SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12557-2024

BETWEEN:

LIAM CONNOLLY Appellant

and

SOLICITORS REGULATION AUTHORITY LTD Respondent

Before:

Ms A Banks (Chair),
Mrs H Hasan,
Ms L Fox.

Date of Hearing: 23 September 2024

Appearances

Edward Levey KC, barrister, Fountain Court, Temple, London, EC4Y 9DH, for the Appellant

Louis Weston, barrister, Outer Temple Chambers, instructed by Nadine Gabbidon, of Solicitors Regulation Authority of The Cube, 199 Wharfside Street, Birmingham, B1 1RN, for the Respondent.

JUDGMENT ON AN APPEAL UNDER S.44E OF THE SOLICITORS ACT 1974

Documents

1. The Tribunal reviewed all the documents in the electronic bundle.

Introduction

2. The Appellant appealed under section 44E of the Solicitors Act 1974 (as amended) ("the Act") against a decision dated 17 January 2024 of an Adjudicator, ("the Adjudicator"), engaged by the Solicitors Regulation Authority ("the Respondent"). The decision of the Adjudicator was made pursuant to the Adjudicator's powers under section 44D of the Act.

The Adjudicator's Decision

3. The Adjudicator of the Solicitors Regulation Authority Ltd ("SRA") considered a report made against the Appellant. The allegation was that between 6 and 16 September 2022 the Appellant attempted to prevent Mrs S from reporting her concerns with Rowberry Morris Thames Valley LLP (the firm) to the SRA and/or the Legal Ombudsman ("LeO") and in doing so he breached Paragraph 7.5 of the Code of Conduct for Solicitors, RELs and RFLs (the Code of Conduct).

   The Adjudicator's Decision ("the Decision") was to:

   - Rebuke the Appellant.
   - Publish the fact that the Rebuke had been administered.
   - Direct the Appellant to pay the SRA costs of investigating the report in the sum of £1,350.00.

   Costs and publication are not subject to appeal.

Code of Conduct 2019

4. Paragraph 7.5 of the Code of Conduct for Solicitors, RELs and RFLs (the Code of Conduct) states:

   > *"You do not attempt to prevent anyone from providing information to the SRA or any other body exercising regulatory, supervisory, investigatory or prosecutory functions in the public interest."*

The Legal Framework

5. The procedure for the hearing of the Appeal is governed by the Solicitors Disciplinary Tribunal (Appeals and Amendment) Rules 2011 which came into force on 1 October 2011.

6. The Tribunal has power under Section 44E to make such order as it thinks fit, and such an order might in particular:

(a) affirm the decision of the Society;

(b) revoke the decision of the Society;

(c) in the case of a penalty imposed under section 44D(2)(b), vary the amount of the penalty;

(d) in the case of a solicitor, contain provision for any of the matters mentioned in paragraphs (a) to (d) of section 47(2);

(e) in the case of an employee of a solicitor, contain provision for any of the matters mentioned in s.47(2E);

(f) make such provision as the Tribunal thinks fit as to payment of costs.

7. In light of the Divisional Court's judgment in SRA v SDT and Arslan and the Law Society Intervening Party) [2016] EWHC 2862, the following framework principles apply to section 44E appeals:

- The role of the Tribunal was to review the Adjudicator's decision, rather than to conduct a rehearing.

- That review function was analogous to that of a court dealing with an appeal from another court or tribunal pursuant to Rule 52.11 of the Civil Procedure Rules. The case law that had developed under Rule 52.11 in relation to (i) the difference between a review and rehearing and (ii) the nature of a review, would inform the correct approach that the Tribunal should adopt when conducting a review.

- The Tribunal should interfere with the Respondent's decision under review only if satisfied that the decision was wrong, or that the decision was unjust because of a serious procedural or other irregularity in the proceedings.

- The Tribunal should not embark on an exercise of finding the relevant facts afresh. On matters of fact, the proper starting point for the Tribunal is the findings made by the Adjudicator and the evidence before the Adjudicator. If satisfied for good reason that a finding of the Adjudicator was wrong, the Tribunal was entitled to reach a different conclusion. The Tribunal had to consider whether, on that evidence, the Adjudicator was justified in making the factual findings that she did.

- Where a challenge was made to conclusions of primary fact, the weight to be attached to the findings of the original decision-maker would depend upon the extent to which that decision-maker had an advantage over the reviewing body; the greater that advantage, the more reluctant the reviewing body should be to interfere. Where the original decision involved an evaluation of the facts on which there is room for reasonable disagreement, the reviewing body ought not generally to interfere unless it is satisfied that the conclusion reached lay outside the bounds within which reasonable disagreement is possible.

The Burden and Standard of Proof

8. The burden of proving that the Adjudicator's decision was wrong or that the decision was unjust because of a serious procedural or other irregularity in the proceedings lay with the Appellant.

9. The standard to which he was required to prove that the decision was unjust was the civil standard, namely that on a balance of probabilities it was more likely than not that the Adjudicator's decision was unjust.

Factual Background

10. The Appellant is an equity partner and manager at Rowberry Morris Thames Valley LLP (the firm).

11. On 26 August 2022, Mrs S (a former client of the firm) sent a letter before action to the firm, making various complaints about the service she had received.

12. On 6 September 2022, the Appellant responded to Mrs S. He made a 'without prejudice' offer of settlement on the firm's behalf. In the letter, the Appellant said that the firm would repay the fees Mrs S had paid:

> *'In response and without admission of liability and on the basis that settlement is in full and final settlement of:*
>
> *'1. The claim detailed in your letter before action of the 26 August 2022,*
>
> *2. Any internal or external complaint about the advice given and service provided by Rowberry Morris, and*
>
> *3. Any regulatory action, such as a complaint about Rowberry Morris to the Solicitor's Regulatory Authority or to the Legal Ombudsman* ["LeO"]*.'*

13. On 14 September 2022, Mrs S responded. She asked the Respondent how he reconciled the third bullet point in his letter with rule 7.5 of the SRA Code of Conduct 2019 (namely that solicitors should not attempt to prevent anyone from providing information to the SRA or other regulatory body).

14. On the same day, the Appellant replied. He said: *"We are not attempting to prevent you from providing information to the SRA. You are free to do so if you wish. If you do so however, you will not be able to accept our offer'.*

15. On 16 September 2022, Mrs S said that she would be willing to accept the offer, if point three was deleted. On the same day, the Appellant responded *'... To be entirely clear, we have not tried to prevent you from providing information to the SRA, or cooperating with an investigation and we had no intention of restricting those things. We do not consider that our point 3 conflicts with the code of conduct. It does not prohibit you from providing information. We are however happy to remove it to avoid confusion.'*

- Mrs S accepted the revised offer, and the matter was concluded.

- On 6 February 2023, Mr S, the client's husband, reported the firm to the SRA.

16. In response to queries raised by the investigation officer, the firm said its without prejudice offer of settlement was not an attempt to prevent anyone from providing information to the SRA, or any other body.

17. Instead, it meant that if Mr and Mrs S made a complaint to the SRA or LeO, the firm would have been able to refer the regulatory body to the settlement (and Mr and Mrs S' acceptance of the offer).

18. It was alleged that the Appellant's email of 14 September 2022 inferred that Mrs S could not raise a complaint with the SRA and still accept the offer. This was incorrect.

    - The ambiguity was corrected, and the provision removed from the final settlement offer.

    - The Appellant accepted that his email was *'confusing'*.

19. There had been a misunderstanding, but any ambiguity was not deliberate or reckless. No financial loss or inconvenience was caused to the client. There were no adverse consequences. The Respondent had acted swiftly to resolve any misunderstanding and there had not been any breach of the Code of Conduct.

20. On 13 June 2023, the Respondent sent an email to the investigation officer in which he said, in summary:

21. The offer was meant to be *'in satisfaction of any regulatory action'* and not a prohibition against making a complaint. He was mortified that it had escalated to this point. He had intended to apply to become a judge. He would not be considered for the position if his record was not spotless. He is a good lawyer who takes great pride in helping people. He did not think a misunderstanding (that was swiftly cleared up) warranted a sanction against him. He had found the process devastating and did not want a clear misunderstanding to ruin his career.

22. The Adjudicator was presented with written submissions from the Appellant's counsel, Mr Levey KC, dated 19 December 2023, summarised as follows:

23. The Appellant accepted that there has been a breach of rule 7.5 of the Code of Conduct for Solicitors. However, the breach was promptly corrected, no harm was caused, and he had expressed considerable regret and remorse.

24. The Appellant did not represent a regulatory risk and there was no prospect of the breach being repeated in future. A written rebuke would be disproportionate sanction in the circumstances.

245 The Appellant had taken responsibility for the letter, albeit it had been drafted by the firm's previous head of department. At the time, the Appellant assumed there was nothing in it that might be said to be a breach of the code of conduct.

26. Even if Mrs S had agreed to the original terms of settlement, she would not have been prevented from providing information to the SRA. The Appellant now appreciated that it is not possible for a solicitor and client to settle a regulatory complaint. Therefore, Clause 3 was meaningless and of no legal effect. Even if it did have legal effect, it would likely have been unenforceable.

27. In his email of 14 September 2022, the Appellant explained that the firm was not seeking to prevent a report to the SRA, but if Mrs S wanted to make a complaint, then she could not accept the offer. His rationale was that it would defeat the purpose of the offer if Mrs S intended to make a complaint anyway. Whilst he had not intended to prevent a complaint he accepted, that the wording of his email could be construed in that way, hence his admission of the breach.

28. As to seriousness and appropriate sanction Mr Levey said that the SRA had agreed a Regulatory Settlement Agreement in the matter of Ian Bond, in which Mr Bond was rebuked for expressly prohibiting a client from pursuing a complaint. However, the Appellant in this instant had not sought to prohibit Mrs S from pursuing a complaint. The offer in this matter was never intended to prevent reporting and the Appellant removed the clause immediately to avoid ambiguity.

29. The SRA's Enforcement Strategy said that it would act where there had been a serious breach of standards. A Rebuke was appropriate where there had been 'significant' misconduct. Mr Levey submitted that the threshold for professional misconduct had not been met in this case. The Appellant had never intended to prevent a report to the SRA, the breach was promptly remedied, no harm was caused, and this was a one-off incident with no prospect of repetition.

30. The Appellant had expressed considerable regret and remorse. The breach was not so serious that it required the imposition of a rebuke.

31. The Adjudicator should first consider the lowest appropriate sanction and work upwards. The Adjudicator would be wrong to place significance on the Warning Notice in relation to NDAs. This Warning Notice had been issued in the context of solicitors acting for employers wishing to settle workplace complaints. A solicitor settling a complaint with his or her own client might be forgiven for not immediately appreciating that the Warning Notice applied in such cases.

32. The Warning Notice said that a breach of the rules *'may'* lead to disciplinary action. It did not explain when or how. The SRA said that the Appellant's conduct was serious because he should have known the content of the Warning Notice. However, whether or not he knew about the Warning Notice was irrelevant. His conduct was either objectively serious, or not. His knowledge of the Warning Notice had no bearing on this question.

33. The Appellant was said to have *'failed to identify'* that the offer letter could *'reasonably be interpreted'* as an attempt to prevent a report to the SRA. The Appellant had accepted that he had made a mistake but that did not make this a serious breach.

34. The Appellant was also said to be directly responsible for his behaviour. However, this did not make the conduct a serious breach. The fact that he prepared the letter was a

neutral factor and did not make the breach any more serious. The SRA said that the breach was only rectified after it was challenged by Mrs S. However, again, this did not make it a serious breach. The Appellant accepted that he made a mistake and should have appreciated the potential breach of rule 7.5 sooner.

35. This case did not come close to significant misconduct. Instead, it would be appropriate to issue The Appellant with a letter of advice and warning. There were a number of factors in support of this position in the SRA's Enforcement Strategy.

The Adjudicator's Findings

36. Although the Appellant accepted that there had been a breach of the rules, he had not accepted that he deliberately (or recklessly) tried to prevent Mrs S from making a report to the SRA. His offer of settlement, he said, was not designed to prevent any complaints from being made. He did accept, however, that a follow up email sent on 14 September 2022 was confusing and *'could be'* construed as a breach of paragraph 7.5. He says that this was a mistake.

37 The Adjudicator agreed that the initial offer of settlement did not explicitly prevent Mr S from making a complaint to a regulatory body. Specifically, the offer said that it was made *'in full and final settlement'* of any regulatory action. It did not expressly state that Mrs S could not raise such an action, only that the matter would be considered *'settled'* if she did so.

38 The Appellant acknowledged, there was little point in including any such provision in his offer. It was, at best, unenforceable. At worst, it was contrary to public policy. The Appellant acknowledged in his written representations to the Adjudicator that there can be no *'settlement'* of regulatory action between a client and a solicitor as such issues are to be settled between a regulator and the regulated party.

39 However, although the offer itself may not have expressly prevented Mrs S from making a complaint to the SRA, the Adjudicator considered that his actual intentions had been revealed by his further email sent on 14 September 2022.

40 The Appellant stated that this email was *'confusing'* and a *'mistake'*. He said that the email told Mrs S, in terms, that she could still report the firm to the SRA. While this was technically true, the Adjudicator found it important that this sentence was read in context of the entire email and the settlement of negotiations as a whole. The email did say that he was not preventing Mrs S from making a complaint to the SRA, but it also immediately went on to say that if she made any such complaint then she would not be able to accept the firm's offer of settlement.

41. Looking at the wider context, Mrs S was complaining about the service she had received from the firm. Her letter before action asked the firm to refund her the £2,616 she had paid in fees. The Appellant's without prejudice offer said the firm would pay this amount to her, on the basis that it was in full and final settlement of any claims, including any *'regulatory action'* with the SRA or LeO.

42. The Adjudicator considered that this meant that when the Appellant told Mrs S that a report to the SRA would preclude her from accepting the firm's offer, he was telling

her that she could make a complaint to the SRA but, if she did so, the matter would not be settled or even capable of settlement. In short, the implication was that if she made a complaint to the SRA, she could not have her money and as such the email effectively made the offer of settlement conditional upon Mrs S agreeing not to make a complaint to the SRA.

43. The logical conclusion was that the Appellant (and the firm) were only willing to settle if it meant Mrs S did not make a complaint to the SRA. The net effect of this was that Mrs S was being offered a financial incentive on the basis that she would not make any complaints to the regulator.

44. Whilst the Adjudicator accepted that Mrs S did not actually agree to this and that the provision in question was removed after Mrs S queried whether it was appropriate, the Adjudicator noted, the fact remained that the Appellant told Mrs S that she would be precluded from settling the matter if she made a complaint to the SRA. He did so on the basis that he felt that any agreement would be without purpose if it did not prevent a report to the regulator. The Adjudicator found it difficult to see how this could be construed as a mistake or misleading, as claim by the . The implication in his email was unambiguous. Mrs S would not receive her money back unless she agreed not to go to the regulator

45. The Adjudicator found that the Appellant had attempted to prevent Mrs S from reporting her concerns with the firm to the SRA and/or the LeO and that he had acted in breach of the Code of Conduct. The Adjudicator agreed that this was not automatically a *'serious breach'* a finding of a breach of the Code of Conduct would not necessarily result in sanction. In order to determine whether any sanction was appropriate and, if so, which one the Adjudicator had to consider the mitigating and aggravating factors specific to the case.

46. The Adjudicator did not consider it is appropriate for this matter to be closed with no action. They did not accept that this was a mistake or an inadvertent breach, and some regulatory action was required to maintain public confidence.

47. There were a number of mitigating factors in this case in favour of a warning; it was an isolated incident, with no lasting or significant harm, as Mrs S did not actually agree that she would not complain to the SRA. To his credit, the Appellant had shown considerable regret and remorse, and his representations made clear that the risk of repetition was extremely low, if not negligible.

48. However, there were also aggravating factors which, the Adjudicator considered required a more serious outcome than a warning. The Appellant was personally responsible for his conduct and is an experienced lawyer and manager of a firm. He says that another partner actually wrote the offer of settlement. Even if the offer letter was not written by him it was he who wrote the email of 14 September 2022, making Mrs S' acceptance of the offer contingent upon her agreeing not to pursue the matter with the SRA.

49. He was personally responsible for the words he used in that email, which were contrary to paragraph 7.5 of the Code of Conduct. Furthermore, although the breach was rectified, the Appellant only agreed to remove the provision from the offer after Mrs S

raised it with him not once, but twice. In fact, his first response to Mrs S was what placed him in breach of his obligations and his initial reaction, when told that he might be in breach of paragraph 7.5, was to make the offer contingent upon her agreeing not to go to the SRA. It was only after Mrs S pushed back, again, that he agreed to remove the provision.

50. Mrs S was not, as far as the Adjudicator was aware, a vulnerable individual. However, she did not have legal representation in her dispute with the firm and if she had not raised the issue (or pursued it even after the Appellant's email of 14 September 2022) the Adjudicator questioned whether the provision would have been removed. Another lay client may have been left with the impression that they could not make a complaint to the SRA if they had accepted the offer. This was certainly the implication in the email.

51. Therefore, although the breach was rectified, it persisted longer than reasonable and was only rectified when prompted. There was a risk of harm, even if that harm did not materialise.

52. In terms of other aggravating factors, the SRA argued that the Appellant's conduct was serious because he should have known and appreciated the content of the Warning Notice on the use of NDAs. The Adjudicator accepted the Appellant's Mr Connolly's point, however, that his lack of personal knowledge of the Warning Notice on the use of NDAs did not necessarily render his conduct more serious. However, this is because a Warning Notice does not create new obligations or responsibilities. It is designed to bring the profession's attention to existing obligations.

53. Paragraph 7.5 is entirely unambiguous. It is a simple prohibition against attempting to prevent anyone from making a report. Whether or not the Appellant knew the content of the Warning Notice or appreciated that it applied to his interactions with Mrs S, he had a responsibility to comply with paragraph 7.5.

54. Mrs S (a lay client) was able to identify the meaning of paragraph 7.5. It was Mrs S who pointed out that it was not possible for the firm to *'settle'* any dispute with the regulator. If Mrs S knew that the provision in the offer (and the Appellant's email of 14 September) were problematic, then it was not unreasonable to expect the Appellant to have known they were inappropriate, whether or not he knew about the Warning Notice or thought that it applied.

55. The Appellant's intent and motivation was also found to have been an aggravating factor. The Adjudicator did not accept that the Appellant's email of 14 September 2022 was a *'mistake'*.

56. The Adjudicator found that the Appellant's intention was to prevent Mrs S from reporting the firm to the SRA (or LeO) and given the aggravating factors, his conduct was elevated above merely a minor or moderate breach of the rules.

57. The Adjudicator found that the Appellant, an experienced solicitor, attempted to prevent an unrepresented former client from reporting his firm to the regulator. He offered a financial incentive for her to agree not to complain. He only rectified this after being taken to task by the client on two occasions. This was more than human error and

some public sanction was required to uphold public confidence in the delivery of legal services.

58. The Adjudicator found a rebuke was in all the circumstances found to have taken place a proportionate censure of the Appellant's conduct.

Review of Adjudicator's decision to the Adjudication Panel of the SRA

59. The Appellant applied under the SRA's own appeal provisions for an internal review of the Adjudicator's decision by an Adjudication Panel which gave its decision in a document dated 31 May 2024 *(the Appellant had been granted permission by the Tribunal to suspend his application for review pending the outcome of the internal process).*

60. The Appellant submitted a witness statement to the Adjudication Panel in which he said there was new information, as follows:

61. He explained that the point of his email of 14 September 2022 to Mrs S was to draw a line under the matter. That he honestly but mistakenly believed it was permissible to give Mrs S an option; if she wished to complain she could not accept the firm's offer it made to settle her complaint. He said he is genuinely sorry and remorseful and apologised unreservedly.

62. He intended to apply to become a judge; that he has a clear regulatory record; that he is a good lawyer who takes pride in helping people; and that a letter of advice would be an appropriate and proportionate response. He had a challenging childhood, the date he qualified as a solicitor, his age, that he was the youngest equity partner at the firm, that the firm is highly regarded and has accreditation which shows that it cares about high quality standards and clients.

63. The Appellant also said that although he is an experienced solicitor he is not experienced in dealing with client complaints. He also surmised that because Mrs S had new solicitors acting for her as regards her underlying legal matter, it is more likely than not that they drew her attention to rule 7.5 and the decision in Bond.

64. The Adjudication Panel did not consider this information to be 'new' and it was, in essence, matters which had been taken into consideration by the Adjudicator when she had made her decision. Furthermore, the Panel considered that the factors the Appellant set out did not affect the nature of his conduct which was considered by the Adjudicator. What happened to a person in their childhood and the fact that they have worked hard to progress their career was irrelevant to whether action should be taken against them for a breach of professional standards.

65. In reaching its decision to uphold the Adjudicator's decision the Adjudication Panel determined that there had been no material flaw in the Adjudicator's reasoning and that she had correctly assessed the facts by taking into account all relevant information relating to the Appellant, Mrs S and the state of knowledge each had; mitigating and aggravating factors, the seriousness of the conduct and matters of proportionality to reach the appropriate sanction.

<u>The Appellant's Appeal</u>

66. The grounds for the internal review were prepared by Mr Levey KC, and in concert with matters raised with the Adjudicator (set out above) they formed the grounds of appeal which Mr Levey asked the Tribunal to consider.

67. Mr Levey said there were issues which the Appellant had raised in a later witness statement relating to the fact that whilst he had been an experienced solicitor at the time he had not been an experienced departmental head, having just taken on that role and not having had prior experience of dealing with such a complaint before. His statement also raised personal mitigation.

68. This was fresh evidence that had not been presented to the Adjudicator when she had made her decision on 17 January 2024 - and Mr Levey asked the Tribunal to admit the evidence in the interests of justice.

69. As to the proper approach on an appeal, Mr Levey accepted that the appeal takes the form of a review, not rehearing. The issue to be determined was whether the Adjudicator's decision to issue the Rebuke was "wrong". In other words, the question was whether the Tribunal ultimately considered that the decision to issue a rebuke was the "right outcome".

70. Mr Levey's grounds were as follows:

- The Adjudicator's decision was materially flawed or alternatively, considering the new information in the Appellant's witness statement, the Rebuke should be set aside and replaced with a letter of advice or warning.

- The Adjudicator failed to give proper consideration to whether a letter of advice or warning was the appropriate outcome and treated that course of action as equivalent to taking no action at all.

- A letter of advice or warning fitted perfectly with the SRA's own guidance in the Enforcement Strategy and the Adjudicator failed to explain why that was not the appropriate option on the facts of the case.

- The fact that the Appellant was personally responsible for his conduct could not be an aggravating factor. In all cases of alleged misconduct, except where a solicitor is held responsible for the conduct of a more junior solicitor, the solicitor in question will be personally responsible for his conduct. The Enforcement Strategy does not treat *'personal responsibility'* as an aggravating factor.

- It was not fair for the Appellant's experience as a solicitor to be taken into account. He may be an experienced solicitor, but he had only just been appointed head of department. This was the first client complaint he dealt with. He also dealt with it under the guidance of the firm's previous head of department.

- It was wrong for the Adjudicator not to accept that the Appellant had made a mistake. Unless the Adjudicator believed that the Appellant deliberately set out to mislead Mrs S she could only find that he had made a mistake.

- He made an honest mistake. He was not seeking to prevent Mrs S from making a complaint. He genuinely believed he was entitled to give her an option. Namely, either accept the offer to waive the fees and draw a line under the matter or choose to deal with the matter by way of litigation and a regulatory complaint. He accepts he was wrong about this.

- He would not have said what he did in his email dated 14 September 2022 if he knew it was a breach of Rule 7.5. As soon as the decision of Bond was drawn to his attention by Mrs S, he amended the terms of the offer within a matter of hours.

- The Adjudicator contradicted herself. She found that his response on 14 September 2022 was his first and only breach of his obligations which he remedied after Mrs S' email on 16 September 2022. She was therefore wrong to say that the breach was raised with the Appellant *'not once but twice'*.

- Mrs S was legally represented. Therefore, the factual basis for the Adjudicator's reasoning that the Appellant should have known the offer was inappropriate because a lay person did, was unsound.

- His conduct was not sufficiently serious to constitute professional misconduct. All the purposes of a letter of advice or warning and all the factors in favour of that outcome in the Enforcement Strategy fit this case perfectly. It is impossible to understand why the Adjudicator did not conclude this was the appropriate option.

- Bond could be distinguished from this case. In Bond, the solicitor attempted on two separate occasions to reach a settlement on terms which expressly prohibited the client from pursuing a regulatory complaint. In this case the Appellant, who was dealing with a client complaint for the first time, believed he was entitled to give the client an option. It was a genuine misunderstanding on his part which he promptly corrected without causing any actual harm to Mrs S. He has learned from his mistake which will never be repeated.

- Mr Levey raised as illustrative of the grey area this case represented, the divergent view on the required sanction reached by different arms of the SRA i.e. the fact that by a letter dated 5 April 2024, the SRA's Investigation Officer (Mr Michael Smith) informed the Appellant that, having considered the application for a review of the decision to issue the Rebuke, it was Mr Smith's recommendation that the decision be overturned. In summary, Mr Smith agreed that there was an issue as to whether the Adjudicator had wrongly equated the issuing of a Letter of Warning/Advice with taking no action; and whether the Adjudicator had given sufficient consideration to the Appellant's inexperience as a departmental head.

- Given that the Appellant had made an honest mistake, and one which he had promptly corrected, Mr Smith recommended that the Appellant be issued with a Letter of Warning/Advice rather than a Rebuke. However, the Adjudication Panel had rejected that recommendation and decided to uphold the Rebuke.

- Mr Levey said that not every breach of the Code of Conduct was sufficiently serious as to amount to *'professional misconduct'*. As the Court recognised in BSB v Howd (QB) [2017] 4 WLR 54 at para [51], the concept of professional

misconduct carries *"resounding overtones of seriousness, reprehensible conduct which cannot extend to the trivial"*.

- In the present case, the Appellant had made a genuine and honest error, which error was promptly corrected and Mr Levey's overarching submission on the appeal was that the Appellant's breach was not sufficiently serious to be treated as 'professional misconduct': it would be a sad day for the profession if such genuine error were to be treated as misconduct requiring a sanction to be recorded on a solicitor's professional record for three or more years.

Respondent's Submissions in Opposition

71. Mr Weston observed that the Appeal was solely against the imposition of the Rebuke upon the Appellant by the Adjudicator.

72. By the Appeal it was contended by the Appellant that the Adjudicator had made the following material errors:

    - Not considering an Advice letter/warning.

    - Considering the Appellant was personally responsible .

    - Wrongly finding the Appellant had not made a mistake.

    - Finding the Appellant had to be prompted twice to correct the mistake.

    - Legal representation.

    - Overarching points that the conduct was not sufficiently serious to amount to professional misconduct.

73. Mr Weston said that nothing in the Appeal came close to establishing that the Adjudicator's decision was wrong. The Appellant's submissions were without foundation and not justifiable.

74. Mr Weston's essential submission was that the Adjudicator's decision was not wrong, not arguably wrong, and had not been shown to be arguably wrong by the matters advanced by the Appellant.

75. Mr Weston submitted that the fundamental question on the appeal was not whether the Tribunal might have reached a different decision, or even would have reached a different decision (both of which would be relevant to an appeal by rehearing) rather it was whether the Adjudicator had been wrong. The Tribunal's duty was to review, not to rehear.

76. Even where - and none was conceded by the Respondent - a relevant factual error was shown to be made on an appeal by review, the issue remained as to whether the decision under appeal was wrong, taking account of any appropriate factual correction.

77. Mr Weston submitted that the Adjudicator was not wrong to find the Appellant acted intentionally and not by mistake. The response e-mail of 14 September 2022 was unambiguous as to its intent and it explained what the Appellant thought could be achieved by the Offer Letter. That was the very point of the email. There was no ambiguity it was not capable of being a *mistake* or *clumsy wording* because the response e-mail is a response to Mrs S's raising of Rule 7.5 of the Code. Only after those two prompts, did the Appellant withdraw the third point of the Offer Letter. He did not do it in reply to the first time Rule 7.5 was raised.

78. The Adjudicator was not wrong to find the Appellant personally responsible. This was not conduct committed under supervision of a team or other staff. The Response e-mail of 14 September 2022 was written under the hand of the Appellant, and it was his argument as to what Mrs S could do under the terms of the Offer Letter. Even if (which was not accepted by the Respondent), the Appellant could argue he did not consider with sufficient care the Offer Letter, his conduct on 14 September 2022 was intentional and his own personal action.

79. The Adjudicator was not wrong to find that Mrs S did not have legal representation in the dispute with the Firm. There was no evidence that she had been represented. The Appellant treated Mrs S as a litigant in person writing directly to her, and Mrs S replied directly to the Appellant.

80. The Adjudicator was not wrong to find this was not a mistake or clumsiness; the words written were clear and unambiguous. The intent was to attempt to settle the complaint on terms of no reporting to the SRA. The Appellant was properly found to have committed serious misconduct. The Appellant attempted to buy off a claim to prevent a report about the firm and he intended to achieve that outcome. That is conduct that Rule 7.5 seeks to prevent and also what is emphasised in the Warning Notice as being wrong.

81. The Adjudicator was not wrong to find the Appellant was prompted twice by Mrs S. Following the sending of the Offer Letter, Mrs S wrote twice, on the morning 14 September 2022, and following receipt of the Response Email on 16 September 2022, then enclosing *Bond*.

82. Mr Weston noted that the Adjudicator's evaluation (upheld on review) was that:

- there was intentional misconduct on the Appellant's part
- that it was not corrected immediately
- it risked harm to Mrs S, by an experienced solicitor, who offered money to secure the outcome of no report being made to the SRA

83. The Adjudicator could not be criticised for not treating this as a minor or moderate breach of the Code. This evaluation was one the Adjudicator was entitled to reach.

84. Mr Weston said that the Adjudicator's decision should only be interfered with if the Tribunal as the appeal body *is satisfied that the decision was wrong or that the decision was unjust because of a serious procedural or other irregularity in the proceedings* and

the *Tribunal should not embark on an exercise of finding the relevant facts afresh. On matters of fact the proper starting point for the Tribunal in this case was the findings made by the adjudicator and the evidence before the Adjudicator. The Tribunal had to consider whether, on that evidence, the adjudicator was justified in making the factual findings that he did.*

85. The High Court had held that there should be some weight afforded to the Adjudicator's decision, and that it should not be interfered with *readily*.

86. The issuing of the sanction of a Rebuke was plainly an exercise of discretion based upon an evaluation of the factual position, and the exercise of a discretion was only wrong if it was unreasonable in the sense set out the last sentence of para. 40 of <u>Arslan:</u>

> *"In such a case the reviewing body ought not generally to interfere unless it is satisfied that the conclusion reached lay outside the bounds within which reasonable disagreement is possible."*

87. The Appellant admitted to the Adjudicator that he breached 7.5 of the Code. That provision of the Code prohibits an *attempt* to prevent reports to the SRA. The language of 7.5 of the Code is clear and plain.

88. The provision is fortified by the Warning Notice on NDA's (dated 12 November 2020) which applies by its first and second paragraphs to *"any form of agreement, under which it is agreed that certain information will be kept confidential… The guidance is relevant to all NDAs regardless of the context in which the NDA arises… ."*

89. The Warning Notice highlighted the concern that NDAs are used to *"prevent reporting to us"* and then states:

> *'We consider that NDAs would be improperly used if you sought to use an NDA as a means of preventing, or seeking to impede or deter, a person from reporting misconduct, or a serious breach of our regulatory requirements to us or making an equivalent report to any other body responsible for supervising or regulating the matters in question.'*

90. Mr Weston said it was plain that the Adjudicator considered the applicable legal and regulatory framework, the factual background, the Notice and the matters contained in it and considered the Appellant's response, and addressing the requirement that when considering the most appropriate sanction such consideration should start with the lowest sanction.

91. The Adjudicator then set out her findings and the reasons for them in detail, in particular the Adjudicator accepted the ambiguity in the Offer Letter and found that the Appellant's actual intentions had been revealed by his further email sent on 14 September 2022. The Adjudicator found that in the correspondence *" [the Appellant] was telling her that she could make a complaint to the SRA but, if she did so, the matter would not be settled or even capable of settlement. In short, the implication was that if she made a complaint to the SRA, she could not have her money.'*

92. The Adjudicator concluded that whilst there was no effect of the correspondence,

> *'the fact remains that the Appellant told Mrs S that she would be precluded from settling the matter if she made a complaint to the SRA. He did so on the basis that he felt that any agreement would be without purpose if it did not prevent a report to the regulator.'*

93. The Adjudicator rejected the Appellant's suggestion that this could be

> *'a mistake or misleading, as [the Appellant] claims. The implication in his email is unambiguous. Mrs S would not receive her money back unless she agreed not to go to the regulator'.*

94. For those reasons, the Adjudicator found that there was an attempt by the Appellant to prevent Mrs S reporting her concerns to the SRA and/or LeO.

95. In explaining her reasons for finding a breach of 7.5 of the Code, the Adjudicator emphasised that there was a clear attempt to prevent disclosures and in addressing the appropriate sanction, the Adjudicator plainly had in mind the need for the misconduct to be *sufficiently serious to amount to professional misconduct* and it would be disproportionate for *any* sanction to be imposed.

96. The Adjudicator explained in detail why a Rebuke was necessary and why taking no action was not appropriate because the Appellant's conduct had not been a mistake or an inadvertent breach. Whilst recognising the mitigation raised, there were aggravating features that justified more than a warning. The Adjudicator presented a reasoned approach to finding that a Rebuke to be a proportionate sanction because this was more than a minor or moderate breach of the rules. On the Appeal the Appellant relied on a statement dated 6 February 2024 prepared both for the unsuccessful review of the Adjudication and for the Appeal. Save for two matters it was submitted by Mr Weston that this statement, which was fresh evidence, should not be considered by the Tribunal as this was an appeal by review and the admission of fresh evidence was not in the interests of justice (<u>Arslan</u> para.38):

> *"Rule 52.11 makes it clear that a court or tribunal conducting a review should not generally receive new evidence that was not before the original decision-maker, although it may do so if justice requires it.."*

97. Mr Weston said there was no obviously good reason why it was not before the Adjudicator. The Appellant knew then what he raised now before the Tribunal. Most of the statement was repetitious of matters previously raised. Where new points were made, they were argumentative of the Adjudicator's decision e.g. he was an experienced solicitor, or speculative or expressing a personal opinion as to the sanction that ought to be have been imposed upon him.

98. There were also points of personal mitigation which were not relevant.

99. The two points that Mr Weston conceded to be admissible in the interest of justice were that Mrs S did have solicitors acting for her in September 2022. However, as he conceded they acted on the underlying dispute, not on the dispute between Mrs S and the firm. Second, the Appellant's position that *I now accept that what I wrote in my email of 14 September is not permitted and why that is the case. Indeed, that is*

something I recognised at the time.. [highlighting his quick correction]. However, Mr Weston said that it was clear that the Appellant did not treat Mrs S as being represented in the dispute with the Firm that he was seeking to settle. Had he done so he would have written to Mrs S' solicitors on the record and not to her.

100. In his communications with the investigation, the Appellant did not admit the breach of the Code (it was not admitted on 1 March 2023 and it was disputed in the COLP's letter of 2 March 2023 (into which the Appellant had input), it was not admitted in his email of 13 June 2023. Mr Weston said that those matters raised in the Appellant's statement and which were contradicted by other evidence, could be considered against him, in considering his credibility and insight, on this Appeal.

101. The Adjudicator considered all relevant matters and she had been entitled to find as she did, that the conduct was more serious than the Appellant contended it had been and to impose a proportionate sanction accordingly.

102. It was submitted by Mr Weston that for the reasons set out above the appeal should be dismissed by the Tribunal.

The Tribunal's Decision on the Appeal

103. The Tribunal had listened with care to the submissions made by the advocates on the parties' behalf and it had considered likewise the written material with which it had been presented.

104. In reaching its decision the Tribunal applied the approach endorsed by the High Court in Arslan as the correct approach to an appeal under section 44E. The Tribunal applied the civil standard of proof to the appeal, namely the balance of probabilities and it considered with care all the material submitted by the parties and it had regard to the oral submissions each side had made and to the authorities to which it had been referred.

105. A review was not an opportunity for the same arguments to be presented to a different decision maker in the hope they may take a different view. To interfere with a decision, the Tribunal had to be satisfied that the conclusions at first instance lay outside the bounds within which reasonable disagreement was possible.

106. As stated in Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2002] EWCA Civ 1642; [2003] 1 WLR 577

> *"In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere."* (para.15)

107. Also, in Assicurazioni the Tribunal noted the following set out in para.197 stated by Ward LJ:

> *"Bearing these matters in mind, the appeal court conducting a review of the trial judge's decision will not conclude that the decision was wrong simply*

> *because it is not the decision the appeal judge would have made had he or she been called upon to make it in the court below. Something more is required than personal unease and something less than perversity has to be established. The best formulation for the ground in between where a range of adverbs may be used-'clearly', 'plainly', 'blatantly', 'palpably' wrong, is an adaptation of what Lord Fraser of Tullybelton said in G D G (Minors: Custody Appeal) [1985] 1 WLR 642 , 652, admittedly dealing with the different task of exercising a discretion….*
>
> *…….If the challenge is to the finding of a primary fact, particularly if founded upon an assessment of the credibility of witnesses, then it will be a hard task to overthrow. Where the primary facts are not challenged and the judgment is made from the inferences drawn by the judge from the evidence before him, then the court of appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with an evaluation of those facts* (emphasis added).

108. In the present matter the Tribunal noted that the Adjudicator had not heard live witness evidence. The Adjudicator's decision had been based upon written evidence, all of which was before the Tribunal. The Tribunal was not therefore in an inferior position vis-à-vis the Adjudicator; it was in the same position. The Tribunal was able therefore to conduct its own evaluation of the evidence along with a review of the inferences and conclusions arising from the facts made by the Adjudicator.

109. On this basis the Tribunal considered that there was nothing to prevent it, as an appellate court, from reaching a different conclusion, if satisfied for good reason that a finding of the Adjudicator was wrong, or that the decision was unjust because of a serious procedural or other irregularity in the proceedings.

110. The Tribunal reviewed all the written material, and it was satisfied that the Adjudicator had set out the factual matrix correctly. Having done so the Adjudicator then went on to draw certain conclusions.

111. The Adjudicator determined that there were a number of aggravating factors which, in her view, meant *"that a more serious outcome than a warning* [was] *warranted to protect the public interest."* The aggravating factors as found by the Adjudicator elevated, in the Adjudicator's view, the Appellant's conduct above merely a minor or moderate breach of the rules.

112. The Adjudicator set out the factors from para. 6.25 onwards, summarised as follows:

- He was personally responsible for his conduct.
- He was and is an experienced lawyer and manager of a firm.
- He was personally responsible for the words he used in that email, which were contrary to paragraph 7.5 of the Code of Conduct.

- Although the breach was rectified, he only agreed to remove the provision from the offer after Mrs S raised it with him not once, but twice. In fact, his first response to Mrs S is what placed him in breach of his obligations.

- Mrs S did not have legal representation in her dispute with the firm and the Adjudicator was not aware whether Mrs S is or was legally qualified.

- Although the breach was rectified, it persisted longer than reasonable and was only rectified when prompted.

- There was a risk of harm, even if that harm did not materialise.

- He should have known and appreciated the content of the Warning Notice on the use of NDAs. (Though the Adjudicator did accept that his lack of personal knowledge of the Warning Notice on the use of NDAs did not necessarily render his conduct more serious).

- Paragraph 7.5 is entirely unambiguous. It is a simple prohibition against attempting to prevent anyone from making a report. Whether or not he knew the content of the Warning Notice or appreciated that it applied to his interactions with Mrs S, he had a responsibility to comply with paragraph 7.5.

- Mrs S (a lay client) was able to identify the meaning of paragraph 7.5.

- If Mrs S knew that the provision in the offer [was] problematic, then it is not unreasonable to expect him to have known they were inappropriate, whether or not he knew about the Warning Notice or thought that it applied.

- His intent and motivation. His email of 14 September 2022 was not a 'mistake'. His intention was to prevent Mrs S from reporting the firm to the SRA (or LeO).

113. The Tribunal reviewed the factors which the Adjudicator had characterised as 'aggravating factors' increasing the seriousness of the conduct, and it concluded that the Adjudicator had erred in treating them as truly aggravating factors.

114. The fact that the Appellant was personally responsible for his actions and for his choice of words in the correspondence could not, objectively, be viewed as aggravating factors. They were not matters which added anything to his admitted conduct. Had the Appellant deliberately hidden his personal responsibility then that could have been a legitimately aggravating factor but that was not the case here. The Respondent accepted at the outset that he had been responsible.

115. The fact that Mrs S, a lay client, was able to identify the meaning of paragraph 7.5 was similarly not an aggravating factor which raised the level of the seriousness. Had the Appellant sought to mislead Mrs S about the meaning of Paragraph 7.5 then this may have been an aggravating factor, but he had not done so.

116. It was a stretch of reasoning for the Adjudicator to conclude that his presumed *'intent and motivation'* was an aggravating factor particularly as there was no suggestion of any lack of integrity or dishonesty on the Appellant's part, and he had set out in his e-

mail *"We are not attempting to prevent you from providing information to the SRA. You are free to do so if you wish."* The Appellant accepted that the wording of his email of 14 September 2022 was confusing and, on its face, could be construed as amounting to a breach of Rule 7.5 and that was why he admitted the breach. There was no evidence before the Adjudicator that this had been anything more than a mistake caused by the Appellant's lack of knowledge. The Adjudicator acknowledged that any attempt to actually prevent Mrs S from reporting the firm to the SRA would have been fruitless and unenforceable and that while there was a risk of harm none materialised.

117. The Adjudicator overstated the delay in which the mistake was remedied, this had a been no more than a few hours.

118. The remaining factor which raised the seriousness of the conduct essentially boiled down to the fact that the breach was only rectified after the client queried the terms of the offer.

119. The Adjudicator accepted the following mitigating factors:

- This was an isolated incident.
- The Appellant had a previously unblemished record.
- The Appellant had shown insight and remorse
- The risk of repetition was extremely low
- The breach had been remedied
- There was as no lasting or significant harm

120. The Adjudicator gave insufficient consideration to the mitigating factors which would have enabled the Adjudicator to reach a more nuanced and balanced decision on the question of seriousness and ultimately the proportionality of the sanction. The Adjudicator did not appear to have taken the Appellant's admission into consideration as a mitigating factor and this had been an error on the Adjudicator's part.

121. Without the existence of the aggravating factors identified by the Adjudicator and now discounted by the Tribunal the Appellant's conduct could not be *"elevated above merely a minor or moderate breach of the rules"* and to this end the Tribunal concluded, on the balance of probabilities, that a Rebuke had been a disproportionate sanction in all the circumstances and that the Adjudicator's decision should therefore be revoked.

122. Finally, with respect to the fresh evidence, the Tribunal had considered this material on a provisional basis but without reaching an immediate decision on admissibility. In the event, the Tribunal did admit the fresh evidence but gave it little weight as the basis of its decision rested in large measure upon the flawed approach adopted by the Adjudicator with respect to mitigating and aggravating factors.

Costs

123. In view of the Tribunal's decision on the appeal the parties agreed that there should be no order for costs. The Tribunal agreed with this course which was a reasonable position for the parties to take in the circumstances in this case.

Statement of Full Order

124. The Tribunal ORDERS that the appeal made under S.44E of Solicitors Act 1974 ("the Act") by LIAM CONNOLLY of 17 Castle Street, Reading, Berkshire, RG1 7SB be ALLOWED and it REVOKES the Society's order made under 44D of the said Act.

It further Orders that the there be no order for costs.

Dated this 8th day of November 2024
On behalf of the Tribunal

A E Banks

A E Banks
Chair

JUDGMENT FILED WITH THE LAW SOCIETY
08 NOV 2024