct and dishonesty. If the First Respondent was deliberately seeking to mislead the client he gave the game away by saying in the email:

> "I can confirm that the original documentation you provided to me cannot be located in our office and we are currently in the process of trying to find the original documentation and it is for this reason that I re-ordered copies of the FENSA, NICEIC and Gas Safe documentation.…"

There had been a debate between Mr Bheeroo and the First Respondent about the meaning of "lost" and "misplaced" but whatever word was used on 30 May 2017 in this email the First Respondent told the client the original documents could not be located in the office. He did inform her the documents were lost.

58.6 Mr Goodwin also submitted that in an earlier email on the same date at 09.57 quoted above, when the First Respondent stated that he could not locate the original documents while the Second Respondent was away, he referred to original documents in the plural and so should be given the benefit of the doubt. This was consistent with what he said in the later email quoted above. There was lot of activity that day and the First Respondent was not just dealing with that matter. In an email at 17.39 on 30 May 2017 the First Respondent did send the client the TA forms (although there was no narrative in the email) because the client replied at 18.08:

> "Thank you for forwarding these forms that you think are the forms that you forwarded to the buyer's solicitors. The signature on the forms is not my signature…"

The First Respondent openly sent these documents which indicated that he had no concerns that they were signed by anyone other than the client. He believed what the Second Respondent told him that she had possession of the signed forms. If he had

believed that the forms did not contain the client's signature he might have been reluctant to disclose the forms or have dealt in a somewhat different way. There was no evidence that he deliberately misled the client and positive evidence that he disclosed the forms by reference to these emails. Mr Goodwin invited the Tribunal to decide that there was insufficient evidence for the Tribunal to conclude that the First Respondent acted as alleged and that dishonesty was not made out to the required standard.

Evidence of the First Respondent regarding Allegation 1.3

58.7 In cross examination, the First Respondent stated that on 19 April 2017 when he returned from holiday the client was not informed the documents were missing. He agreed he did not tell her in emails for example on 18 and 19 May 2017. He did not tell her when he re-ordered documents because he had no intention of charging her so he did not need to tell her. If the documents were lost in the office he just re-ordered them in case they could not be found when he needed them at completion. He could have told her after completion that he had re-ordered. He agreed he only told her when she received a copy of the FENSA certificate at her house and contacted him. He stated that he did not know if he would have told her without that happening. If that had not happened he agreed that the transaction would have continued normally. He agreed that then the client potentially would never have known that the documents sent on 19 April 2017 did not bear her signature. When taken to the emails, the First Respondent did not dispute that the client had offered to provide replacement documents if he needed them. In respect of his response on 30 May at 09.57 and not referring to the envelope of documents being lost and saying he could not locate the original documents while the Second Respondent was away, the First Respondent said he could not remember. He said it was a fair assumption; he never thought the documents were actually lost; he thought they were in the office somewhere and misplaced. He felt Mr Bheeroo was playing with words. He agreed that in this email he did not respond specifically saying which documents he had by reference to the client's email of 28 May 2017 at 1.06 p.m. As to his not having responded, the First Respondent stated that he might not have seen her emails between 10.40 and 11.04.

58.8 The First Respondent was directed to his email at 16.40 on 30 May 2017 when he said:

> "In terms of the documentation that was provided by you on the 5th April, I can confirm that this set of documentation was sent out by my office on the 6th April…"

He said this statement was inaccurate rather than untrue and he had always said that. He agreed that the backdated 6 April letter was created to give the impression that the documents were sent out on 6 April 2017. He was referred to a later paragraph in the 30 May 2017 email at 16.40 already quoted above where he said the original documentation could not be located. The First Respondent stated that the email made no sense and he apologised. He rejected the suggestion that he said what he did because he wanted to say the other side had the documents and had lost them not him. The First Respondent replied "What would be the point?" He said he had not deliberately created that impression; the email was inaccurate and confusing. It was put to the First Respondent that prior to sending the 16.40 email on 30 May the

metadata showed that the backdated letter was created to give the impression the documents had been sent to the other side. He disagreed. He was referred back to what he was recorded as saying to that effect at the 9 June 2017 meeting. He said this was not correct.

58.9 The First Respondent denied that he acted dishonestly and stated that he had no intention to mislead the client as to the location of the documents. The 30 May 2017 email was an inaccurate email but it said the original documents could not be found in the office. He was asked why if he had informed the client her documents were lost she would email at 5.41 p.m. saying:

> "As requested several times previously, please let me know for each of the following documents whether you have provided them to the buyer's solicitors and if so when…"

The question was followed by the list of bullet points. The First Respondent rejected the point; he had said the documents could not be located.

Determination of the Tribunal in respect of Allegation 1.3 against the First Respondent and Allegation 3

58.10 The Tribunal had regard to the evidence, including the oral evidence and the submissions for the Applicant and First Respondent and the documentation put in by the Second Respondent during the investigation and proceedings including her Answer and Note. The Tribunal treated the whole allegation as one so that all elements of it had to be proved for the Applicant to succeed. The allegation spanned a period of time from when the First Respondent became aware that the envelope of documents had gone missing until the client made her complaint. The First Respondent took no steps to advise the client on his return from holiday on 19 April 2017 that her documents were missing. On 19 May 2017, the First Respondent emailed the client relying on the Second Respondent's absence on holiday saying "she must have put it in a safe". The First Respondent knew this to be untrue as all the documents were in the missing envelope; his situation had nothing to do with the Second Respondent's holiday. The client became anxious when a replacement FENSA certificate was sent to her home instead of to his office and she began to ask questions of the First Respondent. The Tribunal had been taken through exchanges of emails between 28 and 30 May 2017 where the client repeatedly asked about the documents and offered to replace them if the First Respondent needed her to do so. At 1.06 on 28 May the client made a very direct statement:

> "…I am concerned that you may have mislaid other documents as well as the Party Wall Notice.

This and chaser emails ultimately prompted the First Respondent to send the email of 30 May at 16.40. It contained two contradictory statements:

> "In terms of the documentation that was provided by you on the 5th April, I can confirm that this set of documentation was sent out by my office on the 6th April…"

And

> "I can confirm that the original documentation you provided to me cannot be located in our office and we are currently in the process of trying to find the original documentation and it is for this reason that I re-ordered copies of the FENSA, NICEIC and Gas Safe documentation.…"

The Tribunal determined that the first of these statements was untrue. It was deliberately misleading; the fabricated documents had been sent on 19 April 2017; no documents were sent on 6 April 2017. The Tribunal did not consider that the second and contradictory statement in the email made the first statement any less untrue. Over the period of intense emails from the client, the First Respondent did not tell the client what had happened. In evidence, the First Respondent stated that he would have told the client that the documents were missing after completion. Perhaps it was no coincidence that the backdated letter recorded in the metadata with the "letterhead to MTG" was timed at 16.03 and the email quoted above was sent at 16.40 on 30 May 2017. The Tribunal considered that this email was more than just inaccurate and confusing as the First Respondent described it in evidence; it was downright misleading and deliberately so as was the earlier email of 19 May 2017 referring to the Second Respondent's holiday. The Tribunal noted that the First Respondent had made great play of saying in his 30 May email to the client that the documents could not be found but from the date he became aware of their loss or misplacement he chose not to tell the client and stated in evidence that if she had not enquired about being sent a copy of the FENSA certificate at that point he would not have told her.

58.11 The Tribunal determined that by his conduct the First Respondent had breached Principles 2, 4, 5 and 6. As to the allegation of dishonesty, applying the test in Ivey, the First Respondent's state of knowledge and belief was that he knew the documents were missing and remained missing such that without the client's knowledge he was seeking to replace them. He admitted in evidence that he had no intention of telling her of the situation until after completion and when he did communicate with her he deliberately misled her as to the position. The Tribunal determined that by the standards of ordinary decent people that was dishonest. It therefore found allegation 1.3 proved on the evidence to the required standard with the associated allegation of dishonesty at allegation 3.

59. **Allegation 1.4 - He [the First Respondent] reviewed, approved and confirmed that the contents of a letter, dated 31 May 2017 and from the firm to his client, were true in circumstances in which he knew or ought to have known that the contents of the letter were false and misleading In doing so he:**

- **breached all or alternatively any of Principles 2, 4, 5 and 6 of the SRA Principles 2011.**

59.1 The Principles cited in this allegation are quoted under allegation 1.1 above.

59.2 For the Applicant, Mr Bheeroo submitted that on the firm receiving the complaint from the client, Mr G reviewed the file and the First Respondent gave him misleading and inaccurate information so that Mr G sent his letter of 31 May 2017 which included:

> "Regrettably, on this occasion, no copies of the documents were retained by the firm, though of course, you have the duplicates which you have forwarded to us.
>
> It is apparent from the file that on 6 May (sic) 2017, the documents were forwarded to Messrs [MTG], your purchaser's solicitors, therefore it does not appear that the documents were lost but rather, from looking at the file, merely sent to the other side, as would be usual.
>
> I can see no evidence to suggest that the documents have been lost or have been replaced on our files by documents signed by someone else. I have made enquiries of [the First Respondent] and his secretary, who both confirmed to me that they have not signed any documents on your behalf. I would be most surprised if that were the case in any event."

Mr Bheeroo referred the Tribunal to the Investigation Report prepared by Ms LM which included at its third finding:

> "That he gave a false account of facts to [Mr G] which included that he had asked [the Second Respondent] to send the TA6 and TA10 forms to the other side when the envelope containing these was missing."

Ms LM added amongst other things:

> "[The First Respondent] admitted that there were errors in the letter which couldn't be correct."

Mr Bheeroo submitted that Mr G prepared this letter after discussion with the First Respondent who said he had seen it prior to it going to the client. The notes of the Disciplinary Hearing recorded:

> "We then turn to the 30 May correspondence and what happened after this had been sent.
>
> …
>
> The letter was placed in front of [the First Respondent] who reviewed a plain copy of it.
>
> MCC [a member of the firm] asked whether he was shown this letter before it was sent out, he said that it was and it was sent to him by email for approval, he cannot recall specifically but he believes he approved the sending of this letter.
>
> On reflection, it is clear that the letter is wrong as it states a number of matters which are untrue. We had discussion about how the letter had come about. The letter itself said that [Mr G] had spoken to [the First Respondent] at some length. He said that this had happened and that the discussion had been relatively heated given the nature of the complaint that had been raised by the

> client, however he had then provided the file to [Mr G] who had written the letter.
>
> Did he now agree with the proposition that the facts as stated in the letter were incorrect- he did.
>
> ...
>
> Asked whether he had specifically said to [Mr G] during the course of the meeting that documents had gone out and he said that he did and he accepted that he had misled [Mr G] during the course of that internal meeting."

59.3 Mr Bheeroo submitted that while the First Respondent only said that he "believed" he approved the sending of the letter he did say he was shown the letter; it was sent to him for approval and he had provided the information in the letter in the first place. He had discussions with Mr G which led to Mr G writing the letter. Mr G's later letter of 9 June 2017 (which the First Respondent had approved) confirmed that what was said in the 31 May 2017 letter was incorrect. It was almost inconceivable given the complaint the client had made that Mr G would not have talked to the First Respondent and Mr G said that he did. In his Answer, the First Respondent stated:

> "There is no evidence to support the allegation that the First Respondent "*approved* and *confirmed* the contents of the letter dated 31 May 2017". The First Respondent accepts he reviewed the letter, but he did not approve and confirm its contents…
>
> Mr [G] did not ask the First Respondent to confirm the sequence of events prior to sending the letter to HL. In the event he had done so, it would have afforded the First Respondent the opportunity to confirm that the letter of 6 April 2017 he created was intended to show the correct position as he believed it to be at the time..."

Mr Bheeroo submitted that it was enough that the First Respondent received the draft and did not correct it and allowed it to go out. Mr Goodwin objected that this did not accord with the wording of the allegation. Mr Bheeroo responded that in the Answer the First Respondent accepted that he at least reviewed the letter and the allegation did not need express approval and confirmation; he implicitly gave his consent. Mr Bheeroo submitted that Mr G would not have sent the letter out otherwise.

59.4 Mr Bheeroo submitted that the 9 June 2017 email had fallen through the cracks. Ms Dunlop testified that the client file was disclosed by the Applicant who was not seeking to hold things back. The Applicant had no obligation to make any further enquiries about the document; it had evidence to support the allegations. Mr Bheeroo could not see how the 9 June 2017 email affected allegation 1.4; the First Respondent's approval of a subsequent letter that formed the basis of no allegation against him did not affect whether he reviewed the 31 May 2017 letter; whether that occurred was a finding of fact for the Tribunal to determine. Mr Bheeroo submitted that the email went to credibility; it would not have changed the Rule 5 Statement. The oversight should not have happened but it did not absolve the First Respondent of the allegations against him.

59.5 In respect of the allegation of dishonesty regarding allegation 1.4, Mr Bheeroo submitted that the First Respondent knew that he had reviewed the 31 May 2017 letter and approved the letter and its contents which were false as he knew the documents had not been sent to the other party on 6 April 2017. He knew he had instructed the Second Respondent to back date the letter. There was nothing from him in the evidence to show he said to Mr G that the letter was incorrect and not to send it out. The First Respondent allowed the letter to be sent. It contained a misleading statement of facts to the client in circumstances where the First Respondent knew them to be false. In respect of breaches of Principles alleged, Mr Bheeroo submitted that it was clear that the First Respondent was not displaying a steady adherence to the standards of his profession in letting the letter go out (Principle 2) and that in doing so he also breached Principles 4, 5 and 6.

Submissions for the First Respondent regarding Allegation 1.4

59.6 Mr Goodwin submitted that the Tribunal needed to have regard to the words used in the allegation and the totality of the allegations. Mr Goodwin submitted that the allegation as drafted said the First Respondent "reviewed, approved and confirmed" the contents of the 31 May letter so all three of the words needed to be established. It had not been pleaded "and/or". Mr Goodwin submitted this applied to all the allegations. If it was said by Mr G that the First Respondent reviewed the 31 May 2017 letter, the First Respondent did not challenge that but there was no evidence that he approved and confirmed the contents of the letter. Mr Goodwin invited the Tribunal to have regard to the First Respondent's explanation to the Tribunal and given in writing, to his credibility as a witness regarding all the allegations and that what he said about the subsequent letter of 9 June 2017 and the procedure for approving the 9 June 2017 letter had proved 100% correct. Mr Goodwin also cast doubt on the evidence of Mr G; he submitted that it was not credible; his statement was littered with uncertainty, using the phrase "it appears" and with his not knowing things. While Mr G was not involved in the firm's investigation process, the report of it was attached to his Report to the Applicant. Mr Goodwin submitted that it was totally inconceivable that Mr G would not have considered the documents before he sent them to the Applicant. Mr Goodwin submitted that there was an absence of evidence to the required standard that the First Respondent had approved the 31 May 2017 letter and so the allegation was not proved and the associated allegation of dishonesty fell away.

59.7 Mr Goodwin referred to the Applicant's failure to disclose the First Respondent's email to Mr G's secretary of 9 June 2017. The email had been flagged up in the 16 October 2017 response to the EWW letter which prompted the Applicant to send the 9 June 2017 letter to Mr Goodwin. Notwithstanding his query, the Applicant had made no further enquiries of Mr G from October 2017 to May 2018 when the proceedings were issued. There was no general obligation to seek documents but Mr Goodwin submitted that there must be an obligation to do so if a solicitor the subject of an investigation raised a point regarding a particular letter given the letter was not provided to the Applicant by the firm but by the client. One would have expected the person drafting the Rule 5 Statement to review the papers and see the reference to a subsequent letter and to an email to Mr G's secretary. Ms Dunlop would have seen the emails requesting details of any contact made with the firm. She said she did not contact the firm to see if such an email existed. She acknowledged

that if she had seen the 9 June 2017 email to Mr G's secretary, it might have influenced her consideration of the allegation regarding the 31 May letter; it should have given her food for thought and reflection but no, the Rule 5 Statement was drafted and issued.

59.8 Mr Goodwin submitted that when the First Respondent's Answer was filed on 30 May 2018, the point was raised again. It was reiterated and explained. Mr Goodwin submitted that Ms Dunlop sent her 15 June 2018 email to Mr Goodwin and the Tribunal so she and Mr Willcox must have known the importance of the document and the need for scrupulous accuracy. Her evidence was that she created her draft reply on 14 June 2018 before she received the email from Mr G's secretary attaching the First Respondent's 9 June 2017 email. Mr Goodwin submitted that made it worse; how could she say at 3f) that the email could not be located. She included these words in the draft before she knew if the email could be located or not. Mr Goodwin did not allege that this was done intentionally but it demonstrated the unfairness of the Applicant's approach in this case. Errors and inaccuracies did occur by the most efficient people and organisations but did not of themselves amount to deliberate or dishonest conduct. Mr Goodwin submitted that it was inexcusable for the Applicant to fail to comply with its obligations to the First Respondent and the Tribunal regarding disclosure of a document which might be relevant and relate to a line of enquiry for the defence of the First Respondent's position. This had only come out because of the cross-examination of Mr G who said there had been no subsequent contact between the Applicant and him. The Tribunal then fairly and properly asked the Applicant to check for the email. Otherwise the email from the firm dated 14 June 2018 attaching the First Respondent's email of 9 June 2017 would not have come to light. Mr Goodwin submitted that, on taking over the matter, Mr Willcox would have reviewed the papers and seen the invitations to the Applicant to obtain the lost email or enquire of the firm if it existed. There was a failure to disclose which continued from 14 June 2018 until 16 January 2019. The failure to disclose unfairly prejudiced the First Respondent's position and Mr Goodwin could not cross examine Mr G upon the email. Mr Goodwin submitted that the email would be relevant to allegation 1.4 and the process or procedure gone through regarding the 31 May 2017 letter. Mr Bheeroo was keen to make representations that the 9 June 2017 email was not of direct relevance to the allegation but then sought to cross examine the First Respondent about the process followed regarding it, thus showing that the email was relevant to the allegation.

59.9 Mr Goodwin submitted that the First Respondent co-operated throughout the proceedings. He volunteered on more than one occasion to undergo a handwriting test when a concern was raised about who had signed the forms. No such test was carried out and it was not alleged that he in fact forged the client's signature which made even more surprising and concerning what was said at paragraph 16 of the Rule 5 Statement.

<u>Evidence of the First Respondent regarding Allegation 1.4</u>

59.10 In evidence in chief, the First Respondent stated that the 9 June 2017 email disclosed during the proceedings was relevant to allegation 1.4 because it showed there was a letter which he did approve. In cross-examination the First Respondent confirmed that neither he nor Mr Goodwin had ever contacted the firm to ask for the email.

59.11 The First Respondent agreed, regarding the 31 May 2017 letter that Mr G had the impression that the First Respondent had the documents and sent them to the other side without having copies made. It was suggested that the intention of the backdated letter put on the file (after the client had found him out) was effective because Mr G thought the documents had been sent out on 6 April 2017. The First Respondent replied that Mr G had said this without discussion with him. The First Respondent agreed that on its face the 31 May letter was consistent with the 9 June 2017 meeting note. He also agreed that Ms LM had recorded in the Investigation Report regarding him that she and Mr OS met with the First Respondent on 8 and 9 June 2017 to interview him about the allegations and she recorded his admissions as quoted above. He accepted that he did not challenge the Report. He agreed the statement in the 31 May letter that the documents had been sent to the other side, on what Mr G meant to be 6 April but said 6 May, was untrue or inaccurate but the First Respondent did not know if Mr G received that impression from the backdated letter; he did not know if Mr G had read the file. He agreed Mr G would not be able to say there was no evidence the documents had been lost if the First Respondent had told him they had been lost.

59.12 The First Respondent stated that he had agreed with Mr G's letter of 9 June 2017. He was not sure if the purpose of the letter was to correct inaccuracies as it was Mr G's letter. The First Respondent stated that Mr G must have discussed the issues with him before the 9 June 2017 letter was sent as the First Respondent approved it. He did not think Mr G said he would send him a draft to approve but Mr G's secretary sent the First Respondent a copy. He had a telephone conversation with her. She called and asked did the First Respondent send it back and he said he would come and look at it. He did not remember sending to her the two emails recently produced but remembered the conversation.

59.13 The First Respondent agreed he was the only fee earner working on Miss HL's file and it made sense for Mr G to come and clarify the position with him. It was put to him that the 9 June 2017 letter said that Mr G could provide information because of an IT check so there was nothing in the letter that required the First Respondent's input as such. The First Respondent stated that if there was a discussion between them that would be reflected in the letter. Reverting to the 31 May letter, the First Respondent stated that after the complaint was received from Miss HL at 9.58 pm on 30 May 2017, he had gone to see the managing partner and at some point had a discussion with Mr G. He was referred to what the note of the Disciplinary Hearing recorded about what he said of his discussion with Mr G. The First Respondent could not remember a heated discussion but he accepted the point. However the First Respondent did not accept the following paragraph:

> "…Asked whether he had specifically said to [Mr G] during the course of the meeting that documents had gone out and he said that he did and he accepted that he had misled [Mr G] during the course of the internal meeting."

He agreed he had not challenged the note. He also agreed that Mr G had not previously been involved with Miss HL. He agreed it would make sense before anything was sent to the client that he would be asked to look at it. In paragraph 17 of his Answer he accepted that he reviewed the letter but he did not remember an email asking him to. He genuinely could not remember what happened. It was put to him

that in the Disciplinary Hearing he accepted he had been shown the letter for approval and that was partly inconsistent with his Answer which said he believed he approved the sending of the letter. The First Respondent said he reviewed the letter but genuinely could not remember receiving an email. He could not remember if the draft was sent to him by email (no such email was before the Tribunal).

Determination of the Tribunal regarding Allegation 1.4 against the First Respondent

59.14 The Tribunal had regard to the evidence, including the oral evidence and the submissions for the Applicant and First Respondent and the documentation put in by the Second Respondent during the investigation and proceedings including her Answer and Note. The Tribunal accepted that the allegation stood or fell in its entirety; the Applicant had to prove that the First Respondent reviewed, approved and confirmed the contents of the letter dated 31 May 2017 which Mr G sent to the client's new solicitors. The First Respondent accepted in his Disciplinary Hearing that he had seen the 31 May 2017 letter. He accepted that there were inaccuracies in it. He could not recall if he corrected the inaccuracies in the letter. He stated in his Disciplinary Hearing that he "cannot recall specifically but he believes he approved the sending of this letter." The letter said that Mr G had spoken to the First Respondent at some length which the First Respondent confirmed in the Disciplinary Hearing and that they had a heated discussion "however he had then provided the file to [Mr G] who had written the letter." He accepted he had misled Mr G during the course of the meeting about the documents having gone out. However this all occurred before the question of approval and confirmation could arise. In the 16 October 2017 response, it was stated:

> "[The First Respondent] cannot now recall his involvement in the finalisation of the letter dated 31 May 2017, but he accepts that if Mr [G] indicates [the First Respondent] read the letter prior to it being sent to [HL], he does not suggest that that is incorrect. However, [the First Respondent] does not recall signing the letter off prior to it being dispatched to [HL].

Mr G said it was common sense that he would have discussed the letter with the First Respondent. The Tribunal had heard the oral evidence of Mr G whose task it was as COLP of the firm to make a Report to the Applicant following Miss HL's complaint. The Tribunal had some reservations about the thoroughness of his approach generally but accepted that he was detached from the investigation, saying he might have to determine an appeal against its outcome at a later date. His evidence was of limited assistance to the Tribunal; he could offer no definitive proof that the First Respondent had approved the letter of 31 May 2017. Mr Goodwin drew attention to the fact that Mr G conceded there was no email or note of approval from the First Respondent. The latter rejected the suggestion that by having reviewed the letter and not telling Mr G of inaccuracies he effectively confirmed the content and let it go out, deliberately misleading the client. He denied that he had acted dishonestly and tried to mislead the client or allowed the client to be misled by Mr G. Mr Goodwin submitted that there was an evidential problem with this allegation. He placed a great deal of emphasis on the approval process for the subsequent letter of 9 June 2017 and that there had been no opportunity to question Mr G about it by reference to the 9 June 2017 email from the First Respondent to Mr G's secretary as it was disclosed after Mr G had completed his evidence. The Tribunal considered that the 9 June 2017

email was of limited assistance regarding the process followed in respect of the 31 May 2017 letter. The First Respondent's belief that he approved the letter was all the Tribunal had to rely on along with the fact that he admitted that the facts in the letter were untrue. The Tribunal found as a fact that the First Respondent had seen the letter but that there was no evidence that he had approved and confirmed its contents. The Tribunal therefore found allegation 1.4 not proved on the evidence to the required standard. The associated allegations of breach of Principles and dishonesty (allegation 3) therefore fell away.

Previous Disciplinary Matters

60. There were no previous disciplinary matters before the Tribunal in respect of either the First or Second Respondent.

Mitigation

61. First Respondent

61.1 Mr Goodwin made submissions orally in mitigation on the third day of the hearing. Dishonesty having been found proved in respect of allegations 1.1 and 1.3 against the First Respondent. The Tribunal indicated that it would be assisted by the provision of a brief skeleton from Mr Goodwin setting out and encapsulating what he said in oral submissions on the subject of exceptional circumstances along with copies of the authorities he referred to. The Tribunal did not consider it appropriate for Mr Bheeroo to make submissions. Mr Goodwin submitted a skeleton argument dated 24 January 2019 and key points from it are recorded below together with his oral submissions.

61.2 Mr Goodwin submitted that the First Respondent respected the decision reached by the Tribunal. By reference to the facts in support of each allegation, it was submitted on behalf of the First Respondent that the conduct was isolated and momentary. The conduct in respect of allegation 1.1 was limited to that which occurred on 30 May 2017. The conduct in relation to allegation 1.3, also in large part, related to that which occurred on the same date, with the Tribunal placing particular emphasis on the email dated 30 May 2017 timed at 16.40. The conduct found proven by the Tribunal in relation to allegations 1.1 and 1.3 could be categorised as a "moment of madness", to be contrasted with dishonesty and misconduct which is repeated and over a period of time. Without in any sense seeking to diminish the seriousness of the Tribunal's findings, the dishonesty in respect of both allegations was not heinous criminal dishonesty, but could fairly be categorised as attenuated dishonesty and, in respect of which, a strike off would be disproportionate and not reflective of the isolated, out of character and "moment of madness" circumstances.

61.3 It was accepted that an allegation of dishonesty would almost invariably lead to striking of save in exceptional circumstances. Mr Goodwin referred to the case of SRA v Sharma [2010] EWHC 2022, where the Coulson J identified the following principles:

> "It seems to me, therefore, that looking at the authorities in the round, that the following impartial points of principle can be identified: (a) Save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the Roll, see Bolton and Salsbury. That is the normal and necessary penalty in cases of dishonesty, see Bultitude. (b) There will be a small residual category where striking off will be a disproportionate sentence in all the circumstances, see Salsbury. (c) 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, such as Burrowes or over a lengthy period of time, such as Bultitude; whether it was a benefit to the solicitor (Burrowes), and whether it had an adverse effect on others."

61.4 It was submitted that the conduct found proved by the Tribunal in relation to the First Respondent fell into the small residual category where striking off would be a disproportionate sentence in all the circumstances. It would be necessary for the Tribunal to have regard to the nature, scope and extent of the dishonesty. In this case, the nature, scope and extent of the dishonesty was momentary, and was of no direct benefit to the First Respondent. Without seeking to go behind the findings of the Tribunal, Mr Goodwin submitted the Tribunal specifically referred to the email dated 30 May 2017 at 16.40, in which the First Respondent made an inaccurate representation to his client. However, in the same email the First Respondent said:

> "I can confirm that the original documentation you provided to me cannot be located in our office and we are currently in the process of trying to find the original documentation….."

Whilst not excusing that which the Tribunal found to be the misrepresentation, the above additional representation was a relevant factor when the Tribunal considered the nature, scope and extent of the dishonesty itself.

61.5 Mr Goodwin submitted that in James and Others –v- SRA [2018] EWHC 3058 (Admin), the Court considered and provided a helpful summary of earlier decisions. Flaux LJ in giving judgment said, among other things:

> "46. ….. the courts have studiously and rightly avoided seeking to define what does and what does not amount to "exceptional circumstances", as this is a fact sensitive exercise in each individual case".
>
> 47. Further guidance in relation to the assessment of whether there were exceptional circumstances in a particular case was provided by Dove J in that case [19] and [24]:
>
> > "19. Clearly, at the heart of any assessment of exceptional circumstances, and the factor which is bound to carry the most significant weight in that assessment is an understanding of the degree of culpability and the extent of the dishonesty which occurred. That is not only because it is of interest in and of itself in relation to sanction but also because it will have a very important bearing upon the assessment of the impact on the reputation of the profession which Sir

> Thomas Bingham MR (as he then was) in Bolton identified as being the bedrock of the tribunal's jurisdiction.
>
> …
>
> 24. It is necessary, as the tribunal did, to record and stand back from all of those many factors, putting first and foremost in the assessment of whether or not there are exceptional circumstances the particular conclusions that have been reached about the act of dishonesty itself."

48. It is important to note that both Sharma and Imran emphasised that in assessing whether a particular case of dishonesty falls into the small residual category where exceptional circumstances can be established so that striking off is not appropriate, the principal focus in determining whether exceptional circumstances exist is on the nature and extent of the dishonesty and the degree of culpability".

…

101. First, although it is well established that what may amount to exceptional circumstances is in no sense prescribed and depends upon the various factors and circumstances of each individual case, it is clear from the decisions in Sharma, Imran and Shaw, that the most significant factor carrying most weight and which must therefore by the primary focus in the evaluation is the nature and extent of the dishonesty, in other words the exceptional circumstances must relate in some way to the dishonesty. This point is made very clearly by Dove J at [29] of Imran where he said:

> "…..in my view it is not possible when assessing exceptional circumstances simply to pick off the individual features of the case. It is necessary, as the Tribunal did, to record and stand back from all of those many factors, putting first and foremost in the assessment of whether or not there are exceptional circumstances the particular conclusions that had been reached about the act of dishonesty itself…
> Of far greater weight would be the extent of the dishonesty and the impact of that dishonesty both on the character of the particular solicitor concerned but, most importantly, on the wider reputation of the profession and how it impinges on the public's perception of the profession as a whole".

"109. The SDT considered that there were exceptional circumstances in that case [Imran] so that suspension for a period of two years was a sufficiently severe sanction to maintain the reputation of the profession. This decision was upheld by Dove J on the basis that, in considering whether there were exceptional circumstances, the SDT had had at the heart of its decision the culpability of the respondent and the effect of his dishonesty on the reputation of the profession; see [30] of his judgement, to be contrasted with the way in which the SDT conducted its evaluations in the present cases. On analysis both Burrowes and Imran where thus cases of "a moment of madness", to be

> contrasted with the dishonesty and misconduct in each of the present cases, which was repeated and over a period of time".

61.6 Mr Goodwin submitted that in Burrowes –v- The Law Society [2002] EWHC 2900 (Admin) the Divisional Court considered that a strike off was "wholly disproportionate" in the unusual circumstances of the case:

> "In my judgment, the conduct here was isolated. It was out of character for a solicitor then, I think, 51 years of age of hitherto unblemished record, and of impeccable reputation within the profession…"

And

> "But necessarily, the question arises in the present case: what sort of manifestation of want of integrity and probity did Mr Burrowes' misconduct, in the circumstances, which I have described, demonstrate? It seems to me that the decision that he should be struck off was wholly disproportionate to that which he admitted and that which was claimed on behalf of the Law Society that he had done…"

Rose LJ placed particular emphasis on the fact that the misconduct was isolated and out of character. In his oral submissions, Mr Goodwin emphasised the factors in (c) in the quotation above from Sharma. He submitted that what occurred on 30 May 2017; could fairly be categorised as momentary, isolated in nature and wholly out of character bearing in mind the First Respondent's good character to date save for the RSA and which was supported by the character references. The dishonesty had not occurred over a lengthy period of time and, having regard to the factors in Sharma, it was of no benefit to him; it was non-financial dishonesty; not a case of a solicitor helping himself to client funds which the Tribunal dealt with on a frequent basis and there was no adverse effect on others.

61.7 Mr Goodwin submitted that, without in any sense seeking to suggest that the findings the Tribunal had made were not serious, given the isolated and wholly out of character conduct that it would be wholly disproportionate to end the First Respondent's career because the reality was that he would never be restored to the Roll. The First Respondent accepted that the factor carrying the most significant weight in assessing whether a particular case of dishonesty fell into the small residual category, where exceptional circumstances could be established so that striking off was not appropriate, was the nature and extent of the dishonesty and the degree of culpability. However, the Tribunal was invited to take into account the First Respondent's personal circumstances existing at the time, as set out in the response sent on behalf of the First Respondent to the Applicant dated 16 October 2017 and, in particular, that which was said as regards the extremely sad and difficult family circumstances and the impact that had upon the First Respondent. In addition, the First Respondent was fasting during the relevant period, for approximately 18 hours a day without food or water, which together with the difficult home life, would undoubtedly have impacted upon his approach to his work and, in particular, his actions relating to the subject matter of the Tribunal's findings.

61.8 Mr Goodwin also made submissions about the conduct of the Applicant in respect of what he described as the regrettable way in which inaccurate and misleading statements were made by the Applicant in the Rule 5 Statement and the email dated 15 June 2018 in Reply to the Answer of the First Respondent. He submitted that the public would no doubt be concerned as to such conduct, and how it impacted upon the wider reputation of the profession and how it impinged on the public's perception of the profession, to include the regulator, as a whole. For the public, and the profession, to have confidence in its regulators, it was essential that they acted accurately and with integrity and which includes representations made in documentation within Tribunal proceedings. He submitted that the public were likely to be concerned if the First Respondent was to be struck off, in the particular circumstances of this case, against the background of the concerns relating to the way in which the Applicant had conducted the proceedings.

61.9 In conclusion Mr Goodwin submitted that the First Respondent acknowledged the findings made by the Tribunal in relation to allegations 1.1 and 1.3. He offered his apology. The Tribunal retained a discretion as to sanction. Not all actions which were dishonest or lacked integrity were equally serious and nor did they necessarily require the inevitable conclusion that strike off was the appropriate sanction. No one doubted that the kind of dishonesty that led to convictions for theft or fraud in the criminal courts made it clear that such a person, if a solicitor, would be unfit to be a solicitor. However, in relation to a momentary or isolated type of dishonesty, such as a one off representation or event, the matters remained serious, but it was important to emphasise that there were degrees of dishonesty and of culpability, and which demonstrated that the case of the First Respondent fell within the small residual category of cases, justifying a lesser sanction than strike off.

62. <u>Second Respondent</u>

62.1 Upon adjourning the matter part-heard for lack of time to complete its deliberations at the conclusion of the third day of hearing the Tribunal determined that it would circulate a short Memorandum to the parties giving directions and so that the Second Respondent would be aware of the position regarding the matter. The Memorandum indicated that it would be open to the Second Respondent to attend the resumed hearing if she so wished and to offer mitigation and make representations in respect of the costs application made by the Applicant. The Second Respondent acknowledged safe receipt of the Memorandum and was notified of the date and time of the resumed hearing. The Second Respondent was not present nor did she submit mitigation in the interval between the adjournment on 17 January 2019 and the resumed hearing on 15 April 2019 but had offered mitigation in the documents she had put in. In her Answer, the Second Respondent stated:

> "I accept that to backdate the letter was completely wrong and would have given an inaccurate picture of events to the paper file and I am very sorry for doing this. I will categorically say and confirm that I would never backdate anything again. I would also add that the original letter of 6th April was held on my computer and not printed or put on the file because I knew it was wrong to put it on there if the letter had not gone out. I have no further explanation as to why I backdated the letter other than it was very silly and naïve of me to do so. It has been suggested I may have done this to progress the file which is

untrue. If I had intended to do this, I would have printed it on the 6th April to make it look as though the letter had been sent."

In her Note, the Second Respondent asked that it be noted that her lack of attendance in no way meant that she did not understand the seriousness of the allegations. She explained her approach to responding to orders given her by a partner. By way of personal mitigation the Second Respondent stated that she had lost her job while acknowledging that she resigned and now had a happy job elsewhere. She stated that she had also lost her pension and had to take a reduced salary as a result of these issues. She described her medical problems in the papers she submitted.

Sanction

63. The Tribunal had regard to its Guidance Note on Sanctions (December 2018) in determining sanction.

First Respondent

64. The Tribunal had found two allegations proved against the First Respondent allegations 1.1 and 1.3, in both cases with dishonesty. The Tribunal assessed the seriousness of the misconduct found proved. The misconduct arose out of the same set of facts. The First Respondent's motivation was as he said himself of his actions in respect of allegation 1.1 "intended to insulate me against any future complaint that the papers had been sent out later than originally stated." Regarding allegation 1.3 he did not want the client to find out that the papers she had delivered had been misplaced in the office of the firm. His motives were therefore entirely self-serving. What he did was planned; he directed the Second Respondent to create the backdated letter and place it on the file to create a misleading version of events and when the client repeatedly asked him about her documents he dissembled, admitting in evidence that if she had not been found out he would not have told her the position until after completion. The First Respondent had direct control of the circumstances once the documents were found to have been misplaced and was responsible for the conveyancing matter. He was an experienced solicitor who should have known better. As to the harm which resulted, the client was impacted; she had to change firms to have the position resolved. The First Respondent damaged the reputation of the firm because his conduct gave rise to a complaint to the Applicant (and even to the police although that complaint seemed not to have progressed). There was also potential harm to the firm involved on the other side of the conveyancing transaction as his actions were designed to shift blame to them. The First Respondent also involved the Second Respondent in his misconduct. The harm he created might entirely have reasonably been foreseen to be caused by his misconduct. There were aggravating factors; dishonesty had been alleged and found proved. The misconduct was deliberate and calculated and continued over a period. There were two incidences of dishonesty. Concealment had been the whole intention of what the First Respondent did. He knew or ought reasonably to have known that the conduct complained of was in material breach of his obligations to protect the public and the reputation of the legal profession. As against that the First Respondent had not previously been before the Tribunal and the harm to the client was somewhat limited. In terms of mitigation, while his previous career was unblemished save for an RSA in an unconnected matter some time ago, it could not be said this was a single episode as there were the two

episodes of dishonesty. The Tribunal did not perceive a great deal of insight; the First Respondent attempted to rewrite history while giving evidence. He had not made any early admissions of the misconduct found proved. The conduct giving rise to the first allegation was serious; done knowingly with intent to mislead. The dishonesty implicated and affected others, the Second Respondent, the client, the firm and anyone who read the file. It was self-serving as set out in the resignation letter of 19 June 2017. The third allegation spanned five email attempts by the client to find out what had happened to her documents when she gave the First Respondent every opportunity to come clean. The First Respondent's responses culminating in the 30 May 2017 email with its untrue statement was misleading and deliberately so. He admitted in evidence that he had no intention of telling her the position until after completion and when he did communicate he deliberately misled her. This was a clear example of a serious departure from the "complete integrity, probity and trustworthiness" expected of a solicitor (Bolton v The Law Society [1994] 1 WLR 512).

65. The Tribunal considered that the misconduct involving as it did, dishonesty was too serious for no order or a reprimand or indeed a fine. Mr Goodwin had asked the Tribunal to impose a fixed term of suspension. The Guidance Note stated:

> "The most serious misconduct involves dishonesty, whether or not leading to criminal proceedings and criminal penalties. A finding that an allegation of dishonesty has been proved will almost invariably lead to striking off, save in exceptional circumstances (see Solicitors Regulation Authority v Sharma [2010] EWHC 2022 (Admin))."

The Tribunal had regard to the personal mitigation offered by the First Respondent; he had referred to his family circumstances, and the fact that he was fasting at the time of the misconduct which he felt might have affected his judgment. He had also referred to the pressure of work. The Tribunal also had regard to his testimonials and to Mr Goodwin's submissions on exceptional circumstances. Mr Goodwin described the First Respondent's conduct as isolated and momentary in terms of the nature, scope and extent of the dishonesty. The Tribunal noted that there were two separate incidences of dishonesty which it felt made exceptional circumstances harder to argue successfully even though they occurred around the same time. The First Respondent might have had a stronger argument regarding allegation 1.1. Allegation 1.3 related to a period of over a month. In both cases the First Respondent acted deliberately to protect himself. The Tribunal did not find the comparison with the case of Burrowes helpful; there the solicitor did what the client wanted; here the client and the firm were deceived. Burrowes truly was a momentary and isolated act; here there were multiple acts. Furthermore the Tribunal did not consider that the personal circumstances relied upon were truly exceptional. There were ways of addressing personal difficulties and the First Respondent gave no indication that he had asked the firm to accommodate his. As to the lost documents, the First Respondent could have explained to the client what had happened and/or sought the assistance of the more senior partner in whose room he worked. The Tribunal did not consider that fasting of itself gave rise to exceptional circumstances without more. His personal circumstances were not such as to absolve him from what he did. Mr Goodwin also argued that the way in which the Applicant had conducted the case should impact on sanction. The Tribunal considered that was a separate and distinct matter which went

to the arguments on costs. Overall the Tribunal found that there were no exceptional circumstances so as to make a fixed term suspension appropriate. The protection of the public and the protection of the reputation of the legal profession did require that the First Respondent be struck off the Roll.

Second Respondent

66. The Tribunal had found one allegation proved against the Second Respondent. It was serious, involving a finding of dishonesty. While the Second Respondent acknowledged that what she had done was wrong she emphasised that she had acted under orders from the First Respondent whom she regarded as her "boss". She had used the words "extreme duress" in her Answer but had offered no evidence in support of her assertion save an assertion that the First Respondent was bad tempered and she had chosen not to come and give evidence. The Tribunal noted the personal mitigation in terms of the Second Respondent's health situation but it was not suggested that she had been affected by it at the material time. The Tribunal considered that in all the circumstances for the protection of the public and the reputation of the profession and those that worked within it that it would be appropriate to make a section 43 order in respect of the Second Respondent.

Costs

67. Mr Bheeroo applied for costs in the mount of £18,592 including costs to the date of issue of these proceedings. The Schedule had been amended by hand to remove the cost of Mr Willcox of the Applicant attending the hearing. Mr Bheeroo submitted that the costs claimed were reasonable for a case of this type and complexities. His instructing solicitors Capsticks worked to a fixed fee of £130 per hour. The Applicant's costs were limited (prior to issue of proceedings), to twelve minutes for communication with the Tribunal, one hour for communication with the Respondents and six minutes for third parties, and the time spent on the Rule 5 Statement. Mr Bheeroo knew Mr Goodwin had criticisms of that but he submitted the time spent by Ms Dunlop at 10 hours was entirely reasonable and modest in the circumstances. In respect of the costs of the hearing, Mr Willcox had spent some time in preparation for the proceedings and in Mr Bheeroo's submission those costs were entirely reasonable and relatively modest. Mr Bheeroo submitted that his fees were the biggest part of the costs. The brief fee including the first day of the hearing was £8,000 with refreshers of £2,000 per day; a total of £4,000. He had charged £800 for a conference with the Applicant, looking at the file and advising in the first place. Mr Bheeroo was of eight years' call and the Applicant was only charging for his attendance at the hearing not for the attendance of anyone from the Applicant.

68. Mr Goodwin submitted that he had no issue with Mr Bheeroo's fees; he dealt with the matter in a relatively fair, proper and considered way making concessions where appropriate but asked the Tribunal to disallow the balance of the costs claimed by the Applicant to reflect what he described as the wholly inappropriate and in part prejudicial way the case had been prepared. He had in mind the drafting of the Rule 5 Statement. It took 10 hours; the errors therein were surprising. He also referred the Applicant's reply email of 15 June 2018 which he submitted contained a material misrepresentation which was accepted by the solicitor at the Applicant to be serious. There had also been a failure initially, on 14 June 2018 to disclose material

information; he had in mind the email from the First Respondent to Mr G's secretary dated 9 June 2017. There was also the continuing failure of the Applicant to discharge its obligations as regards disclosure by that email not being served until this case had opened and after Mr G's evidence had been heard. He submitted that it would be inappropriate and unfair for the First Respondent to have to pay anything towards the Applicant's costs having regard to the way the case had been prepared from the date of issue. At any time from the date of issue to this hearing, the failures and inadequacies in both the Rule 5 Statement and reply email could have been corrected but were not, notwithstanding they were pointed out. For those reasons Mr Goodwin invited the Tribunal to exercise discretion and reflect what he advanced as matters of concern and limit the costs claimed to those of Mr Bheeroo. Mr Goodwin submitted that both Respondents had submitted statements of means. The Tribunal would take them into account. He also asked that the Tribunal not make an order for costs against the Respondents on a joint and several basis but order proportionate payment in fixed amounts regarding Mr Bheeroo's fees. If it was felt that the Second Respondent should pay some of the Applicant's costs because the criticisms Mr Goodwin raised might not reflect on her costs, Mr Goodwin suggested that perhaps 50% of Mr Bheeroo's cost should be paid by the First Respondent which would be a fair proportion. (The Tribunal's Memorandum of the earlier adjournment alerted the Second Respondent to this proposal.)

69. Mr Bheeroo heard the criticisms made but submitted that the allegations had been properly brought. The case had not been a shambles from start to finish. The only issues had been paragraph 16 of the Rule 5 Statement, the Applicant's email of 15 June 2017 and disclosure. Mr Bheeroo had made submissions about their relevance. He submitted it would be completely disproportionate to strike out all of the Applicant's costs because at the end of the day there was one set of facts between both Respondents from which the allegations arose. Two allegations had been found proved against the First Respondent and one against the Second Respondent. On that basis he invited the Tribunal to grant the Applicant's costs in the amount claimed. Mr Goodwin agreed that he was not seeking an order for costs against the Applicant on the basis that the case had been a shambles from start to finish.

70. The Tribunal had indicated its preliminary view before adjourning that the way the matter was dealt with over the first three days of hearing had not gone entirely smoothly; having Ms Dunlop give evidence by video link (at very short notice) had been somewhat unusual. When the Tribunal reconvened to consider sanction and costs it would consider the position of the Applicant in respect of the way the case had been brought. The Tribunal considered the Applicant's application for costs further, immediately before the hearing resumed on 15 April 2019. The Tribunal wished to make clear that it considered that the allegations had all been properly brought against both Respondents. However there were matters which gave the Tribunal concern. It considered the reasonableness of the Applicant having instructed counsel where the First Respondent had instructed a solicitor. While in no way criticising Mr Bheeroo it was possible that if there had been greater continuity in the conduct of the matter at the Applicant some of the difficulties arising from late disclosure of the 9 June 2017 email might have been avoided. The Tribunal had encountered the following problems in the course of the hearing which gave cause for concern:

- There was a statement at paragraph 16 in the Rule 5 Statement which alleged forgery against the First Respondent which was not part of the allegations and which the Applicant acknowledged should not have been included. The email reply from Ms Dunlop when this was raised was unclear and the allegation was not withdrawn until the hearing. This allegation was therefore hanging over the First Respondent when it should not have been after it had been challenged by Mr Goodwin in his 16 October 2017 response to the Rule 5 Statement. This issue could have been dealt with much earlier.

- There was a failure to disclose until the second day of the hearing an email from the First Respondent to Mr G which had been in the possession of the Applicant since 14 June 2018.

- There was a consequent expenditure of a considerable amount of hearing time arising out of the above issues.

- Mr Goodwin would almost certainly have cross examined Mr G upon the undisclosed email and what he asserted were its potential implications.

- Again arising out of the late disclosure, time had to be made for Ms Dunlop of the Applicant to be located, to get up to speed and before she could give evidence, for arrangements to be made for a video link to be set up and tested which in the normal course of a case would have occurred before the hearing began.

As a result, the case went part heard in January 2019 and the Respondents had the matter hanging over them for a further three months. The Tribunal considered that the Applicant had failed to comply with the over-riding practice direction objective in terms of the way the case was handled and had to be extended. It was fair to say that if the Tribunal had not asked for all communications between the firm and the Applicant at the end of the first hearing day it was quite possible that the material produced overnight might not have been produced. All that said, the procedural problems did not impact on findings and sanction and the case was not in the opinion of the Tribunal, and Mr Goodwin did not allege that it had been, a shambles from start to finish.

71. The Tribunal also had to take into account that the Applicant had failed in respect of two of the allegations against the First Respondent and one of the two allegations against the Second Respondent with the associated allegations of dishonesty. It had to consider the guidance given in the case of Brett v SRA [2014] EWHC 2974 (Admin) so that matters were dealt with proportionately; just because the Applicant decided to instruct counsel did not mean the Respondent had to fund it. The Tribunal noted that the fees for Mr Willcox's attendance at the hearing had been removed from the cost claim. The Tribunal considered Mr Bheeroo's costs which Mr Goodwin had not challenged. It felt that they were somewhat high and assessed fees for counsel at £3,000 for the brief and £2,000 by way of refreshers, arriving at £7,500 plus VAT a total of £9,000. It was a matter between the Applicant and counsel where the cost of the conference would fall. The Tribunal considered that the difficulties listed above had increased the length of the hearing by about one day. It therefore reduced the Applicant's costs by one third from £3,232 to £2,156. The Tribunal assessed the total costs to be awarded to the Applicant at £11,250.

72. The Tribunal next considered apportionment of costs between the Respondents. It did not consider that a joint and several order would be appropriate. The First Respondent had played the larger role and had more allegations brought and found proved against him. Costs would therefore be apportioned on an 80%/20% basis. As to affordability of costs, the Tribunal had considered the Personal Financial Statements of both Respondents. The First Respondent would no longer be able to practise as a solicitor but he had capital assets including interests in three properties with equity in all of them and rental income. The Tribunal would not make any additional reduction in his costs liability from £9,000. The Second Respondent had health problems although the information about them was limited. She would still be able to work health permitting and on her Personal Financial Statement dated 10 January 2019 had offered to pay £25 per month. This was a matter for the Applicant to consider. The Tribunal reduced her costs liability from £2,250 to £1,000 on grounds of affordability

Statement of Full Order

73. First Respondent

The Tribunal Ordered that the Respondent, LEVENT HALIL CHETINKAYA, solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that he do pay a contribution to the costs of and incidental to this application and enquiry fixed in the sum of £9,000.00.

74. Second Respondent

The Tribunal Ordered that as from 15 April 2019 except in accordance with Law Society permission:-

(i) no solicitor shall employ or remunerate, in connection with his practice as a solicitor TRACEY CURABA;

(ii) no employee of a solicitor shall employ or remunerate, in connection with the solicitor's practice the said Tracey Curaba;

(iii) no recognised body shall employ or remunerate the said Tracey Curaba;

(iv) no manager or employee of a recognised body shall employ or remunerate the said Tracey Curaba in connection with the business of that body;

(v) no recognised body or manager or employee of such a body shall permit the said Tracey Curaba to be a manager of the body;

(vi) no recognised body or manager or employee of such a body shall permit the said Tracey Curaba to have an interest in the body;

And the Tribunal further Ordered that the said Tracey Curaba do pay a contribution to the costs of and incidental to this application and enquiry fixed in the sum of £1,000.00.

Dated this 31st day of May 2019
On behalf of the Tribunal

A. N. Spooner
Chairman

Judgment filed
with the Law Society
on 31 MAY 2019