SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11650-2017

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

PETER ELSTON GERMAIN Respondent

Before:

Mr E. Nally (in the chair)
Mr M. Jackson
Mr S. Hill

Date of Hearing: 17 October 2017

Appearances

David Collins, counsel of Capsticks Solicitors LLP, 1 St George's Road, Wimbledon, London SW19 4DR for the Applicant

The Respondent appeared and represented himself.

JUDGMENT

Allegations

1. The allegations against the Respondent on behalf of the Solicitors Regulation Authority were that he:

1.1 On various dates during December 2012, while acting for Client A in bringing a personal injury claim, made statements to Client A concerning her claim which were untrue and misleading and which he knew to be untrue and misleading, and in doing so breached all or any of Principles 2, 4, 5 and 6 of the SRA Principles 2011.

1.2 acted dishonestly in respect of the facts and matters set out at 1.1 above, but dishonesty is not a necessary ingredient to the breaches alleged above.

Documents

2. The Tribunal reviewed all the documents including:

Applicant

- Rule 5 Statement dated 5 May 2017 with exhibit DWRP1
- Applicant's schedule of costs to hearing on 17 October 2017 (misdated hearing stated to be on 18-19 October 2017)
- Copy of extract from the Property Register for the Respondent's residence
- Internet printout in respect of estimated value the Respondent's residence

Respondent

- Respondent's Answer to the Applicant's Rule 5 Statement dated 16 June 2017
- Respondent's witness statement dated 26 September 2017

Factual Background

3. The Respondent was admitted to the Roll in 1997. At the relevant times he practised as a member of Sibley Germain LLP, having previously practised as sole Principal of a firm originally (between 2004 and 2008) named Elston Germain Davidson. At the time of the hearing the Respondent held a conditional Practising Certificate.

4. The Applicant received a report from Sibley Law concerning the Respondent's conduct in acting on behalf of a client. During the course of 2011 and 2012, the Respondent acted for Client A on a claim for damages to be brought by Client A against her employer.

5. The Respondent caused proceedings to be issued in the Lambeth County Court on 17 May 2011. A Defence was filed on 24 June 2011.

6. By an order dated 9 September 2011, the Lambeth County Court ordered that the claim would be struck out if an Allocation Questionnaire was not filed on behalf of the Claimant (Client A) by 21 September 2011. The Respondent caused an Allocation Questionnaire to be filed on 21 September 2011.

7. On 11 October 2011, the Lambeth County Court gave directions that a trial would be held on 12 April 2012, with a joint expert report to be filed by 20 December 2011.

8. The Defendant made a Part 36 offer of £5,000 which the Respondent rejected on 31 January 2012 on behalf of Client A.

9. On 31 January 2012, the Court ordered that an orthopaedic surgeon's report should be filed by 15 May 2012. The Respondent did not comply with that order.

10. A further order, of 2 June 2012, required an orthopaedic surgeon's report to be filed by 31 August 2012.

11. On 2 November 2012, at a hearing at which Client A was represented, the claim was struck out because of the failure to comply with orders concerning the appointment of an expert. The order included an order that Client A pay the Defendant's costs.

12. On 6 November 2012, the Respondent wrote to Client A inviting her to attend an appointment at his office. He did not, in that letter, inform Client A that her claim had been struck out; instead his letter proposed a meeting "to discuss the current position and the way forward".

13. On 5 December 2012, the Respondent wrote to the solicitor to the Defendant with regard to their costs.

14. The Respondent subsequently wrote to Client A on 20 December 2012. The letter included:

> "I confirm that following the serious considerations and risks involved in pursuing the litigation you instructed me to accept the offer being made by [Client A's employer] in the sum of £5,000 together with costs.
>
> Your decision was based on the fact that whilst [Client A's employer] accepted the major proportion of liability for the accident they were strenuously defending the cause and extent of the injuries suffered.
>
> ...
>
> We discussed the risks and the outcome if you were to lose the case. As an offer had been made, if you achieved a damages award of the same amount as the offer or less you would be responsible for the othersides' (sic) costs from the date of the offer... You did not wish to take this risk and I have therefore accepted the offer made.
>
> I was hoping to conclude the matter before Christmas but I have not yet received payment but hopefully it may be received at the end of next week or very early in the new year.
>
> As far as your own costs are concerned there will be no sums to be paid by you and I will recover all costs from the insurers."

15. The Respondent corresponded further with the Defendant's solicitors on 28 January and 4 February 2013, when he agreed to a payment of £9,000 in settlement of the Defendant's costs.

16. The Respondent claimed, in a letter to the Applicant dated 29 April 2016 that he had informed Client A, at a meeting shortly after the hearing on 2 November 2012, that her claim had been struck out and of the option of seeking independent advice from another solicitor. He claimed that an agreement was reached whereby he would make a payment of £12,500 to Client A.

17. The Respondent claimed that the "deception" in his letter of 20 December 2012 was directed towards Client A's partner ("...the deception in my letter was only to placate Mr [B]"); was made with the agreement of Client A; and was intended to prevent Client A's partner from finding out about the payment being made to her by the Respondent.

18. On 6 April 2016, the Applicant wrote to the Respondent offering him an opportunity to explain, comment on and respond to the allegations. The Respondent did so in his letter of 29 April 2016 referred to above. On 5 April 2017, an authorised officer of Applicant decided to refer the conduct of the Respondent to the Tribunal.

Witnesses

19. There were no witnesses.

Findings of Fact and Law

20. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondent's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

21. **Allegation 1.1 - On various dates during December 2012, while acting for Client A in bringing a personal injury claim, [the Respondent] made statements to Client A concerning her claim which were untrue and misleading and which he knew to be untrue and misleading, and in doing so breached all or any of Principles 2, 4, 5 and 6 of the SRA Principles 2011.**

Allegation 1.2 - acted dishonestly in respect of the facts and matters set out at 1.1 above, but dishonesty is not a necessary ingredient to the breaches alleged above.

(Submissions set out below include both those made at the hearing and in the documents.)

21.1 For the Applicant, Mr Collins submitted that the allegations concerned a letter which the Respondent had written to Client A following her claim having been struck out on 2 November 2012 following non-compliance with orders concerning the appointment of an expert. The documents were not disputed between the parties. The Respondent's letter dated 20 December 2012 contained false pieces of information: that there was an open offer from the Defendant in the sum of £5,000; that the matter could still proceed to trial; that the Respondent had accepted an offer for Client A; that the

Respondent would recover costs from an insurer; and that the Respondent was expecting to receive a payment on behalf of the Defendant. Mr Collins submitted that it was not disputed that the letter was incorrect. In asserting this he relied on the Respondent's Answer and the Respondent's letter to the Applicant dated 29 April 2016 which acknowledged that the letter dated 20 December 2012 was a "deception". It was the Respondent's case that his letter was written with Client A's knowledge and was sent out to placate her partner Mr B so that any misinformation in it was not dishonest. The Applicant said the opposite; that the Respondent's behaviour would be regarded as and was dishonest; that the Respondent knew that it might be relied on by third parties and it was prepared with that intention to mislead which amounted to dishonesty. The fact that the Respondent said that the letter was written on instructions in order to deceive did not change the fact of dishonesty. It was submitted that the Respondent's actions were dishonest in accordance with the test applied in the context of solicitors disciplinary proceedings that is the combined test laid down in the case of Twinsectra Ltd v Yardley [2002] UKHL 12 that the person has acted dishonestly by the ordinary standards of reasonable and honest people and realised that by those standards he or she was acting dishonestly. The Respondent deliberately created a letter addressed to a client containing knowingly false and misleading information about the outcome and status of litigation. The preparation of such a letter by solicitor, in the knowledge that it might be relied on by or produced to third parties, would be viewed as dishonest by the standards of ordinarily honest people. The Respondent was aware that the letter was being prepared with a specific intention that it would be produced to a third party and admitted that it contained a "deception" directed towards a third party. The Applicant therefore submitted that the Respondent must have known that the preparation of such a letter, deliberately prepared with the intention of misleading a third-party as to matters of fact, would be viewed as dishonest. The Respondent acted dishonestly in writing the letter of 20 December 2012 even if as he claimed, it was not intended to mislead Client A but to mislead others. A solicitor acted dishonestly in creating a document intended to mislead a client or any other party as to the conduct or outcome of court proceedings by making factually incorrect statements.

21.2 Mr Collins submitted in respect of the SRA Principles which it was alleged the Respondent had breached, Principle 2 which required a solicitor to act with integrity, Principle 5 which required a solicitor to provide a proper standard of service to their clients, and Principle 6 which required a solicitor to behave in a way that maintains the trust the public places in them and in the provision of legal services) that providing a misleading document even if it was to be used as the Respondent alleged would be acting without integrity. It would also fail to maintain public trust because solicitors were expected not to produce inaccurate letters and not to mislead. Acting in this way would not be providing a proper service to the client. Principle 4 required a solicitor to act in the best interests of each client. Mr Collins submitted that it was a matter for the Tribunal's judgment whether it accepted the Respondent's account of events. Even if the Tribunal accepted what the Respondent said it might wish to consider whether perpetrating a deception was in the interests of any client even if the client had required the letter to be written in those terms.

21.3 The Tribunal sought clarification from Mr Collins as the scope of allegation 1.1; it was a broad allegation "on various dates…" Mr Collins submitted that he focused on the Respondent's letter of 20 December 2012. The Tribunal also wished to know

whether the Applicant had had any contact with Client A. Mr Collins confirmed that there had been contact and a draft statement had been prepared but not finalised. He did not invite the Tribunal to consider what might or might not have been said in the draft but referred to the medical conditions of Client A mentioned in her claim. Mr Collins agreed that if Client A had given information to the Applicant which was supportive of what the Respondent said, that information was potentially disclosable as unused material. Mr Collins responded that the information was not considered to fall within the test for unused material but the Respondent had made an application for specific disclosure and the draft was disclosed to him.

Evidence of and Submissions by the Respondent

21.4 The Respondent submitted that he was profoundly sorry that Client A's claim had been struck out in the first place and he expressed his apologies to his client at the time. The way he was required to deal with the matter was to try to ameliorate potential problems and no one but Client A saw the letter of 20 December 2012 and so he had not misled anyone else. Client A understood what was being said in the letter – that the matter had been settled in the sum of £5,000 when in fact she had received £12,500. Had there been any query by the client as to the letter it would have been regarding the discrepancy between the sum referred to in the letter and the amount actually paid. The letter was not written with any intention of being dishonest at the time and the Respondent did not believe that he had been dishonest. The intention of the letter was to placate and not to deceive.

21.5 The Respondent gave sworn evidence. He adopted his Answer and witness statement. In cross examination, he agreed that he would expect a letter received from a solicitor to be accurate but he also stated "in accordance with instructions received". The Respondent had drafted the letter of 20 December 2012 on his own. He accepted that there was incorrect information in the letter, in that there was no offer on the table at that time; and no funds had been received from the defendant nor costs from insurers. The Respondent stated that Client A came in to see him and he explained what had happened. She was sympathetic to his position and personal problems; he had known her for many years. The Respondent spoke to Client A about the options: she could claim against his firm (in respect of her claim having been struck out), the firm would refer to its professional indemnity insurers who would deal with the matter relying on the same defence as the Defendant regarding her existing medical conditions. This had been the reason why an offer of only £5,000 had been made. He explained the option of his making payment to her and dealing with the costs. He would have said that she should take independent advice but the matter had been dragging on for some time; the Defendant had been slow to deal with it. Proceedings had been issued close to the expiry of the limitation period; the client had sustained her injuries some years before (on or around 20 June 2008). The client wanted the matter concluded. She was concerned about her partner Mr B. The Respondent had met him with her in around 2004 or 2005 in connection with his financial matters in the course of which Client A had remortgaged her house. She was concerned about his reaction to the matter having been struck out and to her settling it. The Respondent stated that he had said that they could write a letter about the acceptance of the offer, setting out the risks. The Respondent had put her in this position and did not want to make it more difficult. What he had been asked to write was in the letter. He did not recall why he had said he was hoping to conclude the matter before Christmas; he thought that was

something that had come up in conversation when they discussed when she would receive the funds. He did not have access to his diary for 2012 but believed the meeting between them took place before 20 December. He thought that they discussed when the payment would be made in case Mr B asked. He thought the meeting took place on 6 or 7 November 2012. In respect of the rest of the paragraph in question where he said he had "not yet received payment but hopefully it may be received at the end of next week or very early in the new year" the Respondent stated that he had to borrow the money to pay the client.

21.6 In cross examination, the Respondent agreed the letter was written in a formal style using professional language. He agreed that the letter was sent on the firm's headed notepaper with the file reference. The Respondent stated that Client A knew the contents of the letter were not correct and it was not written to cover anything up. Anyone seeing a letter from a solicitor regarding the conclusion of a personal injury claim would expect to see a letter in these terms and if Mr B ever saw the letter he would see the terms on which the client had concluded the settlement. The Respondent stated that he did not know who else would see the letter. So far as he recalled he did not speak to Mr B following production of the letter and he was never contacted by Mr B. From his discussion with Client A, the Respondent stated that he was only aware that the letter would be shown to Mr B if the client needed to explain to him what had happened. It was not intended for anyone other than Client A and to be shown to Mr B. Certainly the explanation in the letter was not what happened. The Respondent denied that he had taken advantage of his position as a solicitor where he was expected to write a truthful letter. This was something he and the client had discussed; it was a way of trying to prevent any further distress when she was already in a distressful situation (and one into which he had put her). The Respondent stated that if he had not written a letter and the client had gone forward in the normal way and made a claim against his firm's insurers it would have prolonged her distress and placed her in the same position but in a year's time. The Respondent stated that at the time he felt it was better to deal with the matter in this way.

21.7 As to the offer of £5,000 in settlement which had been made by the other side, the Respondent confirmed that he had previously advised the client to refuse it; he had considered it insufficient and still did. The letter was premised upon the client accepting an offer of £5,000 with costs and set out what appeared to be advice and risks in respect of that position. The Respondent denied that the relevant paragraphs were all made up; there was an offer of £5,000 and had the matter proceeded the letter would have actually set out the position. What was incorrect was that the matter had been struck out. Client A did have pre-existing medical conditions and sadly was unwell and had other difficulties not associated with her injuries. Mr B seeing this letter would understand and not create difficulties. Client A accepted a sum substantially in excess of £5,000. The Respondent and Client A did not believe that what was being done was dishonest. The client did not want Mr B to know about the £12,500. There was evidence going back to 2004 or 2005 that the client had remortgaged her house to assist him in his financial troubles. Mr B showed an interest in the outcome of the claim. The Respondent stated that the client believed that if he wrote a letter setting out the correct position that the case had been struck out but that the Respondent would settle the client's claim for her to avoid any further inconvenience and costs, Mr B would not want to leave it at that. The Respondent assumed that this would be to see if a larger amount could be gained.

21.8 The Respondent confirmed that he had paid the other side's solicitors from the same source as he had paid the client. He stated that there was an excess of £10,000 on the firm's professional indemnity insurance and it would be cheaper for him to go through the insurers but he did not want to create more difficulties than he already had.

21.9 In terms of the allegations that he had been in breach of SRA Principles, the Respondent felt that certainly allowing the matter to be struck out did not provide a good service to the client and he apologised to her. Acting with integrity towards the client was important and he thought there was more integrity in trying to assist her having let her down once. As to maintaining trust; the Respondent thought that the client trusted him. When she was contacted in 2015 by the Applicant, the Respondent had told her to co-operate. She was concerned that she would have to repay the money which he had paid her but even then she was confident in contacting him. She was one of his fairly early clients and had instructed him in an entirely different matter; the remortgaging but not with the scheme of arrangement with her partner's creditors itself.

21.10 The Respondent stated that Mr B had certainly contacted the Respondent after the personal injury proceedings had been issued. The Respondent recalled one particular call; Mr B's attitude to the payment into court was that it was not enough; he expected the client would receive a higher figure. The Respondent stated that he saw the client from time to time. He could not recall whether the client or Mr B contacted him more frequently.

21.11 The Respondent was unable to assist about the gap between his writing to the client on 6 November 2012 and his letter of 20 December 2012. He thought his meeting with the client took place quite quickly after 6 November 2012; possibly the following week. The Respondent clarified for the Tribunal that a copy of the 20 December 2012 letter would have been placed on file. After his discussion with Client A he approached a friend who agreed to lend him the money. In late January 2013, the Respondent had made payment to the client from his personal account. He therefore assumed he had approached the friend at that time.

21.12 The Respondent was asked by the Tribunal about his Answer where he said that "As far as I am aware, and the Rule 5 Statement does not make any positive statement to the contrary, the letter was not in fact seen by anyone other than Client A." The Respondent stated that he took that from the fact that there was no positive evidence that it had been seen by anyone else. He acknowledged that if Mr B had seen the letter of 20 December 2012 he would have seen the settlement agreed on terms less than it was; £5,000 as supposed to £12,500 and certainly he would have been misled on that point.

Determination of the Tribunal in respect of Allegation 1.1

21.13 The Tribunal had regard to the evidence and the submissions for the Applicant and the evidence and submissions by the Respondent. Allegation 1.1 referred to various dates during December 2012 but for the Applicant, Mr Collins had clarified that the focus of the allegation was on the specifics of the 20 December 2012 letter from the Respondent to Client A. The Respondent's suggestion to the Tribunal was that the

client guided him to draft the letter so that it referred to a £5,000 settlement rather than the true figure of £12,500 which the Respondent had paid to the client. The Tribunal found as a fact that the Respondent had made statements to Client A in a letter addressed to her which were untrue and misleading. He wrote the letter of 20 December 2012 in fabricated terms even if she had encouraged him to do so. The Respondent accepted that what he wrote was factually untrue. The Tribunal considered it was shot through with inaccuracies and whatever the Respondent's motives, a reader would be presented with a completely inaccurate version of what had happened. The contents of the letter could not be relied on. If it had been deployed by the client it could have misled all sorts of people. On the Respondent's own evidence, Mr B would have been misled into believing that his partner had settled for less than she actually would receive. The Tribunal found that this was a specifically crafted letter which had been embellished to include advice and analysis of the risks in accepting a settlement. The Tribunal noted that it flew in the face of the Respondent's previous advice to the client to reject an offer of £5,000 made in October 2011 based on the same underlying facts. The Tribunal determined that in writing the letter of 20 December 2012 with the admitted intention of deceiving a third party, the Respondent had failed to act with integrity and that breach of Principle 2 was proved on the evidence to the required standard. In respect of Principle 5, the Respondent accepted that he had not provided a proper standard of service because his client's claim had been struck out but this was not part of the pleaded allegation. The Tribunal had to consider whether Principle 5 was engaged by his writing the inaccurate letter. The Tribunal noted that when the subject of the letter was raised with the client the situation unravelled to her distress; she thought that she might have to give back the money that the Respondent had paid her. There were risks that she might use the letter and become involved in further problems. For those reasons the Tribunal considered that the Respondent had failed to provide a proper standard of service to Client A and that breach of Principle 5 was approved on the evidence to the required standard. In respect of Principle 6, the Tribunal determined that in order to maintain public trust in the profession and in individual solicitors they must not craft factually incorrect letters to suit particular circumstances with the objective of misleading a third party. The Tribunal therefore found breach of Principle 6 proved on the evidence to the required standard.

21.14 The Tribunal then considered whether it could ever be in the best interests of a client to allow oneself to write such a letter. While it might have seemed like a good idea in the circumstances, one would expect a solicitor to take a wider view. There was a line beyond which a solicitor should not go. It would have been better for the Respondent not to have written at all or to have written a letter explaining that the proceedings had been struck out, admitting that it was his fault and explaining the options for the client including taking independent advice, accepting his offer or going down the insurance route. Incidentally the Tribunal considered that the mismatch between the amount stated in the letter that £5,000 and the amount which he paid the client at £12,500 tended to support his version of events that the letter was written to prevent B knowing what the amount of the settlement he had made with the client actually was (rather than attempting to mislead Client A). The Tribunal noted that the letter might have prevented Client A having problems with her partner but equally could have aggravated them as in doing so the Respondent had associated her with the creation of a false document. He did not know how the situation would unfold and he could have exposed the client to adverse consequences at a later stage. The Tribunal could not see

how the creation of a contrived and fabricated letter of itself could ever be in the client's best interests. It accordingly found that Principle 4 was engaged and proved on the evidence to the required standard. The Tribunal therefore found all aspects of allegation 1.1 proved on the evidence to the required standard.

Determination of the Tribunal in respect of Allegation 1.2 Dishonesty

21.15 The Tribunal considered the allegation of dishonesty according to the two limbed test in the case of Twinsectra. The Tribunal considered whether in making the untrue and misleading statements in the 20 December 2012 letter what the Respondent did was objectively dishonest. The Respondent had created a completely false picture of the status of the litigation and the steps which would follow. The form of the letter proceeded on the basis that it set out the client's instructions in respect of the litigation. The Respondent's evidence was that he frankly informed the client that her claim had been struck out and that she was sympathetic to his position at a time when he had family health issues; that he advised her of the options, that is she could settle quickly with him or go through the firm's insurers and that she could seek independent legal advice. A letter in those terms would have reflected her instructions about the litigation. The letter that the Respondent wrote did not set out the client's instructions. The Tribunal agreed with the assertion in the Rule 5 Statement that the preparation of such a letter by a solicitor in the knowledge that it might be relied on by or produced third parties would be viewed as dishonest by the standards of reasonable and honest people. The Tribunal then considered the subjective test; whether the Respondent knew that what he did would be viewed as dishonest. The Respondent said that he acted from pure motives; to help prevent the client suffering further difficulties with a partner whom she felt was interested in her potential financial benefit from the litigation. The Respondent knew that he was creating a letter designed to mislead that individual; he knew that it included several untruths regarding the status of the litigation, the costs position and the amount of the settlement and the risks of the litigation. The Respondent was an experienced personal injury litigator who had been admitted in 1997. He had to go through several steps to bring the situation to a close including arranging finance by borrowing money from a friend. He knew that even if he had drafted the letter with the client's blessing it included misleading statements and that thereby the objective of the letter would be achieved; he accepted that a reader would be misled. Writing the letter to one person with the intent of deceiving another was a deliberate and very conscious act. The letter was elaborate and not something the Respondent could have dashed off. It drew elements from the facts of the case. He engaged in a level of detail. The Respondent used the word "deception" in respect of the inaccurate information in the letter he was writing. As a solicitor, the Respondent knew that he was writing a misleading letter; he knew of its intended impact and that it was created as a device to deceive. He did this as an officer of the court. The Tribunal concluded that this was someone who knew what he was doing and that he knew that his doing it was dishonest. The Tribunal therefore found that the subjective test for dishonesty was proved. The Tribunal found allegation 1.2 proved to the required standard on the evidence.

Previous Disciplinary Matters

22. None.

Mitigation

23. The Respondent relied on what he had said in his own defence and the reasons for what he had done. He had conditions placed on his practising certificate for the previous two years which had prevented him from working and he had suffered financially because of that. The Respondent submitted that in the case of Shaw v Solicitors Regulation Authority [2017] EWHC 2076 (Admin) it was made clear that striking off was not an automatic sanction where dishonesty was found proved. The Tribunal should take into account the seriousness of the matter and the harm that had been inflicted. The Respondent submitted that he had written a letter and no one other than the client had seen it. No harm had been caused so far as the firm was concerned and the matter has occurred five years ago. He had been a solicitor for 30 years and had wanted to end his career as one. If the Tribunal was inclined to strike him off, he asked it to take into account that his current practising certificate expired at the end of October 2017 and he had not applied to renew it. He was prepared to agree not to do so. The Tribunal invited him to make submissions in respect of any exceptional circumstances which might mitigate against a striking off. The Respondent submitted that the absence of harm resulting from the finding of dishonesty would be a mitigating factor. As to his financial situation, the Respondent was in receipt of state and other pensions and undertook some work part-time in-house for accountants. He had also helped out a family member in their law firm occasionally. He was not presently working. He had been made aware that he needed to submit evidence of means if he wished the Tribunal to take his financial position into consideration in making any orders.

Sanction

24. The Tribunal had regard to its Guidance Note on Sanctions and to the mitigation offered by the Respondent. In assessing the seriousness of the Respondent's misconduct, the Tribunal took into account his motivation. On his case he had acted as he did to assist a client and mislead her personal partner. The Respondent's actions had been planned; he had written to the client asking to see her on 6 November 2012 and thought that he had met with her within a week or so of that letter and the dishonest letter had not been sent until 20 December 2012. He had been in correspondence with the other side's solicitors in the interim; his letter of 5 December 2012 referred to theirs of 23 November showing that he was engaged with the matter during the period 6 November to 20 December 2012. The Respondent had direct control over and responsibility for the circumstances giving rise to the misconduct; he was the fee earner in the matter, a partner and the writer of the letter. He was an experienced litigator who qualified in 1997 and a member of the firm. As such he was responsible for any harm caused. The Tribunal considered that there had been harm. When the false contents of the letter came to light the lay client was subject to further distress and inconvenience by being contacted by the regulator. She was anxious that she might have to return the money and she already had long-standing health problems. The Tribunal considered that the Respondent had lost his moral compass and departed to a great extent from the complete integrity, probity and trustworthiness expected of a solicitor with the commensurate harm to the reputation of the profession. The implication of what the Respondent had done was that a solicitor could be persuaded to write a bogus letter at a client's request. The Tribunal considered that the harm was foreseeable; even on the Respondent's own

case there was a real risk of client showing the letter to a third party and the potential consequences which would arise if the third party discovered that it was fabricated. This was therefore very serious misconduct. There were also aggravating factors; dishonesty had been alleged and found proved; the conduct was calculated and deliberate. The Respondent ought reasonably to have known that the conduct complained of was in material breach of his obligation to protect the public and the reputation of the legal profession. In terms of mitigating factors, the Respondent had not previously been before the Tribunal and this was a single incident of misconduct in an otherwise unblemished career. The Respondent had acted to help the client but he should properly have been advising her that this course of action was unacceptable. The Tribunal gave the Respondent credit for the fact that he had reimbursed the client in respect of her claim being struck out. The Tribunal did not consider that the Respondent had shown any particular insight into his actions although he was clearly genuinely regretful that the case had been struck out and he had not disputed the factual basis of the allegations. The Tribunal considered the various sanctions; dishonesty having been found the Tribunal considered that the misconduct was too serious for a reprimand, a fine or restrictions. As to a suspension, the Tribunal did not consider that a fixed term suspension would be sufficient to protect the reputation of the legal profession and the circumstances were not such that an indefinite suspension would be appropriate. The Respondent had been invited to make submissions about exceptional circumstances and he had referred to the absence of identifiable harm to the client. However the Tribunal considered that the circumstances in which the client found herself were not so extreme as to constitute exceptional circumstances, as there was no evidence to show that Client A was at any risk from Mr B if he had become aware of the true outcome of the litigation. The Tribunal therefore considered that for the protection of the public and the reputation of the profession no less a sanction than strike off would be appropriate.

Costs

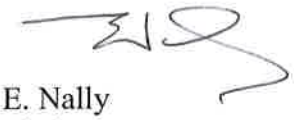
25. Mr Collins applied for costs to be awarded to the Applicant in the amount of £22,830. He explained that the figure had been arrived at based on a fixed fee arrangement between his firm and the Applicant and he acknowledged that the costs schedule was based on a two-day hearing estimate which had been reduced to one day. Mr Collins explained that there had been a wider investigation into the Respondent's practice involving a significant amount of work. This case crystallised from that work. The schedule focused on extracting the allegations against the Respondent as finally drafted. In regard to the Respondent's means Mr Collins provided the Tribunal with Land Registry copy documents and valuation information from the Internet about his residence. The Respondent confirmed that the estimated value of his home of which he was a joint owner was in the region of £800,000 and that there was a very small mortgage. The Tribunal summarily assessed the Applicant's schedule of costs. The Tribunal noted that the costs at the date of issue of the proceedings 5 May 2017 amounted to £5,181 and that work amounting to 26 hours as at May 2017 had shot up to 68.5 hours in October 2017 and the Tribunal considered that the description of work done was somewhat scanty. That additional work did not include the drafting of the Rule 5 Statement and exhibit which by definition had already been prepared in May 2017. The Tribunal did not consider that the costs, as at the date of issue 5 May 2017, were unreasonable but that the amount of work claimed for subsequently was excessive. It would allow costs claimed at the date of issue of the proceedings

including the £525 claimed for the Applicant's investigation costs. Capsticks' costs would then be assessed at 10 hours from 5 May 2017 to this hearing date including preparation for and attendance at the one CMH and four hours for this hearing day totalling 14 hours. Costs were therefore assessed at £5,181 including VAT where appropriate as at 5 May 2017 and then £2,688 including VAT for the period up to and including the substantive hearing, totalling an amount of £7,869 in costs which the Tribunal awarded to the Applicant. The Respondent had not made any submissions regarding the affordability of costs so the order would be enforceable.

Statement of Full Order

26. The Tribunal Ordered that the Respondent, PETER ELSTON GERMAIN, solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £7,869.00.

DATED this 10th day of November 2017
On behalf of the Tribunal



E. Nally
Chairman