Neutral Citation Number: [2018] EWHC 2726 (Admin)

Case No: CO/146/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION COURT
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/10/2018

Before:

LORD JUSTICE DAVIS
MR JUSTICE FOSKETT
and
MR JUSTICE HOLGATE

- -

Between:

SOLICITORS REGULATION AUTHORITY **Appellant**

- and -

(1) MARTYN JEREMY DAY **Respondents**
(2) SAPNA MALIK
(3) ANNA JENNIFER CROWTHER
(4) LEIGH DAY (a firm)

- -
- -

Timothy Dutton CBE QC, Andrew Tabachnik QC, Heather Emmerson and **Nick Daly** (instructed by **Russell Cooke**) for the **Appellant**
Patricia Robertson QC and **Paul Gott QC** (instructed by **Clyde & Co**) for the **Respondents**

Hearing dates: 17 - 20, 23 - 24 July 2018

- -

Judgment Approved

Lord Justice Davis, Mr Justice Foskett and Mr Justice Holgate:

Introduction

1. After a very hard fought hearing, extending over some 6 weeks, before an experienced panel of the Solicitors' Disciplinary Tribunal (Mr S. Tinkler, Chair, Mr R. Hegarty and Mrs L. Barnett), the Tribunal on 22 September 2017 dismissed all allegations of breach of professional conduct rules variously brought against the respondents. In respect of some, though not all, of the allegations which were dismissed one of the solicitor members (Mr Hegarty) dissented.

2. By a subsequent decision on costs, the Tribunal directed that there be no order as to costs. This again was a majority decision. The chair on this occasion dissented, taking the view that the applicant Solicitors Regulation Authority (SRA) had in some respects pursued allegations unreasonably and should pay 40% of the costs.

3. The SRA now appeals against the dismissal of certain of the allegations (allegations 1.1, 1.2, 1.4, 1.8, 1.12, 1.13, 1.14, 1.15 and 1.19). It does not appeal against the dismissal of the remaining allegations. For their part, the respondents do not cross-appeal against the decision on costs.

4. The appeal hearing before this court itself extended over six days (quite apart from pre-reading): a very long time indeed compared to the norm for Divisional Court cases. The case was meticulously and elaborately argued, with the closest attention to detail. Notwithstanding efforts by the parties to prune the documentation from the vast quantity presented to the Tribunal, this court was nevertheless confronted with many folders of documents and transcripts; extremely lengthy "skeleton arguments" (so called); and bundles of authorities comprising in excess of a hundred authorities, notwithstanding that the disputed matters were primarily ones of fact and of evaluative judgment. The hearing itself, however, was greatly assisted by a relatively concise list of issues directed by the court and agreed by the parties, by reference to which the arguments were mainly directed.

5. All this doubtless reflects the very great importance both sides have understandably attached to these proceedings and to their outcome. But it has also been an inevitable further consequence that, quite apart from the time expended in the investigations and proceedings, the costs thus far have become simply enormous – deep into seven figures, on the figures presented to us.

6. Before us, the appellant SRA was represented by Mr Dutton QC, Mr Tabachnik QC, Ms Emmerson and Mr Daly. The respondents were represented by Ms Robertson QC and Mr Gott QC. All counsel had also appeared below. We would like to place on record the immense care and thoroughness evidenced in the submissions made to us.

7. We have sought to bear in mind all points made before us. Nevertheless, we make clear at the outset that in this judgment (to which all members of the court have contributed) we have absolutely no intention of specifically traversing every individual point raised. To do so would be neither a necessary nor an appropriate part of the appellate judicial process in a case of this kind.

The respondents

8. The first three respondents are all solicitors. The first respondent, Martyn Day (MD), was admitted in 1981. At all material times he was senior partner in the well-known firm of Leigh Day, the fourth respondent, whose principal place of business is in London. He was also head of its International and Group Claims Department.

9. The second respondent, Sapna Malik (SM), was admitted in 1998. She was at all material times a solicitor in the International and Group Claims Department, becoming a partner in 2005.

10. The third respondent, Anna Crowther (AC), was a trainee solicitor with Leigh Day before qualifying as a solicitor in 2008, when she remained with the firm working in the International and Group Claims Department.

11. Leigh Day itself has a high profile, with one particular area of expertise (among others) being reflected in the work undertaken by its International and Group Claims

Department. It has over the years frequently been involved, as solicitors, in class and group actions against large corporations or governments or executive branches of government.

12. Very many character references were deployed before the Tribunal – as before us – from individuals such as retired High Court Judges, QCs, junior barristers, fellow solicitors, academics and others attesting in the highest terms to the integrity, professionalism and commitment of each of the individual respondents. In addition, many references were also provided with regard to the firm itself.

13. For example, so far as MD is concerned references variously refer to him as a "forceful and pioneering litigator": one whose motivation "is to see that justice is done, championing the underdog and ensuring access to the law for people who are powerless and at the bottom of society". With regard to Leigh Day, one academic referee says that the firm "has significantly advanced the law on human rights and corporate accountability" and in doing so has "materially improved the position of some of the most vulnerable members of society in the United Kingdom and overseas."

14. It appears, however, that there may also be other perceptions of the firm, not least on the part of those on the receiving end of litigation claims brought by Leigh Day – that perception being of a trawl for cases, some of them highly controversial, involving relentless attacks on governments and corporations, in circumstances of self-sought publicity and with large legal fees potentially accruing to the firm.

15. These viewpoints are irreconcilable. As Ms Robertson frankly put it, Leigh Day can be said to be a "Marmite" firm. But it may perhaps at least to some extent explain the storm of criticism – by no means all of it well informed – which ensued in the light of the firm's involvement in grave claims made by a number of Iraqi individuals of murder and torture and mistreatment on the part of elements of the British army in Iraq: claims which were ultimately demolished as a result of an exhaustive inquiry known as the Al-Sweady Inquiry (ASI), chaired by Sir Thayne Forbes, a former High Court Judge.

Background

16. We turn then to the background. That is very fully set out in the decision of the Tribunal (Case Number 11502-2016), which we gather is publicly accessible, and so we will only provide a relatively short summary here.

17. On 14 May 2004 British army forces were attacked near Majar in South Iraq by members of an insurgent militia group styled as the Mahdi Army. The engagement came to be known as "the Battle of Danny Boy". A number of Iraqis were killed in the engagement. After it was over, the soldiers were, in spite of protests, ordered to collect the Iraqi dead (which was not normal procedure) and take them to the British army camp at Camp Abu Naji (CAN). The following day the bodies so taken, twenty in number, were handed over to the Iraqi civilian authorities. It seems that a number of other bodies had not been located at the time and had been left on the battle-field.

18. In addition, nine Iraqis who had been present at the scene of the engagement - whether as combatants or as innocent participants was fiercely disputed - had been detained and taken, initially to CAN, by the army. Those individuals were subsequently released into the custody of the Iraqi civilian authorities in September 2004.

19. Very soon after the return of the dead to the Iraqi civilian authorities, rumours began to circulate that, after capture, a number of live Iraqis had been taken and then had been murdered. In part, this may have been based on the appearance of some of the bodies which showed injuries thought to be inconsistent with battle wounds but consistent with mutilation or torture. That may well have been the view sincerely taken by some family members of the deceased; but, of course, it would also suit the aims of those hostile to the presence of the British Army in Iraq to foster such rumours. In addition, however, various photographs had been taken; and death certificates had also been signed by Iraqi doctors which (if reliable) were supportive of the deaths and injuries not occurring on the battle-field.

20. The claims received an amount of publicity in the British media at the time.

21. A firm of solicitors, based in Birmingham, called Public Interest Lawyers (PIL) already had an interest in potential claims arising out of the conflict in Iraq. Its senior partner was Phil Shiner (PS). In March 2004 MD and PS had in fact had some inconclusive discussions about the two firms working together on Iraqi cases.

22. In June 2004 an article had been published in the Sunday Telegraph about the Battle of Danny Boy and its alleged aftermath. It was written by Lee Gordon (LG). On 9 August 2004 SM attended a meeting of an association called Lawyers for Justice in Iraq. LG was present. Following that, MD and SM met LG on 25 August 2004. At that meeting LG provided them with various documents in Arabic. These included death certificates and other materials. In addition he provided to them a one page document, in Arabic, which has come to be known as the "OMS Detainees List." That has assumed immense importance in these disciplinary proceedings.

23. On receipt, SM – who did not speak Arabic – arranged for that document (with other Arabic documents provided by LG) to be translated and typed up. The translation as made records the heading "the secretarial office of Al Sayed Al Shaheed Al Sadr in Majr Al Kabir". It then gave a list of names, nine in number, of detainees held by the British. There were several columns, giving their number, name, date of birth, marital status, children and occupation. Of the occupations given, four were described as "worker" and one as "student". In addition there was a column - the fourth column - headed (as translated) "cell/group". Various Arabic names as against seven of the detainees were then set out, such as "Ansar Al Zahra" and "Ab-el fadel Al-Abbas", in such column: although, with regard to two of the detainees, the entry was "volunteer". There was no reference to the Mahdi Army. The evidence of SM was that, to the extent that she studied the translation, the various names would have meant very little to her at that time.

24. At all events, that translation having been made it was saved within Leigh Day to an electronic file. The Arabic version of the OMS Detainees List, with the other documents provided by LG, was placed in a hard copy file. A copy of that hard copy file was then provided to MD by SM. The actual original provenance and purpose of the OMS Detainees List was not known to Leigh Day: indeed neither seems ever to have been conclusively established.

25. So far as Leigh Day was concerned, matters rested there. No client file was opened and the hard file was sent to storage. LG was advised to take his concerns to the Royal Military Police for investigation and he did so, providing documents to them: as did the

Telegraph newspaper group. As recorded by the Tribunal, it was not known if the documents so provided included a copy of the OMS Detainees List.

26. In January 2006 Leigh Day had entered into a referral agreement with PIL with regard to Iraqi cases. In June 2007 Leigh Day was again approached by PIL. PIL had by now been instructed by Khuder Al-Sweady (KAS). KAS was the uncle of Hamid Al-Sweady (Hamid) who was alleged by KAS to have been one of those killed unlawfully by British forces after the Battle of Danny Boy. KAS was looking for redress. PIL was proposing to act, on a legally aided basis, in judicial review proceedings to be brought against the Ministry of Defence on behalf of KAS. However, it was also contemplated that there might be a civil damages claim by KAS, as well as many other civil claims brought by Iraqi civilians: and it was proposed that these be handled by Leigh Day, acting – entirely in accordance with permitted practice at that time – under Conditional Fee Agreements. That, of course, connoted that if civil claims were brought but were ultimately unsuccessful then Leigh Day would recover no costs for itself and in practice, moreover, would itself have to bear the very heavy disbursements outlaid in the interim.

27. As noted by the Tribunal, there were by this time many allegations relating to the conduct of the occupying forces in Iraq, including British forces. Those included cases known as Camp Breadbasket; the "drowning boy"; and the death of a civilian called Baha Mousa: in all of which Leigh Day had been acting. Serious mistreatment and misconduct on the part of elements of the British forces was in due course in some respects established: sometimes in circumstances where the prior military investigations had been found to be altogether inadequate.

28. At all events, the referral arrangements were structured so that PIL would be responsible for public law claims brought and Leigh Day for private law claims brought. We will come on to aspects of the precise referral terms agreed later in this judgment: but it is to be noted now that the arrangements involved payment to PIL of a percentage of Leigh Day's profit costs (not of any damages awarded) in the event of a successful claim.

29. In early September 2007 SM and AC, along with representatives of PIL, went to Damascus to interview KAS and another prospective witness. For this purpose, the solicitors had a number of documents with them. These included the Arabic version of the OMS Detainees List taken from the hard file (it not being appreciated that there was already a 2004 translation, electronically stored). When in Damascus, the Arabic version was, on the instructions of Leigh Day, then translated by a translator there, who wrote out the translation in manuscript on one page of paper.

30. As so translated – although the original manuscript translation no longer exists, in circumstances which we will come on to explain – the heading now read "Representative of the office of the Martyr Al Sadr (QADS), Majar Al Kabir". The names of the detainees were somewhat differently spelled, in translated form. The heading to the fourth column now, as translated, read (instead of "cell/group"): "Name of military unit/company".

31. The evidence of AC was that she (then a trainee solicitor) had been requested to use this list, as translated, to cross-check with KAS's statement as to the names of those who had been killed and with the death certificates, so as to eliminate those on the list. The focus at this stage was very much on the alleged unlawful killings. She was not

aware that the office of the Martyr Al Sadr had any links with the Mahdi Army. She at all events at that time attached no significance to that for the purposes of her checking. The Arabic names of the "units" meant nothing to her.

32. On 7 September 2007 KAS instructed Leigh Day to pursue a private law claim in damages with regard to the death of Hamid. A CFA was entered into. A letter of claim was sent on 19 October 2007.

33. Very many other (unrelated) claims had been, or were to be, also introduced to Leigh Day via PIL. In this respect, PIL had itself been introduced to such cases by its contact in Iraq, Mazin Younis (MY), who himself worked in Iraq with other agents, including in particular one called Abu Jamal (AJ). The arrangements made with regard to referrals and introductions involving PIL and MY feature prominently in allegations 1.12 – 1.16. It is sufficient to note at this stage that very significant sums over the years (totalling in the order of £1.5 million each) were paid by Leigh Day to PIL and MY in respect of civil proceedings so brought. So far as Leigh Day itself was concerned, hundreds of Iraqi civil claims were commenced by it. Many of them ultimately resulted in agreed offers of compensation. We were told that, up to 2017, Leigh Day had generated some £9.5 million in fees from cases introduced by PIL and MY.

34. On 19 October 2007 KAS and another individual represented by PIL issued Judicial Review proceedings against the Secretary of State for Defence in the High Court. The grounds of claim (settled by two eminent leading counsel and by junior counsel) included substantive allegations of unlawful killing and torture and alleged breaches of Articles 2 and 3 of the European Convention on Human Rights. The claim also pressed, as part of the relief sought, for an independent investigation.

35. Reporting restrictions were initially imposed but were lifted in early 2008. The upshot of the proceedings eventually was that the Secretary of State conceded that there should be an independent inquiry. In the course of those proceedings the Administrative Court in fact had been fiercely critical of the adequacy of the investigation and disclosure made by the Royal Military Police. At all events, the result was the establishment of the ASI chaired by Sir Thayne Forbes.

36. In the meantime, in January 2008 the first three respondents, with PS, flew to Istanbul to interview a number of prospective clients, including five of the detainees named in the OMS Detainees List. The interviews lasted some 30 hours. Thereafter on 17 January 2008 those detainees retained Leigh Day to pursue civil claims on their behalf and CFAs (with 100% success fees) were entered into. Letters of claim were sent to the Ministry of Defence on 4 February 2008. At a later date, two further detainees retained Leigh Day and letters of claim on their behalf were sent on 14 January 2009.

37. However, in the interim it had in July 2008 been mutually agreed between the claimants and the Ministry of Defence that the civil claims should be put on hold pending the Judicial Review proceedings and thereafter pending the report of the ASI (which report was subsequently produced in December 2014). As found by the Tribunal, there had been "very little action on the Al-Sweady claims since 2008" apart from a period in 2012/2013 when the Ministry of Defence offered to settle a very large number of Iraqi claims, including the Al-Sweady claims. Although many such claims were then settled, the Al-Sweady claimants chose not to accept the offers made; and those claims, as the Tribunal found, remained live.

38. Following the lifting of the reporting restrictions in the Judicial Review proceedings in January 2008, there was a good deal of activity. Various press releases were issued. MD and PS were reviewing the materials obtained and were in close liaison. It is clear from contemporaneous internal notes and emails that both had found the accounts of the five detainees, as given to them in Istanbul, wholly compelling. Amongst other things, MD was, for example, impressed by the fact that the witnesses had not claimed actually to see (as opposed to hearing sounds of) any unlawful killings and at least one witness did not claim himself actually to have been mistreated. MD was to say in his witness statement that no other interviews which he had conducted in his long career "came close to the emotional drama and tension Phil and I witnessed during the three days we spent interviewing the five detainees." He said: "I came away very clear that we had heard five entirely credible witnesses." His conclusion was that what he had been told "was very likely to be the truth".

39. Following further consideration of the available materials, and having cross-checked the allegations made with the assertions being made by the Ministry of Defence, PS and MD decided to hold a press conference. They did so having also held extensive discussions with the Panorama team who were themselves proposing a forthcoming programme on the BBC with regard to the allegations being ventilated about the aftermath of the Battle of Danny Boy.

40. The press conference was held on 22 February 2008 in London. PS and MD spoke in what, on any view, were highly charged terms. MY and SM were also present. We will have to come on to give more details when dealing with allegation 1.1 which relates to the press conference. But from the perception of those connected with the British forces it caused very great offence and dismay. For example, Colonel Coote (who, as Major Coote, had been in operational command on the ground during the Battle of Danny Boy and who had subsequently produced a detailed report on it and its aftermath) in his witness statement spoke of his anger and dismay at British solicitors "pursuing and championing the false allegations of murder, mutilation and torture."

41. On 29 November 2009 the ASI was formally established, to investigate and report on the allegations made in the Judicial Review proceedings of unlawful killing at CAN and ill treatment of Iraqi nationals at CAN and another base. PIL were appointed solicitors to KAS and five detainees (as named on the OMS Detainees List) as core participants. Leigh Day also acted from time to time in the ASI in conjunction with, albeit very much subordinate to, PIL at various stages, being paid £57,000 overall for their legal services, until ceasing to act in 2012 when the relationship with PIL had become fractured.

42. In the course of their evidence to the ASI the five detainees maintained their accounts as to unlawful killing and torture and mistreatment. Consistently with the statements made in Istanbul in January 2008, part of their evidence also was that all had been innocent civilians caught up in the conflict: one, for example, maintaining that he had been on his way to the local market to buy yoghurt and others saying that they had been working in the fields.

43. As the ASI gathered pace and further materials were produced by the Ministry of Defence, MD became increasingly concerned at the picture beginning to emerge. He considered ceasing to act for the Al-Sweady claimants (including KAS) but was advised on 4 March 2013 by leading counsel that it would be difficult to withdraw at that stage.

In fact, Leigh Day had strongly advised the Al-Sweady claimants to accept the offers of settlement then being made by the Ministry of Defence of a very large number of Iraqi claims, including the Al-Sweady claims: but the Al-Sweady claimants declined to do so. In the event, Leigh Day did not cease to act until 22 January 2015, after the report of the ASI was published on 17 December 2014.

44. On 20 March 2014 leading counsel instructed by PIL on behalf of the core participants in the ASI conceded that they would no longer be submitting that live Iraqis captured during the course of the battle had died or were killed at CAN.

45. It is to be observed that by this time the OMS Detainees List had come to the attention of the ASI. That happened in the following circumstances.

46. From time to time Leigh Day had provided, on what was described as an "ad hoc" basis, documents or photographs from its own files to the ASI. This process ultimately prompted the ASI on 16 August 2013 to issue a formal "Rule 9" notice to Leigh Day seeking inspection of documents relevant to the terms of its reference, and specifically including documents provided to Leigh Day by LG.

47. This notice having been received, and in advance of the inspection by representatives of the ASI, AC (who had previously been assisting in Leigh Day's involvement in the ASI) reviewed the files. In doing so, she studied the manuscript translation of the OMS Detainees List as made in Damascus in September 2007. At this stage, she noticed the reference to the "Martyr Al Sadr", which could connote a connection to the Mahdi Army. She also noticed the references in the translation of the heading to the fourth column to "military unit". She identified this document (and certain other documents) as potentially disclosable, not having been disclosed before.

48. In order to assist the ASI, she typed up the manuscript translation prepared in September 2007. It is not disputed that she did so entirely accurately, faithfully transposing the written script into typed script: albeit she at a later stage, after talking to Arabic speaking colleagues, also added in, in square brackets, a further suggested possible interpretation, in the form of "militia", of the heading to the fourth column. (Arabic speaking colleagues also subsequently conducted a Google search against the Arabic names of those "units": these searches revealed a connection with the Mahdi Army.) Having so typed up the manuscript translation, she then placed the original manuscript of the translation into a secure disposal bag, "without giving the matter very much thought" as she put it in her witness statement: she not thinking that it had any further relevance or use. Her conduct in so doing is the subject of allegation 1.8. As it happens, at that time Leigh Day may have taken it that the OMS Detainees List had come into its possession in September 2007. It was only subsequently recalled and appreciated (when the electronic files were later searched during the SRA investigation and the 2004 translation identified) that it in fact had been provided by LG in 2004.

49. AC reported anxieties she had about this and some other documents to MD and SM. After advice was obtained from leading counsel that the various documents (including the translation of the OMS Detainees List) were disclosable and were not the subject of privilege, the documents were provided in September 2013 to the ASI (whose representatives had on 28 August 2013 attended Leigh Day's offices to review their files). The ASI expressed some surprise that these documents had only been provided some four years after the ASI had commenced. At all events, it is the failure of the

respondents to provide the OMS Detainees List either to PIL or to the ASI prior to September 2013 which underpins allegations 1.2 and 1.4.

50. On 17 December 2014 the report was issued by the Chairman of the ASI. It was, inevitably, extremely lengthy. In it the claims of unlawful killing, mutilation and torture were rejected as entirely without merit. So far as KAS and the other Al-Sweady claimants were concerned, their evidence about those claims was in essentials rejected as dishonest and as fabricated.

51. Numerous inconsistencies in their evidence were noted. The overall conclusion in this regard was in part supported by the OMS Detainees List: described by the Chairman as a "very significant" document. The finding in this particular respect was that each of the nine detainees had been willingly at the military engagement and that "it is very likely that each did so as a member of or volunteer of the Mahdi Army". The finding was made for a number of reasons which were fully set out. These were not confined to but included the OMS Detainees List, of which it was said: "[it] greatly reinforces and substantially confirms the conclusions that I have reached above, namely that each of the nine detainees participated actively in the ambush…" The Chairman (who took the view based on the evidence then available that the OMS Detainees List had first come into the possession of Leigh Day in September 2007, when in fact, as now confirmed, it had come into its possession, via LG, in 2004) considered that the source of the document was probably KAS.

52. In the meantime, in view of the developments at the ASI, the SRA had commenced investigations into Leigh Day and PIL on 18 September 2014. The investigations were immensely detailed and protracted. Ultimately, a very lengthy Rule 5 (2) statement was served on 26 April 2016 (it was subsequently amended more than once). Matters eventually came on for hearing before the Tribunal on 24 April 2017. Vast quantities of documents were produced. The oral evidence alone extended over many days. Submissions, written and oral, were lengthy in the extreme. The hearing extended over some six weeks.

The Tribunal's Judgment

53. The judgment of the Tribunal filed on 22 September 2017, which itself extended over 212 pages, is impressively thorough. It sets out the background facts very fully. The respective submissions of the parties on each allegation are also recorded in very great detail and length. The findings of the majority are clearly recorded and expressed by reference to each allegation (as are the findings of the dissentient member). Whilst we will have to deal with specific complaints about a failure to give sufficient reasons on certain points, any generalised complaint that the decision was inadequately reasoned or failed to engage with the arguments raised would be untenable.

54. One unfortunate area of disagreement between the members of the panel - a point of disagreement which clearly directly impacted on areas of subsequent disagreement - was identified at an early stage. That was as to the assessment of the credibility and reliability of the principal witnesses. The majority, giving reasons, assessed MD and SM as demonstrating honesty in their evidence, while noting MD's tendency sometimes to give discursive answers. AC was also assessed as a credible witness. Generally, each of them was found to have tried to act in accordance with the Rules. The

aggressive contention of the SRA that the respondents were the "kind of people who put financial advantage above professional duty" was expressly rejected.

55. The dissenting member, on the other hand, did not find MD to be a credible, honest or convincing witness. He was assessed as engaging in ex post facto justifications. The dissenting member was also somewhat critical, although rather less so, of the reliability of the evidence of SM and AC.

56. As we have said, there were 20 formulated principal allegations against the respondents variously (since some of the allegations were made against more than one respondent and involved reliance on various breaches of various rules, the Tribunal calculated that over 250 separate allegations were actually involved). A list of those allegations as formulated is appended to this judgment as Appendix 1. All such allegations were found not proved and so were dismissed. It is not difficult to imagine the dismay experienced by the SRA at such a result, after so lengthy and costly an investigation: indeed, notwithstanding the scrupulous courtesy of Mr Dutton in presenting this appeal, a sense of profound dissatisfaction on the part of the SRA with such an outcome was perhaps at times evident.

57. This court, as we have indicated, is concerned only with appeals relating to allegations 1.1, 1.2, 1.4, 1.8, 1.12-1.15 and 1.19. Further, some of these allegations are pursued only in part: for example, no appeal has been pursued against SM with regard to allegation 1.1. It is to be noted that no allegation of want of integrity is, on appeal, now pursued with regard to any respondent in respect of any allegation - save in one important respect.

58. That relates to allegation 1.19. That involves the propriety of Leigh Day paying certain sums to MY by way of what at the time were called "work leave" payments, ostensibly to employers in Iraq to facilitate the attendance of certain prospective witnesses for interviews. Those payments, 29 in number and made between October 2008 and June 2012, totalled US $10,465. The SRA maintained and maintains that MD and SM acted dishonestly, alternatively recklessly, and at all events with a lack of integrity, in permitting those payments to be made. It is said that those respondents permitted the payments to be made notwithstanding that they believed or suspected that they were bribes or otherwise improper. It is a striking feature of this allegation, as pursued and maintained on this appeal, that it was found as a fact by the Tribunal that there was no evidence that, if any such payment was indeed made to an employer, it was improper for such a payment to be made.

59. Of the allegations pursued on this appeal, the Tribunal was in fact unanimous in respect of its dismissal of allegations 1.2 and 1.4. On the others, Mr Hegarty dissented.

60. So far as sanction was concerned, it was agreed before us that if the court upheld the appeal with regard to allegation 1.19 then the matter would need to be remitted for further determination. As for the other allegations, Mr Dutton sensibly proposed that the parties should await this court's decision before assessing whether any particular llegation, were the appeal to be allowed, would need to be remitted for the consideration of sanction.

<u>The correct appellate approach</u>

61. The task for this court is to assess whether the Tribunal was "wrong": CPR 52.21 (3). As explained in the notes to that rule in the White Book, that can connote an error of law; an error of fact; or an error as to the exercise of discretion.

62. We consider it very important to stress that the appellate court is not engaged in an entire rehearing on the facts. This may seem to be an elementary point. But it needs to be emphasised: if only because the minutely detailed arguments presented to this court by the SRA - and in consequence, understandably enough, responded to in corresponding detail - frequently seemed to be engaging in an attempted re-evaluation of the facts in the context of repeating the self-same arguments as to the facts and their evaluation as had been presented to the Tribunal. This was only reinforced by counsel (rather disconcertingly) saying to us that they had to deal with matters before us on the basis that "only" six days had been allocated for the appeal hearing.

63. The authorities in this area are legion. We cite selectively from just a few of those cited to us.

64. As good a starting point as any remains the decision of the House of Lords in *Thomas* v *Thomas* [1947] AC 484, and in particular the speech of Lord Thankerton. That stresses, where questions of fact are concerned, all the advantages enjoyed by a trial judge; and emphasises that an appellate court should not come to a different conclusion unless satisfied that any advantage enjoyed by the trial judge could not be sufficient to explain or justify the trial judge's conclusions.

65. In *Assicurazione Generali SpA* v *Arab Insurance Group* [2002] EWCA Civ 1642, [2003] 1 WLR 577 the court stressed that the appellate court should take "particular care" before it departed from a trial judge's findings of fact, especially where the conclusions depend to a significant extent upon the judge's view of the witnesses: per Clarke LJ at paragraph 32 of the judgment. Similar sentiments were expressed by Ward LJ at paragraph 197 of his judgment. As he also there said: "the appeal court.... 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".

66. In *McGraddie* v *McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477 Lord Reed had cited with approval a number of authorities to support the general proposition that it will be a rare case where an appellate court will be entitled to interfere with a trial judge's determination on the facts. He cited statements from high American authority to the effect that duplication of a trial judge's efforts usually contributed only negligibly to the accuracy of fact determination but at a huge cost in judicial resources; and that a trial on the merits should be the "main event" not a "try out on the road." Lord Reed also cited statements from high Canadian authority to the effect that the trial judge has sat through the entire case and his ultimate judgment reflects his total familiarity with the evidence and that "the insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case may be much more limited and narrow". Lord Reed referred also with approval to other Canadian authority to the effect that: "Appeals are telescopic in nature, focusing narrowly on particular issues as opposed to viewing the case as a whole" (cf. the observations of Lewison LJ in *Fage UK Ltd* v *Chobani UK Ltd* [2014] EWCA Civ 5 where, at paragraph 114 of his judgment, he alluded to the trial judge having regard "to the whole of the sea of evidence presented to him whereas

an appellate court will only be island hopping"). All these are wise comments. We must bear them in mind: the more so when it is here the submission of the respondents that in substance this appeal involves the SRA simply disagreeing with the determination and evaluation of the facts made by the specialist Tribunal entrusted with the task.

67. We consider that a particularly convenient summation of the required approach can be found in the judgment, also of Lord Reed, in the Supreme Court case of *Henderson* v *Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600. That case involved a determination as to whether the Inner House of the Court of Session had been entitled to interfere with the trial judge's factual conclusions.

68. In paragraph 62 of his judgment, in assessing the general principle that on matters of fact the appellate court may only interfere where the trial judge has gone "plainly wrong", Lord Reed said this:

> " The adverb "plainly" does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

And in the same vein he said at paragraph 67:

> "It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

69. It is also (for the avoidance of doubt) to be borne in mind, consistently with the above cited authorities and as was emphasised by Clarke LJ in his judgment in *Assicurazioni* (cited above) and reflected also in the observations of Ward LJ in that case, that where a conclusion is not just as to the primary facts but as to the evaluation of those facts then appropriate restraint on the part of the appellate court is also still called for. The point is discussed in many cases: see, for example, the speech of Lord Hoffmann in *Biogen Inc* v *Medeva Plc* [1999] RPC 1 at p. 45. The relevant principles and authorities are also helpfully cited and summarised in the recent Court of Appeal decision, published after the hearing before us, in the case (a medical sanction case) of *Bawa-Garba* v *General Medical Council* [2018] EWCA Civ 1879 at paragraphs 60ff of the judgment of the court. The court further there noted that "that general caution applies with particular force in the case of a specialist adjudicative body…"; and that the appellate court will only interfere with such an evaluative decision where an error of principle is involved or where the evaluative decision falls outside the bounds of what could reasonably and properly be decided: see paragraph 67.

70. There are a number of other general points that we think also need to be borne in mind in assessing the decision of the Tribunal.

71. The first consideration is that this is a decision of a specialist Tribunal, particularly equipped to appraise what is to be required, in the particular circumstances, of a solicitor by way of professional conduct. The appellate (judicial) court will be cautious in interfering with such an appraisal. The principle is well established on the authorities: see, for example, *Bawa-Garba* (cited above).

72. The second consideration is that with regard to a number of the allegations which are the subject of this appeal the decision of the Tribunal was by a majority. What should the approach of the appellate court then be?

73. The answer is that the decision of the Tribunal is the majority decision. As Ms Robertson rightly said, it is not for the respondents to show that the minority was wrong: it is for the appellant SRA to show that the majority were wrong. The appellate court will nevertheless, of course, have careful regard to the reasoning and conclusions of the minority. As stated by Lord Bingham LCJ in the course of his judgment in the case of *In re a Solicitor* (23 November 1999, unreported: CO/3143/99) - in fact a case on sanction - at page 7:

> "The fact that one member of an expert tribunal has dissented does not, in my judgment, entitle this court to approach the matter as if it were the first instance tribunal entitled to make a primary judgment on the facts or on the appropriate penalty. Our task, as in any other case, is to study the decision (in this case the decision of the majority) and consider whether it is one of those rare cases in which the court should interfere. It is I think appropriate to approach that task with particular care when it is known that one of the three members is unable to agree with the majority and has taken a strongly dissenting view."

74. We adopt and apply that approach in this appeal.

75. A third consideration is that the Tribunal was (as agreed before it) required to apply the criminal standard of proof to each allegation pursued by the SRA.

76. A fourth consideration relates to the separate Tribunal proceedings concerning PS. Those resulted in PS being removed from the Roll. Some of the allegations raised against him, and found proved, had a degree of correspondence with some of the allegations raised in the present case: for example (although not only) allegation 1.1 relating to the press conference. We consider that the Tribunal was justified in attaching limited weight to this. The evidence and case against PS was different; a number of the allegations were conceded by him; and he did not attend or give oral evidence at the hearing. The case against these respondents thus ultimately had to be decided by the Tribunal by reference to the evidence and submissions presented to it.

77. As a fifth consideration, Mr Dutton placed at various stages in his argument great emphasis on what was said in the contemporaneous documents. He was fully entitled to do so: the potential importance of contemporaneous documents in assessing where the truth and reality lies with regard to events occurring many years earlier is well-

known to all tribunals and courts. The matter is the subject of the most illuminating discussion by Leggatt J in the case of *Gestmin SA* v *Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at paragraphs 16 to 22 of his judgment. But, that said, it would be quite wrong to maintain that in such a context contemporaneous documentary evidence of itself trumps any other evidence. On the contrary, it is the duty of the tribunal or court to consider the evidence as a whole: and indeed Leggatt J was careful (and right) to disclaim any proposition that oral testimony serves no useful purpose in such cases.

78. The final general consideration which we bear in mind is that the Tribunal set out the respective submissions of the parties in meticulous and exhaustive detail. Its judgment is to be read as a whole; and in assessing its reasoning it is appropriate to take it that the Tribunal had fully taken into account those submissions. This particularly needs emphasis in circumstances where it is not reasonable to expect a tribunal to elaborate on its reasoning in the way courts and professional judges may frequently be expected to do. As indicated in *Beresford* v *Solicitors Regulation Authority* [2009] EWHC 3155 (Admin) at paragraph 43, it can also be taken that the findings of fact in relation to each allegation necessarily relate back to the evidence and submissions which the Tribunal has set out.

79. Against that background and those general observations we turn to the matters the subject of the appeal. We note that those grounds of appeal are themselves enormously elaborate. A Respondents' Notice was also put in on behalf of the respondents. However, matters were, as we have said, greatly assisted by the parties working to the agreed list of issues at the appeal hearing.

Allegation 1.1

80. This allegation relates to the press conference given by PS and MD on 22 February 2008. The allegation, as formulated below, was as follows:

> "Allegation 1.1 – At a press conference on 22 February 2008 the First Respondent made and personally endorsed, and the Second Respondent permitted to be made and personally endorsed by the First Respondent, allegations that the British Army had unlawfully killed, tortured and mistreated Iraqi civilians, including their clients, who had been innocent bystanders at the Battel of Danny Boy, in circumstances where it was improper to do so and thereby breached Rules 1.02. 1.03, and 1.06 of the CoC 2007."

It is to be noted, however, that on this appeal no allegation of any kind in this respect is now pursued against SM. Further, no allegation of want of integrity by reference to Rule 1.02 is pursued against MD. We were in fact told that this (and PS's case) is the first occasion in which a solicitor's statements at a press conference have been the subject of a reference to a panel of the Tribunal.

81. The current allegations against MD on this appeal are based on Rule 1.03 and Rule 1.06 of the Solicitors' Code of Conduct 2007 as then applicable. Rule 1 itself contains the applicable core duties. Rule 1.03 provides:

> "You must not allow your independence to be compromised."

Rule 1.06 provides:

> "You must not behave in a way that is likely to diminish the trust the public places in you or the legal profession."

82. We were taken in the greatest of detail through the background leading up to the press conference. We have borne that detail in mind. But the essential position on the facts, as found by the Tribunal, was in summary this.

83. After the very lengthy interviews of KAS and then of the five detainees in Istanbul in January 2008 both PS and MD were sincerely convinced of the veracity of their claims. Moreover, their experience gained in other cases (such as Baha Mousa) had caused them to be sceptical of Ministry of Defence denials of allegations of grave misconduct and sceptical of assertions of thorough investigations made by the Royal Military Police. Those claims by these detainees among other things included the assertion that they were innocent civilians inadvertently caught up in the Battle of Danny Boy (a claim they subsequently maintained throughout the ASI). That particular aspect of their claims had not been specifically queried with them by MD in the interviews (although he was aware that the Panorama team had asked them about this when they had interviewed them, and further that they had said that they were not wearing black clothes, the "uniform" of the Mahdi Army). While he had the files with him in Istanbul, MD had not studied the translation of the OMS Detainees List and so had not appreciated that it might have potential significance in that particular respect (he was later to say, after the potential significance of the OMS Detainees List had been identified in August 2013, that he would not have said what he did say at the press conference had he known of it then).

84. Thereafter, and prior to the press conference, MD spent a considerable period of time considering the materials available. He also discussed the case at some length with SM. He prepared a memorandum on the strengths and weaknesses of the current evidence available and an appraisal of the British Army's version of events. He was also provided with information by AC: who, amongst other things, drew his attention to an article in the Guardian newspaper reporting doubts about the reliability of the death certificates. MD also himself had extensive discussions with the Panorama team, who were preparing their TV programme on the subject and who MD understood were themselves very concerned about the alleged conduct of British forces in the aftermath of the Battle of Danny Boy. MD had personally reviewed Panorama's materials. MD and PS themselves also liaised closely with regard to what they proposed to say in the press conference.

85. In addition, MD sought the advice of senior counsel, Mr Richard Hermer. As he explained in a contemporaneous e-mail to PS, MD sought this advice "as I wanted an independent opinion on how strong he feels it all is – just to make sure you and I have not been sucked in by the whole business". Others – including one fellow partner in Leigh Day – had in fact advised MD to be cautious; and Mr Hermer himself was to advise that there was not currently enough to substantiate the allegations of murder for the purposes of civil claims. In due course, however, leading counsel was also sent, in some detail, the lines of what was proposed to be said by MD at the press conference; although he was not sent the full proposed text or the full materials then available to

Leigh Day. Counsel had previously expressed caution about the death claims; and advised against use of such words as "massacre". But counsel did not in any way query the propriety of holding the press conference. Mr Hermer (by now Richard Hermer QC) in fact gave evidence before the Tribunal to the effect that, he having subsequently read the text of the press conference, it "would not have crossed my mind" that breaches of professional obligations might be involved. He also said that he personally found it "utterly bewildering" that it might be a disciplinary offence for a solicitor to say that he found his client's account convincing.

86. In terms of professional guidance, the advice offered in paragraph 10 of the Guidance to Rule 11 of the code of conduct is in substance limited to saying that it was a matter for the solicitor's "professional judgment" as to whether it was appropriate to make a statement to the media about a client's case and, if a statement was made, as to its content.

87. Mr Dutton also referred us to the case of *Hodgson* v *Imperial Tobacco Ltd.* [1998] 1 WLR 1056 (a case with which MD would have been familiar, as he had acted in it). That was a case essentially concerning the confidentiality of proceedings in chambers. However, in the course of giving the judgment of the court Lord Woolf MR indicated that it was preferable for lawyers "not to become engaged in commenting about proceedings to the press (as opposed to communicating facts)". The court went on to say, at page 1073, that, in group litigation of the kind before the court, it was impossible for the court to seek to prevent communication with the media: albeit the court alluded to the "risk of trial by media".

88. In the present case, there can be no real criticism of PS and MD deciding to hold a press conference. Given that the allegations were in any event in the public domain, given that the press restriction order in the judicial review proceedings had by now been lifted and given that matters were to be subject of the forthcoming Panorama programme, it was justifiable. Nor did Mr Dutton really seek to argue otherwise.

89. But his essential argument was that, if a press conference was to be held, then it behoved PS and MD – two very senior solicitors, whose views were likely to be accorded weight by the public and who were saying that they had examined the case "as best they could" – first to check the factual background very carefully: not least because of the gravity of the allegations being made and the potential risks involved and the impact in the interim on others, such as army personnel, even if the allegations turned out to be untrue. Moreover, MD and PS were, he said, obliged as solicitors to express themselves with appropriate objectivity, restraint and balance. But this, he said, simply did not happen. Further, the underlying materials – in particular, the OMS Detainees List – were not properly checked against what was to be stated; PS and MD had not spoken to any of the doctors involved in Iraq and were not themselves, as solicitors, equipped to comment on the medical or pathological implications of the photographs; there were some factual errors in what was actually said at the press conference; and the language and tone adopted was wholly unbalanced and sensationalist. MD (as did PS) thereby, it was said, breached Rule 1.03 and 1.06 – as, indeed, another Tribunal had found in the case of PS.

90. In this regard, it is plainly essential to read the text of the press conference as a whole. It is appended to this judgment as Appendix 2.

91. One difficulty with the arguments of the SRA advanced before us is that, on analysis, these were in substance precisely the arguments that were advanced before the Tribunal below. And the majority, for the reasons there given, did not accept them. Since this was a judgment of the expert tribunal as to the application of the requisite professional standards to the particular facts and circumstances of the case, it is difficult, either at first sight or indeed at second sight, to see on what basis an appellate court can properly interfere.

92. In the present case, the Tribunal (as it had throughout its judgment) recorded the respective submissions in meticulous detail before setting out its majority conclusion.

93. The majority found that MD had, before the press conference, undertaken a review of the evidence and was thinking about what was appropriate to be said and the correct tone to take. The majority also attached weight to Mr Hermer's involvement and advice at the time and to his evidence. The majority further stressed that, whilst the evidence of the detainees was ultimately shown at the ASI very largely to be untrue, that was a matter of hindsight.

94. The majority of the Tribunal, having reviewed the evidence, had (at paragraph 141.81) directed themselves that the question was whether the content of the press conference was reasonable in attempting to achieve an investigation on behalf of the clients: "or, more precisely had the Applicant shown beyond reasonable doubt that it was so unreasonable for [MD] and PS to have said what was said at the press conference that it constituted professional misconduct?" They then said:

> "Generally speaking, the Tribunal found that what was said at the press conference was not unreasonable in the context of the investigation that was being properly sought, the general situation at the time where multiple incidents of a similar nature in Iraq had been or were being uncovered, the documentary evidence of death certificates and photographs, and where the respondents had significant direct evidence from their clients which they believed to be credible."

95. The majority went on to deal with other aspects of the criticisms made. They accepted that one or two sentences were incorrect. By way of example, there had been an error in saying that the five detainees who had provided statements had been acquitted of involvement in the Mahdi Army by the Iraqi courts. MD had been incorrectly informed about this, as one detainee had in fact been made the subject of an amnesty. The Tribunal accepted that was an error but found that it "did not change the overall substance of the statement and was immaterial when taking into account the text of the press conference as a whole". The Tribunal further noted the emphasis placed on the death certificates; and rejected the suggestion that the respondents had intended to create, or did create, an impression that they had other evidence from the doctors.

96. The majority of the Tribunal noted that the allegations made were "serious and shocking." But as to that they found that it was inevitable that the content of the press conference would be shocking: just because the allegations were shocking. As to references to, for example, My Lai the majority agreed that was an "emotive phrase". But it was consistent with concerns and phrases being used in the broader media at the time. The Tribunal in fact noted the "more measured" tone and content of MD's

sections of the press conference as compared to those of PS, albeit the majority (rightly) found that MD was to be taken as having associated himself with PS's words.

97. Overall, the majority in terms found (at paragraph 141.90) that they did not consider that MD had associated himself with his clients' case such that he had compromised his independence and found that he was not so entrenched in his position that he was unable to provide objective advice. They in terms also found (at paragraph 141.91) that MD had not acted in a way that would diminish the trust the public placed in him and the profession. Thus the majority explicitly directed themselves to the language of Rule 1.03 and Rule 1.06.

98. We have carefully considered the strongly expressed dissent by Mr Hegarty. He, in contrast to the majority, attached weight to the various inaccurate statements made in some places in the press conference. (Mr Hegarty was, however, himself in error, as was agreed before us, in saying that MD had not read the report of Colonel Coote.) He also considered that MD should have taken a number of further steps before endorsing the grave allegations being made. He further considered that the references to the Japanese in the Second World War and to My Lai were designed to sensationalise the allegations: and that, taking the script as a whole, it was "unbalanced, subjective and sensationalist". He did not regard Mr Hermer's advice as providing any real justification. He was also critical, among other things, of the overlooking of the OMS Detainees List.

99. Mr Hegarty overall found breaches of Rules 1.03 and 1.06 proved to the requisite standard. He considered that a solicitor making such serious allegations was professionally obliged to take the appropriate and reasonable care to "ensure that the statements he was making were true". He considered that, in his desire to publicise the case and his firm, MD "had lost sight of his professional obligations" (paragraph 141.105).

100. It is clear that in his overall conclusion Mr Hegarty was significantly influenced by his own, expressly stated, assessment that he "did not find the First Respondent's oral evidence in relation to the press conference to be reliable or convincing" (paragraph 141.103). That reflects his more general observations on witness credibility made at the outset of the judgment. But it is here to be stressed that this was *not* the assessment of the majority: who were, in our judgment, entitled to accept the explanations of MD given in his written and oral evidence. We further reject, in this regard, Mr Dutton's submission that the oral evidence did not feature prominently on this aspect of the case. It plainly did so feature.

101. In these circumstances, and having regard to all the submissions made to us, our conclusion is that there is no proper basis for this court, as an appellate court, interfering with the majority judgment of the Tribunal: an evaluative judgment reached after the Tribunal had properly weighed the evidence and competing submissions.

102. Mr Dutton submitted that the majority erred by applying the wrong test in relation to whether Rule 1.06 was breached: in particular, by asking themselves whether MD's conduct was "so unreasonable" that it amounted to professional misconduct. He said that was an unwarranted gloss on Rule 1.06. That, in our judgment, is an unsustainable criticism (a criticism we also further discuss below). The majority expressly directed themselves at paragraph 141.91 by reference to Rule 1.06; and in so far as they imported

notions of reasonableness that plainly was justifiable, given that this was an issue of professional judgment and professional conduct. In this respect, we also found untenable Mr Dutton's criticism that reference to "misconduct" distracted attention away from the wording of Rule 1.06. But what, we ask, was this allegation then doing before the Tribunal if it was not an issue of misconduct? It is, overall, plain that issues of seriousness and culpability are relevant to the assessment of whether there had been a breach of Rule 1.03 or Rule 1.06.

103. Likewise there is no real substance in suggestions that the majority focused too much on what MD knew at the time as opposed to what he ought to have known at the time; or that the majority erred in their approach to hindsight or by their taking into account irrelevant matters. It is, in our view, clear that the majority were focusing not just on MD's subjective beliefs at the time but also on the whole position objectively (as further confirmed by the references to reasonableness). They were also right to direct themselves as to the risks of hindsight. It is true that the majority did not expressly deal with the overlooking of the OMS Detainees List, as translated, in this section of the judgment. But the submissions on that had been fully recorded; and it is a clear implication that the majority had accepted the respondents' submission that MD's failure to spot its significance at that time was not such as to render unreasonable his involvement in, and statements at, the press conference. That is also borne out, we add, by what was said elsewhere by the Tribunal in the judgment on this aspect. Overall, the reasons given by the majority for dismissing these allegations were amply sufficient.

104. Once one rejects – as we do reject – any error of principle or of legal approach in the determination of the majority, the other challenges fall away as in substance involving no more than a disagreement on the part of the SRA with the majority (and agreement with the minority) on what are matters of evaluation of the evidence.

105. We would add that, so far as the text of the press conference is concerned, we do understand Mr Dutton's point that solicitors engaging in such statements made at a press conference are lending their professional authority to the (very controversial and grave) allegations being made: allegations which ran the risk of being untrue and which in the event were later found to be untrue. But the majority found that MD did so having acted with reasonable care; and found that his statements did not ground themselves solely on his and PS's own (genuinely held) views of the veracity of their clients but also had other support from, for example, the photographs and the death certificates.

106. We consider that, in this context, it is particularly important to bear in mind – as the majority of the Tribunal clearly did – the *purpose* (found to be a proper purpose) of the press conference. It was designed to help achieve – as the then current Judicial Review proceedings were also designed to achieve – an independent investigation into the allegations: allegations which were already in the public domain. It could by no means be said that, fairly read, the statements made in the press conference were in effect *warranting* the truth of the detainees' allegations. It was, after all, known to everyone that the Ministry of Defence were at the time fiercely rejecting (and, as it transpired, rightly so) the truth of the allegations. So what PS and MD were aiming for, albeit in highly charged and vehement language, was an independent investigation into the allegations: just so that they could be found, on further investigation, to be either true or untrue. This also meets Mr Dutton's complaints that the conference was premature in terms of what was being alleged, given that investigations were at an early stage.

The point is answered by the perceived need for an investigation *at that stage*, so that the full and true story could then be ascertained.

107. That, moreover, is confirmed by MD using, in a number of places in the text, phrases such as "our clients say", "there are massive contradictions between what these five Iraqis have said as against what the British army have said", "on the evidence we have seen", "the burning question" and so on. As MD himself also said at the end, after stating that PS and he believed that their clients' allegations were likely to be true:

> "… but what is crucial is that an immediate and thorough investigation is carried out into what happened… there must be a public enquiry into these events. The key question for the British people is whether or not the army was responsible for an act of immense bravery or acts of terrible brutality. Whether or not there is enough evidence to prosecute individual soldiers, it will only be by an open public enquiry that this question will be answered."

108. Strongly worded language specifically designed to help achieve such an aim has to be considered in that context. As to previous references (by PS) to the Japanese in the Second World War and to My Lai it is clear, from the text, that PS was talking in general, contextual, terms as to the need to avoid a cover up of a kind that had happened on previous occasions. He was not at that stage talking of this specific case: as the immediately following text of MD, which introduces the specific allegations in the present case, shows.

109. In the last analysis, therefore, these grounds of appeal are simply a reflection of the SRA's disagreement with the evaluation of the majority: an evaluation reasonably open to them. Since it cannot be said that the actual conclusion of the majority on this allegation was perverse and since the conclusion was sufficiently reasoned, this challenge must fail.

110. We should add that Ms Robertson also sought to reinforce this conclusion of the Tribunal by reference to Article 10 of the European Convention on Human Rights. In general terms, that no doubt could be a relevant consideration. However, we do not need to dwell on it. Article 10 does not confer an unqualified right of freedom of expression: and there can be no objection in principle to public statements which a solicitor chooses to make being made subject to the professional standards to be expected of a solicitor. The ultimate point remains that, on the evidence, a breach by MD of those standards, by reference to Rules 1.03 and 1.06, was rejected by the Tribunal. There is no sufficient basis made out for an appellate court to interfere.

Allegations 1.2 and 1.4

111. It is convenient to take these matters together, as did the Tribunal. The Tribunal also took them together with allegation 1.3 (relating to the asserted failure to provide or disclose the OMS Detainees List to the Administrative Court in the Judicial Review proceedings). No appeal is brought with regard to the Tribunal's dismissal of allegation 1.3. Allegations 1.2, 1.3 and 1.4, as formulated below, were as follows:

> "Allegation 1.2 – The First, Second, Third and Fourth Respondents failed during the period between September 2007 and August 2013 (in respect of the First and Second Respondents), the period between October 2008 and August 2013 (in respect of the Third Respondent) and the period between 31 March 2009 and August 2013 (in respect of the Fourth Respondent) to provide a copy of the document known as the OMS Detainee List (or ensure that a copy was provided by their clients) to PIL and thereby breached Rules 1.01 and 1.06 of the CoC 2007, and Principles 1 and 6 of the Principles.
>
> Allegation 1.3 – The First, Second, Third and Fourth Respondents failed during the period between September 2007 and July 2009 (in respect of the First and Second Respondents), the period between October 2008 and July 2009 (in respect of the Third Respondent) and the period between 31 March 2008 and July 2009 (in respect of the Fourth Respondent) to ensure that a copy of the OMS Detainee List was provided by their clients to the Administrative Court and thereby breached Rules 1.01 and 1.06 of the CoC 2007.
>
> Allegation 1.4 – The First, Second, Third and Fourth Respondents failed during the period between November 2009 and August 2013 to ensure that a copy of the OMS Detainee List was provided by their clients to the ASI and thereby breached Rules 1.01 and 1.06 of the CoC 2007, and Principles 1 and 6 of the Principles."

112. It is to be noted that the Tribunal was unanimous in its decision to dismiss these allegations. It is also to be noted and borne in mind that the Tribunal had been unanimous in dismissing allegations 1.6 and 1.7 which relate to alleged failures of management and identification of documents, including the OMS Detainees List, and alleged failures of document sharing arrangements with PIL: and those allegations also are not the subject of appeal.

113. These two allegations are based on alleged breaches of Rule 1.01 and Rule 1.06 of the 2007 Code (and its successor Principles). Rule 1.06 has been set out above. Rule 1.01 provides:

> "You must uphold the rule of law and the proper administration of justice."

114. It is common ground that the respondents did not deliberately withhold the OMS Detainees List. It is common ground that had they appreciated its potential significance - which significance went primarily, even if not solely, to the credibility of the account of the detainees, albeit it also perhaps potentially bore to some extent on issues such as quantum and the identities of survivors – they would immediately have disclosed it. The errors were thus ones of oversight.

115. We were helpfully referred to the Court of Appeal decision in *Wingate and Evans* v *Solicitors Regulation Authority* [2018] EWCA Civ 366. The judgment of Jackson LJ

(with whom Sharp LJ and Singh LJ agreed) includes a valuable review of the authorities and discussion of the meaning of "lack of integrity" for the purpose of the core principles. That is not an issue on these particular allegations. But in the course of his judgment Jackson LJ also made helpful observations, with which we agree, concerning the operation of Principle 6 (which corresponds with Rule 1.06). He said this at paragraphs 105 and 106 of his judgment:

> "105. Principle 6 is aimed at a different target from that of Principle 2. Principle 6 is directed to preserving the reputation of, and public confidence in, the legal profession. It is possible to think of many forms of conduct which would undermine public confidence in the legal profession. Manifest incompetence is one example. A solicitor acting carelessly, but with integrity, will breach Principle 6 if his careless conduct goes beyond mere professional negligence and constitutes "manifest incompetence"; see ***Iqbal*** and ***Libby***.
>
> 106. In applying Principle 6 it is important not to characterise run of the mill professional negligence as manifest incompetence. All professional people are human and will from time to time make slips which a court would characterise as negligent. Fortunately, no loss results from most such slips. But acts of manifest incompetence engaging the Principles of professional conduct are of a different order."

116. As we see it, the OMS Detainees List was always of at least potential significance. As translated in September 2007, the heading referred to the office of the "Martyr Al Sadr" – which, to the informed, connoted a connection with the Mahdi Army. Further the column heading "Military Unit", followed by a list of names and references to "Volunteers", also gave a military connotation (a connotation that perhaps could also be gleaned from the 2004 translation). The provenance of the list was never definitively established; but the ASI found that it was a very significant document. At the same time, considerations of hindsight are to be borne in mind: and as the Tribunal found in terms (at paragraph 142.91):

> "… as the case evolved and changed, and vast quantities of other evidence was gathered and witnesses heard, its significance became greater."

117. The Tribunal found as a fact that the respondents had not identified the significance of the OMS Detainees List prior to AC's review of the files, following receipt of the notice from the ASI, in August 2013. The Tribunal found as a fact that the respondents never knowingly withheld a significant document (paragraph 142.75). In the course of dealing with allegation 1.5 the Tribunal had also found that a "key reason" for Leigh Day failing to appreciate its significance was the changing significance of the documents as the case progressed. A further identified reason was the fact that there had been an agreed "freeze" on the civil claims in the course of July 2008, pending the prospective independent investigation and pending determination of the Judicial Review proceedings; and so the civil claims were largely inactive thereafter between 2008 and 2015, apart from a brief flurry when the Ministry of Defence made settlement offers in 2012: see paragraph 149.27.

118. When the document was eventually identified in 2013, MD's immediate reaction was as to its "massive significance" (although subsequently in his evidence he somewhat moderated that). But it is clear – and as the Tribunal in terms found – that the significance of the OMS Detainees List would at all events not have been such as to make the ASI unnecessary. That would be gravely to overstate the matter (and it is right to record that Mr Dutton did not seek to argue otherwise). Indeed, it is to be emphasised that torture, mutilation and execution could not be justified whether or not the alleged victims were combatants.

119. At the ASI the detainees had maintained that they had been civilians innocently caught up in the Battle of Danny Boy, and continued to do so even after the OMS Detainees List had been put to them. Mr Patrick O'Connor QC, who had been leading counsel instructed by PIL for the core participants at the ASI, gave evidence before the Tribunal. He made clear his own assessment that the OMS Detainees List had not of itself by any means been decisive; nor had it prompted the concession concerning the alleged unlawful killings made by him during the ASI. The detainees' case, in his estimation, had unravelled because of the repeated exposure of many inconsistencies in their oral evidence and in the light of ongoing disclosure from the Ministry of Defence. The OMS Detainees List featured in but a relatively short section of the report of the ASI: and we also note that, in essentials, it was used by the Chairman, who had described it as "very significant", to confirm the view which he in any event had formed as to the detainees' status as participants in the battle.

120. But all that said, it remains the case that the document was potentially significant. It is fair to record that the respondents have berated themselves for their collective failure to spot its significance at any time prior to August 2013.

121. In dealing with these allegations, the Tribunal followed its practice of setting out the respective submissions in meticulous detail by reference to each of the allegations made and each breach of the rules (be it Rule 1.01 or Rule 1.06) asserted.

122. Mr Dutton submitted that the Tribunal had gone "badly wrong" in its appraisal of this part of the case. He said that it had failed properly to consider what professional duties were owed by the respondents in the context of their retainer; failed properly to consider the core duties of solicitors both in the pursuit of civil claims and in assisting the ASI; and failed properly to consider those occasions when the respondents should have appraised the OMS Detainees List. He further said that the Tribunal focused too narrowly on disclosure obligations as required by specific rules; and also paid too much regard to the fact that it was PIL who were instructed in the ASI.

123. In paragraph 142.75 of its judgment the Tribunal itemised its conclusions in broad terms. Those included, among others, the following:

(i) Leigh Day provided documents whenever they identified a significant document, and never knowingly withheld a significant document;

(ii) Leigh Day provided specific documents when asked;

(iii) there is no professional misconduct in not conducting a disclosure review when there is no actual duty under the relevant rules to conduct such a review;

(iv) the disclosure review point never was reached in the civil claims for which Leigh Day were solicitors on the record;

(v) Leigh Day carried out a full disclosure review on receipt of the ASI's notice in August 2013;

(vi) Leigh Day had in November 2010 (in fact, October 2010) provided to PIL (solicitors acting for the core participants in the ASI and who had eventually been required to conduct a disclosure exercise for the purpose of the ASI) an index of the documents it held. The index included the OMS Detainees List (described, as it was in Leigh Day's own files, as "List of Detainees and Translation"). But, for whatever reason, PIL had never sought copies of, or inspection of, any of the documents included in the index provided to them.

124. The Tribunal in terms found that there was no obligation on Leigh Day to conduct a disclosure review exercise in relation to its arrangements with PIL or thereafter in relation to the ASI prior to August 2013: paragraphs 142.81 and 142.85.

125. As to the allegation that the respondents should, outside of the specific requirements under the rules to conduct a disclosure review, nevertheless have conducted a thorough file review the Tribunal dealt with that primarily at paragraphs 142.89 – 142.92 of its judgment. Since it is that passage which was the particular focus of Mr Dutton's criticisms we set it out in full.

> "142.89 The Tribunal then considered the allegation that the Respondents should, outside of the specific requirements to conduct a disclosure review referred to above, have conducted a thorough file review such that the significance of the OMS Detainee List would have been identified and thus the document would have been handed over because the Respondents would not knowingly have withheld it. The Tribunal was mindful that the Applicant had to prove beyond reasonable doubt that the Respondents should have conducted the review, and that it would have resulted in the significance being identified.
>
> 142.90 The Tribunal found that in September 2013 it was clear that the OMS Detainee List was significant. However in September 2007 the significance that ultimately came to be attached to the document was far from evident. The focus of the reviews at that stage was to assess the evidence of the possible unlawful deaths and torture. This included the death certificates, the photographs apparently showing torture, inconsistent British Army evidence, the unusual circumstances of the removal of bodies and the personal witness evidence of Detainees. The reasons for the presence of the Detainees on the battlefield had some relevance to credibility but it was a small part of a much bigger picture.
>
> 142.91 It could not, therefore, be said that a review conducted at that stage would, beyond reasonable doubt, have identified the significance of the heading of the fourth column of the OMS

> Detainee List, or that the significance would have been such as to have called the whole case into question. In any event, some reviews of the file had been undertaken at various points around that time. None of the various people who looked at the document, which certainly included the Third Respondent, very likely included the second Respondent, and possibly even the First Respondent, identified it as significant. The evidence suggested that it was in reality a document that was not very significant in 2007, but as the case evolved and changed, and vast quantities of other evidence was gathered and witnesses heard, its significance became greater.
>
> 142.92 The civil claims had been stayed in 2008 and the file in essence lay un-reviewed from then until January 2015. The Tribunal did not find that the Applicant had proved that at any intervening point the Respondents should have conducted a "start-to-finish" review of all the evidence on the file in relation to the civil claims, nor that any such review would have identified the significance of the document or that its significance at the time of any review would have called the whole case into question."

126. Mr Dutton's arguments were in effect a reprise of those advanced below. Ultimately, however, he essentially concentrated on a number of "trigger points" at which the respondents could, and as he says should, have reviewed the files with a view to identifying relevant documentation (not least the OMS Detainees List): and this was so quite apart from any specific disclosure obligations arising under any rules. He in fact submitted that to focus on the obligations of disclosure under the rules was a distraction. A solicitor is professionally required, he said, to take reasonable steps, quite apart from his disclosure obligations under the rules, to familiarise himself with the relevant papers when making and pursuing allegations on behalf of a client: and all the more so when (as here) the allegations being made were of the gravest kind. These trigger points were, as he submitted, as follows.

127. The first was when the translation of the OMS Detainees List was obtained in Damascus in September 2007. It should not then, he said, have been used solely to cross-check the names of those said to have been unlawfully killed – its wider potential significance was there to see.

128. The second was when SM prepared a letter and bundle of relevant documents (including the OMS Detainees List) for transmission to PIL in November 2007. This was done at a time when the documentation was not particularly voluminous and followed an informal agreement reached over the telephone by MD and PS that each firm would "set out to each other exactly what we have". In the event the letter and bundle was not sent to PIL, either then or thereafter, in circumstances where SM could offer no explanation for that oversight and even though she accepted that, by January 2008, she realised that it had not been sent to PIL.

129. The third was at a time immediately preceding the visit in January 2008 to Istanbul designed (among other things) to interview, and obtain statements from, a number of

the detainees. The files, it is said, should at that stage have been carefully reviewed for the purpose of preparing for and conducting the interviews.

130. The fourth was when MD was reviewing the materials with a view to preparing for the press conference on 22 February 2008 (see above).

131. The fifth was the sending of letters of claim on behalf of the five detainees on 4 February 2008 (with further letters of claim for two more detainees on 14 January 2009 and preceded also by the letter of claim on behalf of KAS dated 19 October 2007 in circumstances where a witness statement of one of the alleged "innocent bystanders" had by then been obtained).

132. The sixth was the opening of the ASI. That involved the Chairman, in his opening address on 9 March 2010, among other things stating that the ASI "hopes and expects to receive co-operation from all persons and organisations with relevant material or evidence"; and inviting anyone who had relevant information to provide it as soon as possible. Even if (as the Tribunal held) those statements did not of themselves impose a specific legal obligation on Leigh Day to review its files even so, it is submitted, Leigh Day should have done.

133. The seventh related to the occasions during the ASI when Leigh Day (primarily through AC) provided documents from its files on an ad hoc basis: moreover, AC and others on occasion were involved in preparing for and attending a number of the witness interviews undertaken for the purposes of the ASI and the firm – albeit it had very much a "junior" role compared to PIL - was paid £57,000 until its participation ended in 2012. It is said that those various matters, and in particular the ad hoc disclosures which of themselves connoted an appreciation of a general obligation to assist the ASI, should have prompted an overall file review and a check on what had been provided to PIL. That the chairman of the ASI had not himself expressly criticised Leigh Day for any oversight in this respect was, it was said, immaterial.

134. Mr Dutton overall submitted (as he had below) that it was remarkable that between September 2007 and August 2013 at no time was a proper file review undertaken and remarkable that the significance of the OMS Detainees List was overlooked. He said that the failings, cumulatively if not individually, were inexcusable and so serious as to amount to breaches both of Rule 1.01 and Rule 1.06. He said that the Tribunal should have so held.

135. He further complained that the Tribunal, at paragraphs 142.89 to 142.92, had not properly grappled or engaged with these issues, whether singly or cumulatively, and had given insufficient reasons for its decision on this aspect of the case. He referred us to a number of authorities, including *English* v *Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409, in this regard for the relevant principles.

136. We can see no proper basis for interfering with the Tribunal's conclusion that there was no professional obligation under any rules for the respondents to undertake a full disclosure review in this period: including its finding that the opening remarks of the Chairman of the ASI did not of themselves give rise to such an obligation. Its conclusions at paragraph 142.75 were open to it; and its reasoning and further conclusion in paragraphs 142.76 to 142.88 were likewise open to the Tribunal. As to the failure to disclose the documentation to PIL in November 2007, contrary to the

arrangement that had been reached, that certainly was unfortunate and was never really explained. It is to be criticised. However the Tribunal was entitled to conclude, as it obviously did, that the ultimate responsibility to obtain relevant documents rested with PIL; and that any oversight by SM in this respect did not, of itself, amount to misconduct.

137. But we have, all the same, hesitated over the Tribunal's reasoning and conclusions set out in paragraphs 142.89 to 142.92.

138. Our concerns are, in essence, these. There is force in Mr Dutton's submissions by reference to the asserted trigger points. We have borne in mind Ms Robertson's submission that this was a single manuscript document, given an anodyne description for filing purposes, set in the context of a complex case involving a "jig-saw puzzle" of information requiring to be pieced together. It may well be that each individual oversight can be explained or at all events be assessed as not of sufficient seriousness of itself to constitute an infringement of either Rule 1.01 or Rule 1.06. But, that said, cumulatively the oversight was both repeated and protracted. It is a particular concern, by reference to allegation 1.4, that (set in the context of the Chairman's opening remarks) Leigh Day thereafter acted, working with PIL, in the ASI, attended interviews with witnesses and periodically made ad hoc voluntary disclosures from its own files without undertaking a full file review or still identifying the significance of the OMS Detainees List. It is of only limited assistance to the respondents in this respect that PIL and the Ministry of Defence themselves also seem to have been making disclosure to the ASI on something of an ad hoc and rolling basis and (in PIL's case) inadequately.

139. The Tribunal was, in our judgment, entitled nevertheless to find that in September 2007 the significance that ultimately came to be attached to the OMS Detainees List was far from evident: the focus at that time was on the deaths and torture and the reasons for the detainees' presence on the battlefield "had some relevance to credibility but it was a small part of a much bigger picture". The Tribunal was also entitled to attach weight to the fact that the civil claims had been on hold from July 2008.

140. But what of the various other "trigger points" occurring after September 2007 and before July 2008? And what of Leigh Day's own involvement as solicitors in the ASI and, in particular, its attending some interviews and its making of ad hoc disclosures in its course? The express reasoning and conclusion of the Tribunal on those particular aspects is, on the face of it, in effect confined to what is shortly said in paragraph 142.92. Yet further, the previous finding in paragraph 142.91 that a review conducted "at that stage" would not have revealed the significance of the heading to the fourth column to the OMS Detainees List is explicable if "at that stage" is taken to refer to September 2007 (as, naturally read, it seems to). It is not, however, so easy to explain for all the other stages: indeed MD himself on one occasion had stated after the OMS Detainees List had finally been identified in August 2013, that its significance was "blindingly obvious." It is right to note that the Tribunal, in paragraph 142.91, found that those - notably AC – who had looked at the OMS Detainees List (as translated) had not in fact identified it as significant and it is also right to note that the Tribunal found that the significance of the document became greater "as the case evolved and changed". The Tribunal clearly was anxious (and understandably so) to avoid undue use of hindsight. But while Mr Dutton accepts that the respondents did not in fact note its significance, his point remains that they *should* have done.

141. We have to say that, on such materials as we have been taken to, we would consider that the ultimate decision of the Tribunal on these allegations - and most particularly, perhaps, allegation 1.4 – seems perhaps to have been a generous one in favour of the respondents. But it is here that one has to bear in mind the approach required to be adopted by the appellate court in situations of this kind (as exemplified in the observations in the various authorities set out above). In saying that, we appreciate that the primary facts were not much in dispute on this particular aspect of the case. Nevertheless it was for the Tribunal to assess the credibility and cogency of the explanations given by the respondents in their evidence and to make its own evaluation of whether a breach of the core duties and principles had been proved. It is essential for an appellate court to show an appropriate (albeit not undue) degree of deference to the evaluative judgment of the specialist tribunal entrusted by the rules with assessing the standards of conduct required of solicitors in a particular context. We also have noted that the Tribunal was unanimous on this aspect. On the whole, we are not able ourselves to conclude that the conclusion of the Tribunal went outside the range of what was reasonably open to it.

142. As to the asserted lack of reasons given in this regard by the Tribunal, it is generally understood that the degree of amplitude and precision that might be expected in a judgment of a court is not necessarily to be that expected of a non-judicial tribunal. Here the Tribunal clearly had taken into account the respective submissions, very fully set out (including as to the identified "trigger points"). Clearly it must have accepted those of the respondents. The conclusions at paragraphs 142.89 – 142.92 have also to be set in the broad context of what was found at paragraph 142.75 and in the context of what is then said in the intervening paragraphs. They are also to be set in the context of the unanimous (and in our view significant) dismissal of allegations 1.6 and 1.7, which are not appealed, and of the further reasoning there given as to why the significance of the OMS Detainees List was not identified until August 2013.

143. Consequently the appeal with regard to these two allegations must be dismissed. In so deciding, we do not say that the respondents, individually and collectively, do not merit any criticism for these oversights. They do: and, in fairness to them, we repeat that they have very strongly criticised themselves. But that is not to say that such lack of competence and such oversights as were involved necessarily were of a degree such as to constitute misconduct coming within the ambit of Rule 1.01 or Rule 1.06. We reject the argument of the SRA that the Tribunal applied the wrong test or approached the matter in the wrong way. We reject the argument that its conclusions on these allegations were perverse. We reject the argument that the Tribunal's decision was insufficiently reasoned. To the extent necessary, we also agree with what is said in the Respondents' Notice in these respects on these allegations. In substance, the SRA's real complaint is that the Tribunal did not accept its case and arguments on these allegations. But that is not a legitimate basis on which an appellate court can properly interfere or can substitute (on a less well-informed view of all the evidence and without any real idea of the "feel" of the case in the light of all the evidence adduced below) its own view of the matter.

144. Overall, therefore, we are unable to conclude that the Tribunal was disentitled from reaching the judgments that it did reach on these allegations.

Allegation 1.8

145. This allegation is made, and pursued, against AC only. The allegation, as formulated below, was as follows:

> "Allegation 1.8 – On or around 27 August 2013 the Third Respondent destroyed an original document comprising a handwritten English translation of the Arabic version of a document known as the OMS Detainee List and which had evidential significance to the ASI, and thereby acted in breach of Principles 5 and 6 of the Principles."

146. The allegation was based on Principles 5 and 6 of the SRA Principles which took effect on 6 October 2011. Principle 5 provides as follows:

> "You must provide a proper standard of service to your clients."

Principle 6 provides:

> "You must…behave in a way that maintains the trust the public places in you and in the provision of legal services"

These Principles (albeit slightly differently worded) correspond to the core duties set out in rules 1.05 and 1.06 in the prior code of conduct.

147. The allegation is entirely based on AC, on 27 August 2013, disposing of the manuscript translation made in September 2007 of the OMS Detainees List. She did so, as we have said, by discarding it into a confidential waste bag "without giving the matter very much thought," as she put it in her statement.

148. It is important, for the avoidance of doubt and perhaps also to dispel some previous public misapprehension here, to repeat at the outset the following matters:

(i) First, the original OMS Detainees List (as provided by LG) was left untouched.

(ii) Second, before disposing of the manuscript translation (described by her as "scruffy" and difficult to read) AC herself typed up an exact copy of that translation for the assistance of the ASI (and which was duly handed over in due course).

(iii) Third, AC had no intention whatsoever of misleading or of depriving the ASI of a relevant document.

149. The respective submissions made below were (consistent with its practice in this case) recorded by the Tribunal in meticulous detail.

150. The majority – who accepted AC's evidence - expressly found that AC had not been negligent, let alone that the negligence was such as to constitute professional misconduct (paragraph 145.34). They noted that at that time Leigh Day had not introduced training on such matters (it since has). It was also noted that two QCs, in their personal references, had stated they had not themselves known of the principle of law requiring solicitors to disclose translations even where made or obtained by them for the purpose of litigation: a position established by the Court of Appeal decision in *Sumitomo Corporation* v *Credit Lyonnais Rouse Ltd.* [2001] EWCA Civ 1152, [2002] 1 WLR 479. (In her submissions to us, Ms Robertson also added that solicitors not

infrequently in practice destroy manuscript attendance notes of, say, telephone conversations once they have been typed up. One can see her point – albeit the analogy is by no means perfect given the circumstances here.)

151. The majority further found that public trust in the profession had not been diminished. Amongst other findings, they identified that the critical document was the original Arabic OMS Detainees List which was left untouched; the manuscript translation made in September 2007 had "almost no evidential significance"; the manuscript translation had in any event been accurately transcribed by AC; and AC's motivation in transcribing the translation into type-written form was positively to assist (see paragraph 145.35).

152. The minority (Mr Hegarty) considered it "untenable" to say that AC was not in breach of Principle 5 by destroying an "original, relevant and disclosable" document. AC had consulted no one before doing as she did. Its destruction meant that the clients could not comply with their disclosure obligations in the ASI. Her conduct was "manifestly incompetent" and "deplorable" and "serious". AC had not applied her mind to whether the manuscript was disclosable or not. Her actions were so serious as to amount also to a breach of Principle 6.

153. Mr Dutton submitted that the majority erred in their approach to Principle 5 and thereby erred in principle. He said (amplifying arguments that, as already noted, he had also raised in other contexts) that the majority had wrongly introduced considerations of professional misconduct instead of simply focusing on whether or not there had been a breach of Principle 5.

154. In this regard, he noted that under s. 31 (2) of the Solicitors Act 1974 any person may make complaint to the Tribunal if a solicitor "fails to comply with [the] rules" (see also s. 32 (3) for failure to comply with accounts and trust rules). It was further noted, that, by s. 44 D (1), disciplinary powers are conferred on the Law Society where it is satisfied, among other things, that there had been a failure to comply with the Act or rules made under it *or* (emphasis added) that there has been professional misconduct. As for the Tribunal itself, it is empowered, by s. 47 (2), to "make such order as it may think fit".

155. Given the context of this case, and given the finding that there was no negligence, we found this debate to be somewhat arid – indeed, although argued below, it seemed, with all respect, to have become before us on appeal little more than a means adopted for seeking to generate a purported point of law with the aim of overcoming the conventional difficulties in challenging an evaluative judgment, based on the evidence, of a specialist tribunal.

156. As we have had cause to ask rhetorically before in this judgment: what was this particular allegation doing before the Tribunal if it was not a matter of professional misconduct? In truth, if such an allegation under Principle 5 is to be pursued before a tribunal then it ordinarily needs to have some inherent seriousness and culpability. It no doubt can be accepted that negligence may be capable of constituting a failure to provide a proper standard of service to clients. But even so, questions of relative culpability and relative seriousness surely still come into the equation under this Principle if the matter is to be the subject of disciplinary proceedings before a tribunal. We do not, we emphasise, say that there is a set standard of seriousness or culpability

for the purposes of assessing breaches of the core principles in tribunal proceedings. It is a question of fact and degree in each case. Whether the default in question is sufficiently serious and culpable thus will depend on the particular core principle in issue and on the evaluation of the circumstances of the particular case as applied to that principle. But an evaluation of seriousness remains a concomitant of such an allegation.

157. If authority be needed for such an approach, then it can be found not only in the observations of Jackson LJ (in the specific context of Principle 6) in *Wingate and Evans* (cited above) but also in the decision of the Court of Session in *Sharp* v *The Law Society of Scotland* [1984] SC 129. There, by reference to the applicable Scottish legislation and rules, it was among other things held that whether a breach of the rules should be treated as professional misconduct depended on whether it would be regarded as serious and reprehensible by competent and responsible solicitors and on the degree of culpability: see the opinion of the court delivered by the Lord President (Lord Emslie) at page 134.

158. We consider that, though the statutory schemes are by no means the same, the like approach is generally appropriate and required for the English legislative and regulatory regime in the treatment of alleged breaches of the core principles. We appreciate that there may be some breaches of some rules - for instance, accounts rules: see, for example, *Holden* v *Solicitors Regulation Authority* [2012] EWHC 2067 (Admin) - which can involve strict liability. But that cannot be said generally with regard to all alleged breaches of the core principles coming before the Tribunal; which in our view ordinarily will involve an evaluative judgment and an assessment of seriousness to be made. All that said, in the present case, we repeat that this debate under Principle 5 is particularly sterile, given that the evaluation of the majority was that AC had not even been proved to be personally negligent, let alone that the negligence was such that it constituted professional misconduct (paragraph 145.34).

159. Reverting to the present case there was, overall, no error in the actual approach of the majority in this regard. Indeed it was also the approach of the minority (whose ultimate disagreement was based on his differing evaluation of the seriousness of the conduct, on the evidence): see paragraph 145.33 of the Tribunal's unanimous findings in this respect.

160. We also add that we in any event found reliance on Principle 5 to be rather an elliptical way of approaching the criticism made of AC. The unwitting destruction by a solicitor of one disclosable document in the circumstances of this case scarcely seems to fit well with an allegation of failure to provide a proper service to the clients. Mr Dutton said that Principle 5 was in play because the ultimate obligation of disclosure was on the clients: and the solicitor's duty was to assist them in that (cf. *Myers* v *Elman* [1940] AC 282). That may be so and we are for present purposes prepared to accept the potential application of that Principle here; albeit it may be observed that the relevant specific disclosure obligation at this time was on Leigh Day itself, triggered because of the Rule 9 notice served in August 2013 by the ASI on Leigh Day. Moreover, Leigh Day was by this time, as we understand it, no longer acting or instructed for the core participants in the ASI; and whilst it was retained in the civil claims these were at this time subject to the stand-still agreement.

161. Be that as it may, once it is seen that there was no error in approach by the Tribunal, no sustainable criticism can, in our opinion, be made of the conclusion of the majority with

regard to the alleged breach of Principle 5: which was plainly a conclusion open to them on their assessment of the evidence and of the explanations given.

162. Likewise there can be no valid criticism of the majority in their conclusion with regard to the alleged breach of Principle 6. Indeed, it in effect followed from the prior conclusion, open to them, that there had been no negligence, let alone such negligence that it constituted professional misconduct. The error made by AC, whilst certainly unfortunate, overall was properly adjudged not to be sufficiently egregious or inexcusable (cf. also the observations of Jackson LJ in *Wingate and Evans*, cited above) as to constitute a breach of that Principle. The reasons given by the majority were both entirely sufficient and entirely cogent.

163. In this regard, we ought to add that we have, in common with the majority, the greatest difficulty in seeing what real significance or evidential value the (destroyed) manuscript translation could have had. Its asserted relevance clearly was an important part of the minority's reasoning – but nowhere does the minority seek to explain what its actual relevance or significance was. Indeed in places the minority seems to place the translation almost on a par with the (crucial) OMS Detainees List itself and seems to play down the fact that AC had first accurately transcribed the manuscript translation before disposing of the manuscript.

164. We pressed Mr Dutton on this. With respect, he was wholly unable to give any coherent answer. It is true that the Chairman of the ASI had in his report referred to the loss of the original manuscript translation as removing any possible help it could have given "in establishing the provenance of the Arabic original". However it appears that, at that time, the Chairman was, on the evidence then available, taking it that Leigh Day first came into possession of the OMS Detainees List on its visit to Damascus in September 2007: see paragraph 2.156 of the report. If that were right, and given the then involvement of KAS it (possibly, even though speculatively) might be the case that ascertaining the identity of the translator, and the precise circumstances in which the translation was at that time made, could assist.

165. But it is not right. It has since been conclusively established that the OMS Detainees List had come into existence in 2004 and had been handed over then by LG to Leigh Day (and, indeed, translated then). That being so, it becomes almost impossible to see how the subsequent further manuscript translation made in Damascus in September 2007 could have had any real value: in circumstances, where it had been accurately transcribed, in typed form, by AC before it was disposed of.

166. As to the concerned reactions of MD and SM, evidenced in contemporaneous emails at the time, when they learned – some three weeks later – of the destruction by AC of the manuscript translation, these have to be put in the context of this occurring at a time when it had been overlooked that a translation had been made (and electronically stored by Leigh Day) in 2004 and when there was inevitable concern and sensitivity about the fact that the potential significance of the actual OMS Detainees List had until then been entirely overlooked within Leigh Day and thus that it had not earlier been disclosed. At all events, their then concerns cannot make significant what in truth was not and is not obviously significant.

167. In all the circumstances, we are rather surprised at the vehement criticisms of AC ("manifestly incompetent", "deplorable" etc.) made by the minority. Ms Robertson in

fact submitted to us that this allegation should not have been prosecuted and at all events, having been unsuccessfully prosecuted, should never have been appealed. It suffices to say that we can see no proper basis whatsoever for this court, as an appellate court, setting aside the Tribunal's dismissal of this allegation.

Allegations 1.12 – 1.14

168. The SRA made the following allegations: -

> "Allegation 1.12 – The First and Second Respondents entered into on behalf of and/or approved the entry into by the Fourth Respondent of an improper fee sharing arrangement with MY pursuant to an agreement dated 23 March 2009 which was an improper arrangement in that it was an arrangement for the payment of a referral fee in respect of historic cases and thereby acted in breach of Rules 1.01, 1.06, 8 and 9.02 of the CoC 2007.
>
> Allegation 1.13 – From 31 March 2009 onwards the Fourth Respondent remained a party to the improper agreement of 23 March 2009 and/or financial arrangements and in making payments pursuant to this agreement to MY took steps to fulfil an improper agreement in that it was an arrangement for the payment of a referral fee in respect of historic cases and thereby in breach of Rules 1.01, 1.06, 8 and 9.02 of the CoC 2007 and Principles 1 and 6 of the Principles and Chapter 9 of the CoC 2011 as in force at the relevant time.
>
> Allegation 1.14 – The Fourth Respondent entered and the First and Second Respondents entered into on behalf of and/or approved the entry into by the Fourth Respondent of an improper fee sharing arrangement with MY pursuant to an agreement dated 27 April 2010 between the Fourth Respondent, PIL and MY which was, in respect of the arrangement between the Fourth Respondent and MY, an improper arrangement in that it was an arrangement for the payment of a referral fee in respect of historic cases and thereby acted in breach of Rules 1.01, 1.06, 8 and 9.02 of the CoC 2007."

169. Mr Dutton confirmed that each of these allegations depended upon the SRA establishing before the Tribunal that Leigh Day, with the approval of MD and SM, entered into arrangements for the payment of referral fees to a non-lawyer, MY, which involved a breach of Rule 9.02 of the Code of Conduct. If they succeeded on that point the SRA contended that MD, SM and Leigh Day had acted in breach of Rules 1.01 and 1.06 of the Code of Conduct and of Principles 1 and 6. In other words, the SRA alleged that in so breaching Rule 9.02 of the Code of Conduct, these Respondents had failed to uphold the rule of law and the proper administration of justice, and had behaved in a way which was likely to reduce the trust placed by the public in each of them and the profession.

170. The arrangements were made through two agreements. The first agreement was made on 23 March 2009 between Leigh Day and MY. The second was a tripartite agreement between Leigh Day, MY and PIL made on 27 April 2010. The SRA submits that in

substance these agreements rewarded MY for cases of clients which had been referred before the date of the first agreement (described as "historic referrals") and therefore were in breach of Rules 8 and 9 of the Code of Conduct. It is said that the majority were incorrect to reject these contentions and that the minority view of Mr Hegarty accepting the SRA's case was correct.

Rules 8 and 9 of the Code of Conduct

171. The introduction explains that Rule 8 restricts the persons and businesses with whom a solicitor may share his professional fees. It operates as a prohibition on fee-sharing save in the specific circumstances identified. The purpose of the rule is to protect the independence and professional judgment of a solicitor, in the public interest. Rule 8.01 deals with fee-sharing with colleagues. Rule 8.02 deals with fee-sharing with non-lawyers. It extends the categories of persons with whom fees may be shared beyond the exceptions to the implicit prohibition in Rule 8.01. Rule 8.02 (e) allows fee-sharing which "does not involve a breach of Rule 9", the latter provision dealing with "referrals of business". The upshot for the present case is that provided that the fee-sharing arrangements with MY complied with Rule 9 there would have been no breach of Rule 8.

172. The Code of Conduct explains that the purpose of Rule 9 is also to protect the independence of a solicitor. Thus Rule 9.01(1) requires that when making or receiving referrals to or from third parties a solicitor must not compromise his independence or ability to advise and act in the best interests of his clients. Rule 9.01(3) plainly states that Rule 9 does not apply to referrals between lawyers. Rule 9.01(4) prohibits a solicitor from entering into arrangements with certain persons in respect of any claim arising as a result of death or personal injury. This provision was the basis for allegation 1.15 which we deal with below.

173. Rule 9.02 imposes additional requirements when a solicitor enters into a financial arrangement with an "introducer". The agreement must be in writing and available for inspection (sub-para. 9.02(a)). The introducer must undertake as part of the agreement to comply with Rule 9 (sub-para. 9.02(b)).

174. Rule 9.02(e) requires the agreement with the introducer to provide that before making a referral to the solicitor the introducer must give the client "all relevant information concerning the referral, in particular the following items: -

> "(i) the fact that the introducer has a financial arrangement with you; and
>
> (ii) the amount of any payment to the introducer which is calculated by reference to that referral; or
>
> (iii) ……. "

175. Rule 9.02(g) imposes a direct obligation on the solicitor: -

> "Before accepting instructions to act for a client referred under 9.02 you must, in addition to the requirements contained in 2.02 (Client care), 2.03 (Information about the cost) or 2.05

> (Complaints handling), give the client, in writing, all relevant information concerning the referral, in particular:
>
> (i) The fact that you have a financial arrangement with the introducer;
>
> (ii) The amount of any payment to the introducer which is calculated by reference to that referral…"

176. It is solely because Rule 9.02(e) and (g) require a client to be notified about the financial arrangement (including the referral fee payable) *before* either the referral is made by the introducer or the instruction from the client accepted by the solicitor, that the agreement between the solicitor and the introducer must pre-date any such notification to a potential client. The client then has an opportunity to decide whether he is content for the referral to be made and for his instructions to be given to the solicitor.

177. It follows that allegations 1.12 to 1.14 are solely concerned with the legal effect of this requirement for notification to the client, prior to referral or instruction, of a pre-existing agreement to pay a referral fee and whether that requirement was breached in this case. It is common ground that this highly specific requirement for client notification cannot be satisfied in relation to a case which has already been referred to the solicitor before an agreement to pay referral fees for cases is made between the solicitor and the introducer. Hence, there is an implicit prohibition on an agreement to pay referral fees in respect of historic cases.

178. Mr Dutton in this respect also referred us to the Guidance Note on Rule 9 which states that when investigating complaints about breaches of the rule the SRA would "consider the substance of any relationship rather than the mere form".

Factual background

179. The SRA submitted to the Tribunal (para. 147.4) that the core facts relevant to these allegations were not in dispute. That was also the position in this appeal. These facts may largely be taken from the Tribunal's judgment.

180. On 22 April 2008 MY contacted SM about the possibility of referring a number of new potential cases. He suggested that Leigh Day enter into a referral agreement directly with him, under which they would pay him 15% of the success fees they obtained (para. 115). Leigh Day initially thought that PIL should be responsible for any payment of referral fees to MY out of the fees which Leigh Day would be sharing with PIL. PS agreed that he would reach agreement with MY on the issue (para. 116).

181. In late July 2008 a revised referral agreement was agreed between PIL and Leigh Day whereby PIL would be entitled to 27.5% of Leigh Day's fees on cases referred by PIL and 13.75% on cases not referred by PIL.

182. When in November 2008 PS sought MD's views on his proposals for an agreement with MY, MD advised PS to obtain the advice of leading counsel on any regulatory implications. On 22 December 2008 PIL was advised that by Rule 9.02(h) it was prohibited from making any financial arrangement with MY in respect of referrals,

because it would be receiving public funding for the work it would undertake for those clients. This advice was passed on to MD and SM the following day (para. 117).

183. On 23 December 2008 MD sent an email to MY explaining that whereas PIL could not enter into an agreement to pay referral fees to him, Leigh Day would be able to do so. He proposed to enter into a joint relationship with both PIL and MY whereby Leigh Day would pay each 13.75% of their profit costs. He said that some formal documentation would need to be prepared and signed and that everything would have to be set out for the client (para. 119).

184. From January 2009 MY was not making any further referrals to PIL and thereby to Leigh Day. He was putting pressure on Leigh Day to finalise an agreement for paying him referral fees (para. 120).

185. On 2 February 2009 SM sent MD a note which carefully went through the requirements of Rule 9.02 and raised the question whether an agreement could be entered into permitting payment to MY of referral fees for cases which had already been referred to PIL by MY (para. 121).

186. On 13 March 2009 MY sent MD, SM and PS an email attaching a list of 76 "possible clients", stating that he was keen to finalise the fee arrangement so that he could go ahead with preparing those cases.

187. The same evening SM sent to MY a draft agreement under which Leigh Day would pay to MY 13.75% of its recovered profit costs for cases which were successful, covering both cases which had already been referred and those yet to be referred to the solicitors. The email pointed out that Leigh Day was seeking the views of the SRA on whether the agreement could include payments for historic cases. On 14 March 2009 MY responded to SM acknowledging that they would have to wait until a decision was made on historic cases, but added that this issue was of "crucial importance" to him. On 15 March PS emailed MD and SM emphasising the urgency of finalising the agreement with MY because the latter would not refer any further cases until that was concluded. SM replied that she was still seeking a response from the SRA on the regulatory issues (para. 123).

188. On 16 March 2009 the SRA told SM that in their view it would be impermissible for an agreement to provide for payments to be made to MY for referral of historic cases, because it would be "impossible retrospectively to comply with the requirements in Rules 9.01(2) and 9.02 of the CoC 2007 to notify clients in advance of the referral fee." MD was made aware of this (para. 124).

189. On 17 March 2009 SM sent an email to MY explaining the SRA's position that an agreement with him could not apply retrospectively and repeating that PIL could not share their fees with him in respect of cases for which they had public funding. With MD's agreement, SM therefore proposed that until such time as the amount of fees shared by Leigh Day with MY (for cases referred by MY to Leigh Day after the signing of an agreement) equalled the amount of fees shared or to be shared with PIL (for cases already referred to Leigh Day by MY/PIL), Leigh Day would pay 27.5% of their recovered fees to MY and make no payment to PIL (para. 125).

190. On 18 March 2009 MY agreed to this proposal. The written agreement containing this arrangement was signed on 23 March 2009 (para. 128).

191. In an email sent to MD on 17 March 2010 PS asked for the agreement between Leigh Day and MY to be reviewed so that there would be an agreement in writing that once MY caught up with PIL as regards their respective shares of Leigh Day's profit costs, MY and PIL would each receive half of the 27.5% share being paid to MY, i.e. 13.75% each.

192. On 19 March 2010 MD responded that it was clear that MY could not be paid referral fees on cases previously referred by PIL because the clients in those cases had not been notified at the outlet of MY's "interest" and so he could not be paid any fees on those cases. But in all cases referred to Leigh Day since the agreement dated 23 March 2009 the clients had been notified beforehand about the agreement and so referral fees could be paid out of the profit costs on those cases. Leigh Day prepared a tripartite agreement between PIL, Leigh Day and MY to clarify these arrangements.

193. This agreement was signed on 27 April 2010. It contained the following clauses:-

> "2. It is hereby agreed that LDC will only pay referral fees to MY when the arrangement has been made clear to the new client on LDC's first meeting with the client and this will only occur when the client has been specifically referred to LDC by MY. It is further agreed that in light of the historic work of both MY and PIL with regard to the legal claims of Iraqi civilians against the British Government, the parties objective is that PIL and MY should receive an equal amount for the referral for all Iraqi claims to LDC.
>
> 3. The parties to this deed agree that only one referral fee is due on any case and this will be paid to either PIL or MY. They agree that it will be for LDC to assess in each instance who is to receive the referral fee in relation to any particular case, on the understanding that the two recipients should over a two year period from the date of this agreement receive broadly a half each of the referral fees in terms of all Iraqi cases referred to LDC.
>
> 4. Once a year, LDC will account to both MY and PIL as to the cases taken on that fall within these agreements, who is entitled to referral fees in each case and the respective amount paid out to PIL and MY."

194. It is common ground that the agreements signed in March 2009 and April 2010 provided for the distribution of referral fees as between PIL and MY so that they each received a sum equivalent to an equal share over time of fees received by Leigh Day on those cases referred before 23 March 2009 (the historic cases) and those referred thereafter. This was referred to as an "equalisation" arrangement.

The Tribunal's decision

195. In summary the majority decided: -

(i) Although the primary purpose of Rule 9 was to protect the independence of solicitors, there was no allegation that the arrangements made had in any way affected Leigh Day's independence. There was no suggestion that any client suffered any financial detriment; the referral fees were borne by Leigh Day and did not affect the amount of damages received by clients. There was no suggestion that a payment of 27.5% of success fees was excessive or disproportionate (para. 147.32);

(ii) Leigh Day could not pay referral fees to MY for historic cases because the clients in those cases would not have received "the prior notification required by the Rules, and thus any payment in relation to those cases would be in breach of the Rules" (para. 147.34);

(iii) There was nothing wrong in Leigh Day paying 27.5% of its success fees to MY for cases referred after the agreement in March 2009 provided that the clients in those cases were given all "relevant information" in advance (para. 147.35);

(iv) All clients who were referred by MY to Leigh Day after that agreement in March 2009 received proper notification of the arrangements for paying referral fees to MY (para. 147.37);

(v) MD, SM and Leigh Day changed the proposals for making payments to MY precisely so that they could comply with the Rules. It was those Rules which had dictated how the payments would be structured (para. 147.35). The fact that the earlier proposal to pay MY 13.75% on *all* cases was increased to 27.5% on *future* cases only did not mean that he was, as a matter of fact being paid for the pre-existing or historic cases. This was a commercial arrangement that had been altered so as to make sure that correct notification to clients would be given. This was not a sham arrangement or a method of controverting the Rules. Instead, the arrangement was made in compliance with the Rules (para. 147.39);

(vi) The increased payment to MY did not represent a payment for the "historic referrals". Instead, MY was being compensated, through being paid an additional amount, for the fact that he could not be paid referral fees by Leigh Day for those cases where the requirements for prior notification of clients could not be met. MY was being paid something for the "new cases" because he could not be paid anything for the "historic cases" (paras. 147.12, 147.34, 147.35 and 147.38);

(vii) The "equalisation" agreement depended entirely on the date when successful cases were referred (i.e before or after 23 March 2009) and thus who was paid a referral fee for them. The actual distribution of referral fees accorded with that agreement. "… no payments were ever made to MY when a case that pre-dated 23 March 2009 was successful. Payments on those cases were only ever made to PIL" (paras. 147.35 and 147.38);

(viii) Although the findings that the Respondents were not in breach of Rules 8 and 9 meant that there was no need for the Tribunal to go further, the allegations made were not so serious that they could have breached either the Core Duties or Principles 1 and 6. All clients had been informed that referral fees would be paid by Leigh Day and no client was making any contribution whether out of his damages or otherwise. The arrangement had no financial impact on clients and affected only the profits to be retained by Leigh Day. Clients who had already instructed Leigh Day on historic cases were unaffected and all new clients were fully informed of the position. There was no diminution in the trust the public would have in the profession or its reputation. The arrangements had no effect on the rule of law or the administration of justice (para. 147.46).

196. In summary, the minority decided:-

(i) The overall amount to be paid for referral fees (27.5%) was not a matter of concern (para. 147.50);

(ii) The objective was that PIL and MY should receive an equal amount of the referral fees for all successful claims. The arrangement made was in substance a mechanism for rewarding MY for historic cases. That was plain from the intention to revert to the original payment proposal involving equal amounts, once there had been equalisation overall as between PIL and MY. The substance of the agreement was to pay MY for historic cases and the increase in his percentage share was simply a means of circumventing the Rules (para. 147.50);

(iii) The submission that all clients after the agreement dated 23 March 2009 received proper notification of the referral fees was "disingenuous" because they were not told that MY would be receiving a 27.5% referral fee until such time as he had received payment for all the historic cases (para. 147.52);

(iv) This was an attempt to create an artificial arrangement which would appear to comply with the Rules but was in substance a clear breach of the Rules and a deliberate attempt to circumvent the Rules. On that basis, the conduct also involved breaches of Rules 1.01 and 1.06.

Discussion

197. Having set out the regulations, factual background and the reasoning of the Tribunal in some detail, it is possible for us to deal with the SRA's criticisms of the majority decision relatively briefly. Mr Dutton accepted that in *form* the agreements made in March 2009 and April 2010 complied with Rule 9.02. The relevant fee arrangements in those agreements were notified to those clients whose cases were referred to Leigh Day after the date of those agreements and that notification took place before those cases were referred by MY or Leigh Day accepted instructions. MY was only paid referral fees out of Leigh Day's fees earned on those cases.

198. Nonetheless, the SRA submits that MD, SM and Leigh Day acted in breach of that Rule because, in summary: -

> (i) Their object was to pay MY for the referral of historic cases;
>
> (ii) That gave rise to an insoluble client notification problem. By definition, those clients whose cases were referred to PIL and thus Leigh Day before 23 March 2009, could never be notified of the fee arrangements agreed in 2009 and 2010 *before* those agreements were entered into and so Rule 9.02(e) and (g) was breached;
>
> (iii) In substance, the agreements made in 2009 and 2010 sought to pay MY referral fees for historic cases, without being able to comply with the requirement in Rule 9.02 to have pre-notified the clients in those cases;
>
> (iv) Alternatively, even if the arrangements made in March 2009 and April 2010 were in substance agreements to pay referral fees in relation to new cases referred after the date of those agreements, MD, SM and Leigh Day failed to comply with Rule 9.02(g) because not all "relevant information" was notified to the clients involved in those new cases, namely the fact that half of the 27.5% to be paid to MY was for historic cases, the "equalisation" arrangement, and, when MY had "caught up", the variation whereby 13.75% would be paid to MY (instead of 27.5%) and 13.75% to PIL.

199. We reject each of these submissions. First, we should record that Mr Dutton accepted that the agreements in 2009 and in 2010 did not involve a "sham" in the sense explained by Diplock LJ (as he then was) in *Snook* v *London and West Riding Investments Ltd.* [1967] 2 QB 786, 802 C-E. This was not a case where the parties intended to create legal rights and obligations which differed from the terms set out in those documents or their outward appearance. The parties intended that MY should receive referral fees solely as a percentage of the fees earned by Leigh Day on cases referred to them after 23 March 2009 (subject, of course, to the clients in those cases receiving prior notification in accordance with Rule 9.02). The parties intended that MY should not receive any referral payments out of fees earned by Leigh Day on any of the cases referred to them before 23 March 2009. The agreements in 2009 and 2010 gave effect to that common intention.

200. Given that the agreements in 2009 and 2010 were structured in that way, Rule 9.02 imposed obligations on MY and Leigh Day to notify "relevant information" to the clients in cases referred to Leigh Day after 23 March 2009, before any such referral or Leigh Day being instructed, but not to any of the clients in cases referred before that date. That is why the SRA accepts that as a matter of form the referral fee arrangements made in 2009 and 2010 complied with Rule 9.02. On that basis the insoluble problem of being unable to notify the clients in the historic cases simply does not arise.

201. It is therefore essential to this part of the SRA's argument that it persuades the court that in substance the 2009 and 2010 agreements provided for MY to be paid referral fees for the historic cases. In agreement with the conclusion of the majority below, we reject this contention. In our judgment the form and the substance of these agreements were one and the same. As a matter of substance, MY would only receive referral fees if and in so far as cases referred after 23 March 2009 were successful. He was not entitled to anything out of the fees earned by LD on successful cases referred to them before that date. The equalisation arrangement depended upon post-March 2009 claims succeeding and to such an extent as would yield for MY an amount equivalent to the amount earned by PIL on the historic cases.

202. As a matter of substance, the agreements in 2009 and 2010 were structured so as *not* to breach the only relevant requirement in Rule 9.02, namely prior notification to the clients in a case yet to be referred of a pre-existing agreement for payment of referral fees to the introducer.

203. The amount to be paid to the introducer is a matter for agreement between the parties, so long as it does not infringe any part of the Code of Conduct or Principles. No such criticism is made of the percentage agreed in this case. It is not suggested that there was any risk to Leigh Day's independence. The majority recorded these matters in para. 147.32 of the judgment. Accordingly, policy concerns of the kind set out in *Westlaw Services Ltd* v *Boddy* [2010] EWCA Civ 929 at [45] do not arise in the present case.

204. There is, in our judgment, no legal objection to the parties agreeing to increase the amount payable to MY in respect of referrals by him after 23 March 2009 in order to reflect the fact that he could not be paid referral fees on earlier cases because of Rule 9.02. Whereas that rule did prohibit arrangements for referral fees which did not comply with the requirement for prior notification to the relevant client, it did not contain any other prohibition relevant to the circumstances of this case. It is this point which perhaps helps to explain the divergence of view within the Tribunal. In our judgment, the reasoning of the majority reveals that they correctly understood that the agreements made in 2009 and 2010 were straightforwardly arranged so as to avoid breaching the only requirement that would give rise to a prohibition of the fee arrangement, namely the notification requirement. On the other hand, the minority decision wrongly treated Rule 9 as prohibiting an uplift in referral fees for new cases of the kind agreed here, even where the notification requirement would be satisfied.

205. On this analysis there is no difference in principle between increasing MY's intended fee from 13.75% by a few percentage points or by doubling it. Nor does it make any difference that under the equalisation arrangement MY's entitlement to 27.5% of Leigh Day's fees was to reduce to the level which had originally been intended, namely 13.75%. Nor can it be said that the substance of the agreement differed from the form

adopted because equalisation would be achieved once MY received as much as PIL had received in respect of historic cases. As the majority correctly understood, "equalisation" was dependent upon whether successful cases had been received before or after 23 March 2009 and so was entirely consistent with compensating MY for the fact that he could not be paid referral fees on historic cases simply because of non-compliance with the notification requirement, whilst at the same time paying that compensation on new cases so as to comply with that requirement. It is impossible to treat the agreements in March 2009 and April 2010 as representing some artificial device designed improperly to circumvent the Rule when neither the object of the arrangement nor the means used to give effect to it infringed the Rule.

206. We turn to the SRA's alternative argument that, even if the arrangements made in March 2009 and April 2010 were in substance, as well as form, agreements to pay referral fees for "new cases" referred after the date of those agreements, the Respondents failed to provide the clients in those cases with "all relevant information concerning the referral" and thereby breached Rule 9.02(g). The submission is based upon a notification letter we were shown and which the parties treated as being typical of all such letters sent to clients in "new cases". The letter explained that MY would be paid 27.5% of any profit costs received by Leigh Day if the claim were to be successful. We do not consider that in order to comply with the language of Rule 9.02(g) it was necessary to notify the clients not only about that "amount" but also the commercial reasons of Leigh Day, PIL and MY for setting the percentage at that level. The percentage did not exceed what would have been paid in any event; it is agreed not to be excessive; and the SRA advanced no explanation as to how this information could have assisted or affected any client involved in any of the new cases. The same goes for the "equalisation arrangement", or compensation arrangement, the rationale for which was essentially the same as the setting of MY's percentage at 27.5% before it would eventually drop to 13.75%. Lastly, there is nothing in the point that the notification letter did not identify the fact that PIL would in due course receive 13.75%. As Ms Robertson pointed out, a payment of that kind to another solicitor falls outside the scope of Rule 9 (see Rule 9.01(3)) and therefore the short answer is that this was not a matter required to be notified under Rule 9.02(e) or (g).

207. Having rejected the grounds of appeal which relate to the Tribunal's dismissal of the SRA's case on Rule 9, there is no need for us to deal at any length with the grounds of appeal criticising the Tribunal's handling of the alleged breaches of Rules 1.01 and 1.06 and Principles 1 and 6. We see no basis upon which it could be said that the majority's findings in para. 147.46 of the judgment could be criticised.

Allegation 1.15

208. The SRA made the following allegation:

> "Allegation 1.15 – The First and Second Respondents authorised and/or approved the payment of a prohibited referral fee of £25,000 to MY on or around 23 December 2008. The payment was prohibited and improper in that it was (i) a contingency fee in respect of claims arising as a result of death or personal injury to a third party whose business, or part of whose business, was to support claims arising as a result of death or personal injury; (ii) made pursuant to an agreement (constituting a financial

> arrangement) which was not compliant with rule 9.02 CoC 2007; and/or (iii) a referral fee in respect of historic cases, and thereby acted in breach of Rules 1.01, 1.02, 1.06, 8 and 9.01(4) of the CoC 2007."

Factual Background

209. As we have noted above, on 22 December 2008 PS told MD and SM that PIL was prohibited from entering into any referral agreement with MY in respect of any work that PIL was undertaking on a publicly funded basis and therefore could not pay him any referral fees for such work.

210. The following day MD sent an email to MY explaining that for this reason Leigh Day rather than PIL would pay referral fees to MY. He offered to pay MY 13.75% of Leigh Day's profit costs on each case. By way of example, MD told MY that Leigh Day expected to make well over £1m on the Baha Mousa case and so on this basis MY should receive over £150,000 in relation to that case alone. MD went on to explain that formal documentation would need to be prepared and signed and the clients notified and stated: -

> "[SM] arranged to pay 25k into your account today as a down payment on what will be due to you on Moussa."

211. On 23 December 2008 Leigh Day did indeed make a payment to MY of £25,000, recorded as being "on account of costs for referral". It is common ground that PIL had referred the Baha Mousa case to LD in January and the litigation had been settled in July 2008. It was therefore an historic case.

212. At that stage Leigh Day had not yet been advised that it was impermissible to make payments to an "introducer" for the referral of historic cases by virtue of Rules 9.01(2) and 9.02 of the CoC 2007. When in March 2009 the SRA advised Leigh Day of that position, Leigh Day entered into the agreement referred to above, by which Leigh Day would pay MY 27.5% of their recovered fees for future cases, partly to compensate MY for it not being possible to pay him referral fees for historic cases.

213. The SRA contended before the Tribunal that the payment of £25,000 made to MY on 23 December 2008 had been improper because, in summary: -

(i) It was a payment in respect of an historic case and thus in breach of Rule 9.02;

(ii) It was made prior to any written agreement being in place, in breach of rule 9.02(a), and;

(iii) It was an improper contingency fee contrary to Rule 9.01(4)

214. It should be noted, however, that according to the respondents' submissions before the Tribunal, no more was paid to MY than was properly due to him under the 2009 and 2010 agreements, after taking the payment made in December 2008 into account (see para. 148.21). In other words, the payment of £25,000 was credited against the sums otherwise due to MY under the March 2009 agreement. That account of what took place has not been challenged.

The Tribunal's decision

215. The Tribunal decided unanimously that the conduct complained of did not involve any lack of integrity, notwithstanding the absence of any written agreement at the time the payment of £25,000 was made and the respondents' failure to appreciate at that stage that the payment of referral fees for historic cases was prohibited (para. 148.29). The SRA has not appealed against the findings made by the Tribunal on integrity.

216. In summary, the majority found: -

(i) The Rules did not prohibit a payment on account of referral fees being made before any referrals were made by the introducer, leaving aside the need for the referral agreement to be in writing (para. 148.31);

(ii) The payment of £25,000 made to MY on 23 December 2008 clearly related to the Baha Mousa case, which was an historic case. The clients had not been notified that any referral fee would be paid by Leigh Day to MY. In December 2008, Leigh Day treated the £25,000 as an interim payment to MY of monies due on the Baha Mousa case, which had already been settled, and not as an advance payment of monies that might become due under an agreement yet to be made. Accordingly, the payment to MY of £25,000 in respect of the referral of an historic case had been in breach of Rule 9.02 (para. 148.32);

(iii) The breach of Rule 9.02 was not so serious as to justify a finding of professional misconduct and so allegation 1.15 was dismissed (paras. 148.33 to 148.36);

(iv) The payment of £25,000 was not an improper contingency fee for the reasons given by the majority when rejecting allegations 1.9 to 1.11 (para. 148.30).

217. On the issue of the seriousness of the breach of Rule 9.02, in para. 148.35 the majority found that the breach had occurred between 23 December 2008 and 23 March 2009 (see para. 148.32) while the Respondents were investigating the position in order to ensure regulatory compliance. When the payment of £25,000 was made, Leigh Day had not appreciated that it would be treated as prohibited if it related to an historic case, such as Baha Mousa. This had not been a "planned error", nor a scheme designed to circumvent the Rules. But on 23 December 2008 Leigh Day then had appreciated that a written agreement would be necessary. As soon as Leigh Day understood the regulatory position in relation to historic cases they re-characterised the payment so that it would be compliant with the Rules (para. 148.35).

218. In para. 148.36, the majority noted that the primary purpose of Rule 9.02 was to ensure that clients had advance notice that a fee would be paid to an introducer. Although the clients in Baha Mousa had only been given notice of referral fees payable by Leigh Day to PIL, Leigh Day would have been entitled on 23 December 2008 to characterise the £25,000 as a payment on account of future referrals. In the period following the payment "the Respondents did put in place the appropriate written agreement". The fact that the payment was categorised "for a short period" as relating to the Baha Mousa case, rather than cases not yet referred, seemed to the majority "to be an extremely technical matter" and insufficiently serious to attract a finding of misconduct.

219. The minority found that the payment of £25,000 on 23 December 2008 was in breach of Rule 9.02 because at that time the payment related to the Baha Mousa case and a written agreement had yet to be made in respect of referral fees for MY. It was impossible for the respondents "to simply correct their breach by re-categorising the payment" (para. 148.38). Solicitors were not entitled to make a payment before having investigated the position in order to ensure regulatory compliance (para. 148.40). On the other hand, the actions of MD and SM here should not be treated as reckless. Subject to that qualification, and the finding that there had been no lack of integrity, the minority found allegation 1.15 proved beyond reasonable doubt (para. 148.41).

Seriousness of rule breach and professional misconduct

220. The SRA repeated its contention that in order to substantiate allegation 1.15 it only had to establish that breaches of Rule 9.01 and 9.02 had occurred, without also having to show that those breaches were so serious as to amount to professional misconduct. We reject that contention, applying the same approach as set out by us above.

Breach of Rule 9.02

221. Undoubtedly the majority did find that in December 2008 Leigh Day paid £25,000 to MY as an interim payment of monies supposedly due to MY in respect of the Baha Mousa litigation and therefore acted in breach of Rule 9.02 because that was an historic case. However, the SRA submitted that the majority erred when it stated in para. 148.36 that in December 2008 Leigh Day would have been entitled to make the payment on account of future referrals, because that ignored the absence of any written agreement until 23 March 2009. There was therefore a further breach of the Rules, namely the requirement in Rule 9.02(a) that when a "financial arrangement" with an introducer is made, the agreement must be in writing and available for inspection by the SRA. By Rule 9.02(i) a "financial arrangement" includes (inter alia) "any payment to a third party in respect of referrals". The SRA submits that if, contrary to its contention, it was permissible for the Tribunal to assess the seriousness of any breach in order to judge whether it amounted to professional misconduct, the majority erred when it came to assess seriousness because it disregarded this second breach of Rule 9.02.

222. The Tribunal's decision must be read fairly and as a whole, and without "excessive legalism or exegetical sophistication" (*South Bucks DC* v *Porter (No.2)* [2004] UKHL 33, [2004] 1 WLR 1953 at para. 33).

223. The SRA's criticism of para. 148.36 of the Tribunal judgment is, in our view, unsustainable. In particular, it involves reading that paragraph in isolation and ignoring earlier reasoning which the majority had already expressed in earlier parts of the decision.

224. It is plain from para. 148.29 that the majority's reasoning began with their appreciation, and thereafter proceeded on the basis, that on the date of the payment of £25,000 there was no written agreement in place with MY and that it had been necessary for Leigh Day to enter into such an agreement so as to comply with the Rules.

225. It is plain from paras. 148.31 and 148.32 that the majority found that the payment of £25,000 was in breach of Rule 9.02 during the period 23 December 2008 to 23 March 2009. The beginning of that period was defined by the date when the payment was

made. At that stage the payment was made in relation to the Baha Mousa case. The end date of the breach period was defined by the date of the agreement with MY to pay him fees for the referral of new cases after that date, 23 March 2009, and by the re-characterisation which then took place of the payment of £25,000 as being on account of future fees due under that agreement. It is therefore plain that the majority had the breach of Rule 9.02(a) well in mind. It did not need to be spelled out more explicitly in the decision.

226. It is in that context that in paras. 148.33 to 148.36 the majority dealt with a number of aspects relating to the seriousness of the non-compliance with Rule 9.02 during the period 23 December 2008 to 23 March 2009. In para. 148.35 the majority once again referred to MD's appreciation on 23 December 2008 that there was a requirement to enter into a written agreement. Although most of para. 148.36 was concerned with the primary purpose of Rule 9.02, namely to ensure that the relevant clients would receive advance notification of an agreement to pay referral fees, the majority then continued:

> "In the period following the payment, the Respondents did put in place the appropriate written agreement"

227. Reading the judgment fairly and as a whole, it is untenable to suggest that the majority simply focused on Leigh Day's ability to characterise the payment of £25,000 as a payment on account of future referrals, whilst disregarding its non-compliance with the requirement for there to be an agreement in writing. There is therefore no foundation for the SRA's contention that the majority's judgment on "seriousness" was flawed because it disregarded the breach of that requirement.

228. There is no basis to justify this court treating the majority's decision on either the application of Rule 9.02, or its assessment of "seriousness", as wrong.

Breach of Rule 9.01(4)

229. Rule 9.01(4) provided: -

> "You must not, in respect of any claim arising as a result of death or personal injury, either:
>
> - (a) enter into an arrangement for the referral of clients with; or
>
> - (b) act in association with,
>
> any person whose business, or any part of whose business, is to make, support or prosecute (whether by action or otherwise, and whether by solicitor or agent or otherwise) claims arising as a result of death or personal injury, and who, in the course of such business, solicits or receives contingency fees in respect of such claims."

By Rule 9.01(6) "contingency fee" was defined as meaning: -

> "any sum (whether fixed, or calculated either as a percentage of the proceeds or otherwise howsoever) payable only in the event

> of success in the prosecution or defence of any action, suit or other contentious proceedings."

230. Mr Tabachnik QC submits that this definition of contingency fee is very broad. It covers *any sum* which is payable only in the event of success in prosecuting or defending any contentious proceedings and however calculated. The definition is not limited to sums paid as a percentage of damages recovered. It includes sums paid as a proportion of "the proceeds" of a claim, which would include a solicitor's profit costs. The mischief at which Rule 9.01(4) was aimed in death and personal injury cases was the payment of referral fees contingent on a successful outcome. The Rule prohibits a solicitor in respect of any claim arising from death or personal injury from entering into any referral arrangement or from acting in association with, any person whose business includes making, supporting or prosecuting such claims, and who solicits or receives contingency fees for such claims.

231. The SRA thus submits that the payment of £25,000, whether in respect of an historic case or on account of referral fees for future cases, fell within the definition of a contingency fee in Rule 9.01(6) and the arrangement was therefore prohibited by Rule 9.01(4).

232. The respondents submit that Rule 9.01(4) and (6) should be construed purposively. The context in which the Code of Conduct was introduced in 2007, was that (a) conditional fee agreements that complied with statutory conditions and (b) referral fees in the form of fee sharing with non-lawyers, were both permissible. The previous rules, the Solicitors Practice Rules 1990, had generally prohibited fee sharing. It is submitted that it would make no real sense to treat the 2007 Rules as having introduced greater flexibility by allowing a solicitor to enter into a CFA and to agree to share his fees with a non-lawyer for referrals, but to prohibit the payment of referral fees to that person out of the costs to which that solicitor became entitled under the CFA. The prohibition in Rule 9.01(4) of CoC 2007 should be treated as applying only where the third party solicited or received fees from the lay client; for example, as a percentage of the damages recovered.

233. In fact, in front of the Tribunal the SRA had advanced the same point of construction under allegations 1.9 to 1.11 in order to establish breaches of Rule 9.01(4) in relation to the agreements for future referrals made by Leigh Day with MY in March 2009 and in April 2010, and not simply the payment of £25,000 in December 2008. The majority rejected the SRA's submissions on this point of construction (paras. 146.56 to 146.65). The minority decided that on a natural reading of the language used in the Rules, there was no room for any alternative, purposive construction, and the agreements with MY had been prohibited by Rule 9.01(4). However, Mr Hegarty concluded that any breaches of Rules 8 and 9 had not been deliberate. He added that they only amounted to technical breaches, because although the respondents had been mistaken as to the meaning of the Rules they had applied their minds to them (para. 146.72).

234. The SRA has not sought to appeal the Tribunal's decision on allegations 1.9 to 1.11. Mr Tabachnik explained in his oral submissions that the SRA had pursued the same point of construction in its appeal on allegation 1.15 because, as the minority had found (para. 148.46), the respondents failed to check the Rules at all before making the payment of £25,000. Thus, it was said, this was not a situation where the respondents considered the Rules beforehand but simply made an error as to their interpretation.

235. We incline to favour the construction of Rule 9.01(4) advanced by the SRA. The language used in the Code of Conduct is very broad. It refers to "any sum" payable in the event of success in a claim *or a defence*. Where a defendant is successful, the definition of "contingency fee" would apply to the payment of a fee out of defence costs. Thus the definition extends to include payment out of a solicitor's profit costs, whether acting for a claimant or for a defendant, and is not limited to payments by the client or out of damages recovered by the client. We also see force in the SRA's submission that it was unnecessary and inappropriate to refer back to the 1990 Rules in order to construe the 2007 Rules because the language used in the latter was clear. But if recourse were to be had to the 1990 Rules, then it is to be noted that the same definition of "contingency fee" was used in those Rules in conjunction with the qualified prohibition of contingency fees in Rule 8. That definition was therefore plainly referring to a solicitor's profit costs recoverable on a contingent basis.

236. However, we do not find it necessary to reach a concluded view on this point of construction. The prohibition in Rule 9.01(4) no longer exists and Mr Tabachnik confirmed that the issue has no ongoing practical importance. In any event, it is relevant to consider whether, if the SRA could establish that the payment in December 2008 involved a breach of Rule 9.01(4), it could also establish that that breach was sufficiently serious as to amount to professional misconduct. Allegation 1.15 has only been pursued by the SRA in this appeal, in contrast to allegations 1.9 to 1.11, because the respondents failed to consider the relevant Rules at the time the payment was made. Even then, the minority rejected the accusation of recklessness (para. 148.41). But more to the point, it is common ground that the payment of £25,000 was not treated by Leigh Day and MY as a freestanding transaction. Instead, MY received no more than he was entitled to receive under the terms of the March 2009 and April 2010 agreements in respect of referral fees for future cases. The payment of £25,000 was treated as forming part of that entitlement and not as a sum additional thereto. The SRA has decided not to pursue any appeal in relation to the application of Rule 9.01(4) to those agreements. We therefore do not see how any finding adverse to the respondents would be justified in relation to the application of that Rule to the payment of £25,000 on 23 December 2008. Put another way, any breach of Rule 9.01(4) regarding that payment was not so significant as to constitute professional misconduct.

Conclusion

237. For all those reasons, we dismiss the various grounds of appeal raised in relation to allegation 1.15. The dismissal of this allegation by the Tribunal was entirely proper.

Allegation 1.19

238. This allegation, made against MD and SM, was in the following terms:

> "[They] authorised and/or arranged the payment of sums of money by [LD] which they knew or suspected to be improper and failed to take proper steps to satisfy themselves that such disbursements were proper and thereby acted in breach of Rules 1.02 and 1.06 of the CoC 2007. It was also alleged that they acted dishonestly in respect of this allegation although that was not a requirement for this allegation to be proved."

239. Allegation 1.19 was relied upon as one of the allegations in support of the assertion (set out in Allegation 2) that MD and SM "acted without integrity in breach of Rule 1.02 of the CoC 2007 and Principle 2 of the Principles by reason of the seriousness of the said breaches and/or [their] reckless disregard of their professional obligations." It was averred that "[for] the avoidance of doubt in the case of allegation 1.19 if [MD and SM] were not dishonest (as alleged in paragraph 1.19) they were reckless."

240. In view of the way in which the argument of the SRA has been developed before us, it is to be noted that the allegation was framed on the basis that MD and SM "knew or suspected [the payments] to be improper *and* failed to take proper steps to satisfy themselves that such disbursements were proper" (emphasis added). Ms Robertson emphasised that the SRA's case presented before the Tribunal was (i) that the believed or suspected impropriety of each payment was that it was a bribe (not that it was anything else) and (ii) that the failure on the part of MD and SM to satisfy themselves that each payment was not a bribe was such as to render each of them dishonest. There was, she submitted, no alternative case advanced. We will return to this below.

241. As will emerge, the Tribunal unanimously rejected certain parts of the foregoing allegation and rejected others by a majority. In order to understand those features of the dismissed allegations that form the subject of this appeal, it is necessary to introduce briefly the way in which the case for the SRA was advanced before the Tribunal; about which, as we have indicated, there is some debate.

242. The alleged wrongful payments were characterised in the contemporaneous paperwork as "work leave" payments, an expression which the SRA sought to suggest was a "euphemism" for an improper payment in the form of a bribe - even though the word "bribe" was not set out expressly in the allegation. The primary case advanced was that MD and SM "knew or suspected" that the payments were "bribes", the suggestion that they "knew or suspected" that they were "otherwise improper" being a secondary case. (As indicated above, Ms Robertson asserts that no such secondary case was advanced.)

243. The position of MD and SM was that the payments, which MY in particular had said were necessary, enabled or facilitated the release from their employment temporarily of potential witnesses in Iraq who could not be interviewed in Iraq. MD and SM were heavily reliant on MY for the information concerning these payments and neither saw anything wrong or improper in making them despite the use of the word "bribe" in certain emails referred to below. SM was primarily involved in authorising these payments. A total of 29 such payments were made between October 2008 and June 2012 out of Leigh Day's office account, each of which was in the general region of $250-$400. The total amount paid was US$10,465 which, as a matter of fact, represented a very small proportion of the total expenditure incurred by Leigh Day in investigating the basis of the alleged claims.

244. The majority of the tribunal found (paragraph 151.43) the following to be the nature of the payments:

> "The payments were made to MY and/or AJ. The payments were made to people in order for them to attend trips for interview in Middle Eastern countries outside Iraq because it was not practicable to interview them in Iraq. The payments were apparently made in connection with the release of individuals

> from their employment, and were made at a fixed rate irrespective of who the employer was. Some of the individuals were employed by what appeared to be State organisations in Iraq."

245. The majority of the tribunal added the following:

> "There was no evidence as to the persons to whom the money was ultimately paid although as a matter of fact the money must have been initially paid to the individual who had left Iraq to be interviewed or someone else going back to Iraq, because [Leigh Day] staff never went to Iraq themselves. There was no evidence of any payment actually being made to an employer, whether a State organisation or not. There was no evidence that, if any such payment had been made, it was improper to pay an employer to release its worker for a period."

246. Accordingly, the majority "found that there was no evidence to show that these payments were actually bribes, or otherwise improper, and thus [MD and SM] could not be said to have "known" they were such. Indeed, the majority said that it was "clear … that [MD and SM] … did not know the payments were improper." Mr Hegarty also himself concluded that neither MD nor SM "knew" that the payments were bribes since there had been no evidence to show that the payments "were definitely bribes".

247. Accordingly, that part of the allegation relating to the alleged *knowledge* that the payments were *bribes* was thus rejected unanimously by the tribunal; and there is no appeal against that conclusion. We will return to what is said to have been the alternative basis for the allegation below.

248. Against the background to which we have referred, we would observe that the position taken by the SRA before the Tribunal was that the SRA did not need to establish that the payments made were in fact bribes - or indeed otherwise improper. The justification for taking this position was that a solicitor must never make a payment that he suspects may be improper. Accordingly, if there is evidence that the solicitor thought that a payment was improper and yet proceeded to make the payment, there is nothing further that the SRA needs to do to bring a disciplinary charge based upon that evidence even if, as a matter of fact, there is nothing improper about the payment.

249. It is, of course, for the SRA to decide how it seeks to advance any allegation of misconduct against a solicitor. However, we would observe in this case that it was pursuing as its primary line of attack in this particular area a very serious allegation, namely that two solicitors were guilty of deliberately paying sums of money which they knew to be bribes and were thus guilty of blatant dishonesty, a factual allegation that would need to be established beyond reasonable doubt in order for it to be sustained. A positive finding that this allegation was substantiated could well have led to the two solicitors being struck off. To proceed without having available (and adducing) evidence that the payments were actually bribes is, in our judgment, surprising to say the least. As it was, despite its stated position to which we have referred in the preceding paragraph, the SRA did seek to adduce some evidence of the effect of the Iraqi Penal Code, the suggestion apparently being that, had they investigated, MD and SM would have discovered "that there were all sorts of problems with making these payments to

police officers or other State officials". None of this was in the Rule 5 Statement and the Tribunal unanimously rejected the relevance and cogency of that evidence.

250. It follows that in this court the actual propriety or otherwise of the payments made is not in issue: the evidence before the Tribunal did not establish that there was anything illegal or otherwise improper about the purpose for which the payments were made. Accordingly, this court must proceed on the basis that there was, in fact, nothing improper about them, whether in the form of a bribe or in some other manner. Indeed, for our part, we have difficulty in seeing how it could credibly be argued that there was anything improper by the standards of the law of England and Wales in making a payment to secure the availability of a potential witness for interview. If MD and SM were to find what they genuinely thought was the truth about what occurred at CAN, they needed to facilitate the taking of witness statements from those who, so they were told by those in Iraq "on the ground", had something of relevance to say. If it was impossible to do so without making the payments said by MY to be required in order to secure their attendance, we can see nothing improper in doing so. There does not appear to have been anything in the size of each individual payment or otherwise to suggest that the evidence of a witness was being "bought" even if, as may be the case, the making of any such payment was "unusual" in the experience of MD and SM. If the test is how "ordinary decent people" would consider the propriety of the making of such payments (see below), in our judgment, possessed of all the relevant information, they would not regard the making of such payments as dishonest or otherwise improper.

251. Notwithstanding that position, the SRA contends that the majority of the tribunal should have shared the conclusion reached by Mr Hegarty (see below), namely (i) that MD and SM "suspected" that the payments were "improper" and thus authorised the making of the payments "dishonestly" or, alternatively, (ii) they did so "recklessly". It is averred by the SRA that the majority was wrong not to reach that view on the evidence.

252. The threshold for establishing such a proposition has been set out above and we do not repeat it. Given that this court is being invited, in the first instance, to conclude that the dismissal of a charge of dishonesty by the majority of the Tribunal after hearing the oral evidence was, in effect, perverse and caused material errors in its approach, the scale of the task for the SRA is obviously formidable: particularly where, as here, the Tribunal heard the evidence of MD and SM being tested in cross-examination over a considerable period in many of its aspects including those aspects affecting this issue. For the majority, their credibility as witnesses was intact. Notwithstanding those considerations, if the court is satisfied that it must intervene it will do so.

253. If the decision to reject the allegation of dishonesty was indeed perverse, the logic would be that there was no answer to the allegation and this court should substitute the converse conclusion. Mr Dutton, however, recognised that this court might be slow to do this and invited us to remit this issue to a differently constituted tribunal for re-consideration.

254. Mr Dutton submitted that there were three questions:

> (i) did MD and SM know or suspect the payments to be improper?

> (ii) did they make the payments without taking proper steps to satisfy themselves that the payments were proper?
>
> (iii) were they dishonest or was their integrity compromised?

255. He asserted that the majority made "demonstrable and in some cases admitted, errors in their findings of fact", disregarded "evidence that was plainly relevant on credibility", failed to follow the approach to the fact-finding exercise as recommended by Leggatt J, as he then was, in *Gestmin SGPS S.A. v Credit Suisse (UK) Ltd.* (cited above) and "failed to address the issue of recklessness as distinct from holding an actual suspicion that these were bribes or improper payments" on the basis that the payments "were unusual payments which clearly required investigation and … were made without any such investigation [and thus insufficient] being done for [MD and SM] to be satisfied that the payments were proper."

256. When pressed by the court about the investigations that should have been carried out, Mr Dutton said that "enquiry should have been made of [MY, AJ and KAS]" about to whom the payments were made and the status of the recipients (was it, for example, a "manager in a police department"?) and that receipts should have been requested from the recipients. If these were thought simply to be unusual payments, he contended that the failure to investigate constituted recklessness.

257. He encapsulated the case on dishonesty, presumably given the approach to the issue now set out in *Ivey v Genting Casinos UK Ltd* [2017] UKSC 67, [2018] AC 391 as distinct from the approach in *R v Ghosh* [1982] QB 1053 (which prevailed at the time of the hearing before the Tribunal), as follows:

> "Whether or not these payments were actually bribes was not the issue. The point is that a solicitor who is on notice that payments may be bribes must not make those payments unless he satisfies himself that the payments are proper. If he makes the payments anyway, then the SRA submits that that is dishonest because ordinary decent people would not consider it honest for a solicitor to make such payments …."

258. In the way that the case on dishonesty has eventually been presented by the SRA (and, as the Tribunal itself noted, it does appear to have been something of a moving target as the case had proceeded), the dividing line between deliberate dishonesty and recklessness in the making of those payments has not always been easy to identify.

259. The high point of the SRA's case against MD and SM in terms of "suspicion" that the payments were "bribes" is to be found in certain emails that each of them either received or composed where the word "bribe" appeared. It starts with an email from PS to MD (and copied to SM) dated 24 January 2008. It was in these terms:

> "I am writing to follow up the issue of costs and expenses, etc, as the two parties come together on this case. Firstly thank you for the cheque for £3,859.50 being half the costs that PIL incurred prior to us flying out to Istanbul. I will be working … on coming up with a list of each and every expense that falls to be shared between the parties. Where we have already incurred

> expenses I will try and make sure that each expense is supported by an invoice. *You already have my concerns about the payment for the passport fee which may be no more than a disguised bribe. I guess at the moment we both have more important things to worry about.*
>
> Now that the two firms have six clients each I guess that the remaining payment of £10,000 from [Leigh Day] to PIL is due and I look forward to receiving that cheque in due course.
>
> I think that is all for now but if I have missed anything out please let me know." (Emphasis added.)

260. MD replied within less than 2 minutes saying:

> "Thanks for that Phil.
>
> I have rather left all the financial stuff to [SM] so will ask her to go through (sic) all this and sort out the cheque as soon as she is back."

261. His failure to comment on the "disguised bribe" comment afforded the basis for cross-examination before the Tribunal, as did SM's failure to note it and follow it up. We will return to this below, but it should be emphasised that the SRA did not in fact pursue the suggestion that the payment of passport fees was improper in the proceedings against MD and SM, although such an allegation had been made as part of Allegation 1.18 in the SRA proceedings against PS. The position before the Tribunal was summed up in the following paragraph (paragraph 151.50) in the majority decision:

> "The Tribunal had no evidence as to whether those payments had actually been improper, or how (or whether) those payments had been investigated, and no allegation was brought that any Respondent knew, suspected or should have suspected that those payments were improper. In its EWW[1] letter the [SRA] had raised questions regarding these payments potentially being improper, but following responses to those EWW letters from the Respondents the [SRA] had not pursued any allegations of impropriety relating to them. The [SRA] did not bring any other evidence regarding those payments either from PS or anyone else, and it did not make any allegation regarding them in the PS proceedings. That may well have all indicated that the payments had been investigated, either at the time or subsequently, and found to have been perfectly proper. However the Tribunal heard no evidence on the actual position regarding passport fees. Accordingly the Tribunal placed no evidential weight on those emails."

262. However, what the SRA seeks to argue is that the majority of the Tribunal should have placed weight on the failure of SM to follow this up when evaluating her testimony in

---

[1] An 'Explanation with Warnings' letter.

relation to the email referred to below and in relation to their assessment of MD's evidence as Mr Hegarty did (see also below).

263. The email upon which the SRA placed considerable reliance before the Tribunal was one from SM to MD sent at 20.38 on Saturday 11 October 2008, in what was a very informal, chatty and abbreviated form as follows:

> "Thnx M, yes hugs and kisses again with Phil and with him for [KAS].
>
> [KAS] has Phil/us round his little finger re money – Phil agreed an allowance of US$75/day for the Majaris, which will probably have to extend to the whole group + [KAS] has put in a bill for US$3,000 for various expenses *including bribes to get people here leave from work – again to keep things smooth I guess we have to agree to pay this.*
>
> I don't think [AC] is going to get a chance to go through the photos again with the Majaris – so if you really want this doing, I will probably have to try tomorrow afternoon, though some, in particular Ibrahim are getting close to the edge – ideally need the jpegs and schedule sent through – had these been sent to [AC].
>
> I imagine Monday being tied up with the Majari visas, so don't have a lot of time to get through it all.
>
> Good point re media, I had thought it was Al Jazeera and Al Arabiya, but will check.
>
> S." (Emphasis added.)

264. SM sent the email from Beirut where she (along with others) had been interviewing witnesses. There was contemporaneous evidence that she had been working in the region of a 14-hour day and her evidence, accepted by the majority of the Tribunal, was that it was a very stressful and harrowing time. The majority of the Tribunal concluded thus (at paragraph 151.49):

> "[SM] explained that when she sent the email to [MD] referred to above, she was tired, stressed and frustrated. She stated that she found elements of this trip especially difficult and very stressful. She gave evidence, that the Tribunal found very convincing, that this trip in particular had been extremely harrowing. She had personally had to spend up to 14 hours a day showing photographs of corpses to clients to ask them to identify dead friends and relatives. She had taken witness statements from people who were describing torture to which they had been subject. Some of these clients were very young, and one had been so distressed that he had literally urinated all over the floor of her hotel. After the trip she had suffered flashbacks. She stated that whilst she had used intemperate language in the email she did not believe or suspect that the payments were bribes or otherwise

> improper. The Tribunal found the evidence of both [MD] and [SM] to be credible on these points."

265. These findings of the majority are criticised by Mr Dutton as being "irrational and wholly inadequate". It is argued that they "failed to take into account that the wording of SM's email was raising concerns that the payments may be or were "bribes" … and that MD took no steps to clarify SM's meaning." The approach they took, it is argued, ignored "the clear import of the contemporaneous documents … [and] was contrary to the approach which should have been taken", namely the approach based on *Gestmin* (see above).

266. Whilst views might differ on whether the language of the email was "intemperate", the language is undoubtedly very much of a "shortcut" and abbreviated nature. On one view, that can give rise to the suggestion that, in an unguarded moment, it reveals the true thinking of the person using it; on another view, it can give rise to the conclusion that it would be unjustified, certainly in the context of a serious allegation such as that being made, to attach literal significance to a word that, on closer examination and consideration, does not really demonstrate that its user meant it in the way that is being suggested. SM told the Tribunal that, however she may have expressed herself, she did not believe or suspect that the payments were bribes in the sense that the word usually conveys. Subject only to the question of whether the rest of the evidence demonstrates an overwhelming case to the contrary, we are unable to see why the majority was not entitled legitimately to accept the explanation that she gave in her evidence. *Gestmin*, helpful though it is in providing guidance, does not demand rigid and unqualified acceptance by the court of the literal meaning of a word in a contemporaneous document if the true analysis of the circumstances in which it was used, including the type of document in which it appears, suggests that it was the wrong word to use or one which did not wholly convey the meaning intended by the writer. In our judgment, this is the effective conclusion that the majority reached. We consider that they were entitled to do so. They were also entitled to conclude that there was nothing in the failure to pick up the point in PS's earlier email to cast doubt on this conclusion.

267. When he replied to SM on the following day (a Sunday morning), MD did not react to her use of the word "bribe" in the passage of the email referred to above. In relation to MD, the majority (at paragraph 151.48) reached this conclusion:

> "He gave evidence that he treated this as a sounding off from a very tired and frustrated person who was stuck in Beirut late on a Saturday. He said that he did not think for a second that the Second Respondent would have thought that they were bribes because he knew her very well and when she had genuine concerns she did not hesitate to raise them."

268. Unless MD was being wholly disingenuous in his evidence, he had plainly not attached any sinister significance either to PS's earlier email or to this email from SM. As with SM, there were many testimonials from distinguished lawyers and judges and others who spoke of his honesty and integrity in dealing with the kind of issues that a lawyer in his position has to deal with on a daily basis. If it had impinged on him that what was being described was truly a bribe it could properly be assessed that it was more likely than not that he would have reacted differently. It should also be borne in mind that the first time either MD or SM was asked about these emails was in letters from

the SRA requesting explanations, some 7 years after the emails had been received or sent. MD gave evidence that he received 350-400 emails per day on a variety of major, often high profile, cases. The conclusion to which the majority came was plainly open to the Tribunal unless in accepting it to be so there was other evidence that wholly undermined that conclusion. We will deal with what is suggested in that context below; but we should address the final documentary reference to the word "bribe" upon which the SRA has sought to place reliance.

269. The word was used by AC in an email to a Mr Phillip King, an ASI investigator, on 5 January 2011 in the following way:

> "I know before when we have had Iraqi police officers come out to Beirut (on another case) *we have had to fork out bribe money for their employers* (I think they called it 'work leave money') to get them a couple of weeks off although it sounds like things have got a bit more official since then.
>
> Best of luck next week and I hope it isn't too much of a nightmare." (Emphasis added.)

270. SM saw the email about 12 days later after she returned from leave and told AC to "be careful about phrases you use with investigators like "bribe money", which may well get passed on to MoD." AC responded, saying that she realised in retrospect that it was "very stupid" on her part to use such a phrase. Mr Dutton submitted that SM's only concern was that the MoD might see the word "bribe" used in an email whereas had she been acting honestly and conscientiously she would have said something like "Anna, do not use the words bribe money, they were no such thing". But SM did say quite clearly in her evidence that she (SM) did not think that AC believed that "bribe money" was being paid.

271. The short point for the purposes of this appeal is that SM was cross-examined extensively about this email and the other emails and the majority found as a fact that she did not believe the payments to be bribes and equally had no suspicion that they were bribes. We have already observed that the dividing line between the way the SRA has put its case on dishonesty and recklessness has not always been easy to identify. Mr Dutton submitted that if either MD or SM suspected that the payments "might be" bribes (which was part of the SRA's case), but deliberately refrained from inquiring further into them for fear of discovering the truth, "then we are into dishonesty". He relied on the approach in *Royal Brunei Airlines v Tan* [1995] 2 AC 378, 389. It is worth quoting the well-known passage in full:

> "Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless."

272. It is to be noted, however, that the suggestion that MD and SM deliberately shut their eyes to the nature of the payments because they would rather not know the truth seems

never to have been put expressly to either of them during their respective cross-examinations. Any allegation of that nature, involving an imputation of dishonesty, ought fully and fairly to be articulated and equally fully and fairly put to the person against whom the allegation is made so that it can be answered: see, e.g. *Fish v General Medical Council* [2012] EWHC 1269 (Admin), referred to in *Wingate and Evans v SRA* (cited above). It would be wrong to make any adverse finding without that having occurred.

273. We do not intend further to extend the analysis of the significance of the emails (including an email exchange between MY and SM in early October 2008) save to consider the argument, foreshadowed above, that the acceptance by the majority of the credibility of MD and SM on this issue was flawed by reason of material errors made in its appraisal of certain other evidence. Subject to that issue, this is a clear case where the Tribunal had the best possible opportunity to assess the credibility and reliability of the two crucial witnesses on this important issue. The majority accepted their evidence and formed the view that there was nothing in the answers given during the hearing that dictated a different conclusion from the conclusion reached. This court cannot interfere with that assessment. That Mr Hegarty took a different view on their credibility on this issue is, perhaps, unfortunate, but he was entitled to form his own view and it would not have been for this court to criticise his own assessment of their evidence: it was pre-eminently a matter for the individual members of the Tribunal. We will, however, return to his analysis of the consequences of his assessment when we have considered the argument concerning the alleged influence of a materially mistaken view of other evidence.

274. The Tribunal had noted that the payments "were listed as expenses on the trip expense schedules filed by [Leigh Day] for each trip and were described as "leave" or "work leave payments"." The majority went on (at paragraph 151.49) to say this:

> "The fact that the descriptions were openly shared with numerous third parties (namely PIL, IHAT[2] the ASI and the RMP) did not seem consistent with the Respondents suspecting these payments to be improper. The Tribunal considered it highly unlikely that the ASI or IHAT would have been involved in payments that were improper or that they suspected to be improper."

275. It is accepted on behalf of the Respondents that the reference to open-sharing with IHAT was erroneous. IHAT was not set up until March 2010 and consequently could not have been made aware of the earlier "work leave" payments. The same applied to the suggestion that the ASI had reimbursed a "work leave" payment in respect of a trip carried out jointly with the ASI. The ASI was not established until November 2009 and so no sharing of the description could have taken place with the ASI when the "work leave" payments were being made. However, the email exchange in which AC was involved with Mr King (see above) demonstrates that no secret was made of the nature of the payments with investigators on behalf of the ASI and, as Ms Robertson submitted with some force, there was no come-back from Mr King about it and SM's response, having seen the email, was not that AC should not have expressed herself in the way she did to an ASI representative for fear of his response. This supported the contention,

---

[2] The Iraq Historic Allegations Team.

she argued, that SM did not see the payments as improper. Furthermore, there was evidence before the Tribunal that SM had not disguised the nature of the payments from PIL (which would have been aware of the nature of the payments in any event), the expectation being that PIL would have forwarded a request for reimbursement.

276. In our judgment, having read the decision as a whole, the mistakes were immaterial (and would doubtless have been corrected without changing the decision of the majority if a draft of the decision had been promulgated for correction) and do not in any way detract from the substantive decision taken by the majority. A fair reading of the relevant part of the decision demonstrates that the majority were simply treating the "open sharing" evidence as confirmatory of its view of the rest of the evidence: it was not "crucial" to the decision, as Mr Dutton contends, nor does it constitute a "stepping stone" on the path to the assessment of the credibility of MD and SM, again as he sought to contend.

277. It is to be repeated and emphasised here that the majority had formed the following general conclusions about MD and SM as set out at an early stage of the judgment (at paragraph 23):

> "The Tribunal considered that [MD and SM] demonstrated honesty in their answers. Suggestions were made at several points in the proceedings that they ducked or avoided difficult issues and changed their views over time in order to adhere to a single, constructed version of events. The Tribunal considered that the evidence before it did not support these suggestions and rejected them."

278. The Tribunal had found that what MD had said about the OMS Detainees List to be "straightforward and credible" and, whilst it related to another aspect, it was an important issue where credibility played a part.

279. In relation to SM and AC, the Tribunal had said this:

> "The Tribunal found [them] to be credible witnesses who considered their responses thoughtfully, and who were open about matters which they regretted, or which they could not recall fully."

280. Finally, the following conclusion commended itself to the majority (paragraph 27):

> "Generally, the Tribunal found that the Respondents actively investigated regulatory requirements, and tried to act in accordance with the Rules. They were open in evidence about things they did, and why they did them, and were prepared to acknowledge where they would, with hindsight, have done things differently. The Tribunal rejected the Applicant's general contention that the Respondents were the kind of people who put financial advantage above professional duty."

281. All those conclusions, particularly the last sentence of that last paragraph, lent support to the specific finding of credibility and honesty in relation to the "work leave" payment issue.

282. In our judgment, there is nothing in the way that the majority reached its conclusion on this issue that undermines the legitimacy of its conclusion. We can see no grounds upon which the rejection of the case of dishonesty or want of integrity can be set aside. The question of remission does not arise in those circumstances.

283. Mr Hegarty did not reach the same conclusion on matters of credibility and reliability, certainly so far as MD was concerned. He had considered (paragraph 28) that MD was not "a credible, honest or convincing witness". He said that SM was "far more credible in giving her evidence", but she "came across as a solicitor who was intent on fighting for her clients and trying, but at times not succeeding, in staying within her professional Rules."

284. He was entitled to form those views of their credibility and reliability as witnesses if that is the way they presented themselves to him. However, we do not accept that those views entitled him to express the ultimate conclusion he reached on this aspect of the case as set out below. His starting-point was, unlike the majority, that the evidence demonstrated that both MD and SM "suspected" that the payments were bribes, both having been put on notice of the possible impropriety of the payments.

285. In relation to MD he said that the threshold for dishonesty as set out in the *Royal Brunei Airlines* case was established (see paragraph 271 above). We have already observed that the elements needed to support such a conclusion were not put to MD during his cross-examination and it would, accordingly, be unfair and unjustified to draw such a conclusion.

286. Mr Hegarty then went on to say that "acting recklessly in this way" (he purporting to apply the *Royal Brunei Airlines* case), "it was clear that [MD] had diminished the trust the public placed in him and the profession and had acted without integrity and thereby breached rule 1.02 and 1.06." Accordingly, it was said by Mr Hegarty that he "found allegation 1.19 proved beyond reasonable doubt, including that [MD] had acted dishonestly."

287. He said more or less the same in relation to SM. The words used (paragraph 151.67) were as follows:

> "As with [MD], Mr Hegarty determined that whilst [SM] did not know for certain that the payments were bribes, she must have suspected them to be so, which is why she described them as such in her 11 October 2008 email. Reasonable and honest people, operating ordinary standards, would find it dishonest to make payments that were suspected to be dishonest. Mr Hegarty further found that in acting recklessly in this way, it was clear that [SM] had diminished the trust the public placed in her and the profession and had acted without integrity and thereby been in breach of Rule 1.02 and 1.06. Accordingly, and for the reasons given above, Mr Hegarty found allegation 1.19 proved beyond reasonable doubt including dishonesty."

288. As expressed, this seems to equate dishonesty with recklessness: which is not permissible. Deliberately closing one's eyes to the obvious is one thing (and potentially dishonest), simply proceeding with a suspicious transaction without being concerned as to the risks or other consequences of so doing is another (and potentially reckless).

289. We will deal with the SRA's argument that the case on recklessness was not addressed by the majority; but we reaffirm our view that Mr Hegarty was not entitled to reach the conclusion that MD and SM had been dishonest (in the *Royal Brunei* sense) on the basis of the way the case seems to have been advanced before the Tribunal.

290. As appears from the foregoing Mr Hegarty does at all events appear to have endeavoured to address the recklessness case. If that is so, it would be surprising if the majority had not considered it. A great deal of the SRA's case generally was based upon the suggestion of reckless conduct. When recording in summary form the SRA's case on the specific issue of the "work leave" payments, the Tribunal said this (paragraph 151.4) of that case:

> "If the matter had been investigated, the Respondents would have discovered "that there were all sorts of problems with making these payments to police officers or other State officials". The Iraqi Penal Code referred to in the hearing was evidence of this. The First and Second Respondent had failed to undertake any investigation. Failing to investigate a suspicious payment and making that payment was, at the very least, reckless. If the payment was made in the knowledge or belief that it was a bribe or otherwise improper, it was both objectively and subjectively dishonest."

291. The Tribunal also adverted to the fact that there "had been some lack of clarity in the Applicant's pleading and submissions in relation to this allegation." That was a fair criticism. However, they went on to record that their understanding of how the case was put was as follows:

> "… The Tribunal ultimately understood the Applicant to allege:
>
> 1. that the First and Second Respondents knew certain payments were improper; or alternatively
>
> 2. that they suspected the payments were improper
>
> and, furthermore, having either that knowledge or suspicion they failed to satisfy themselves that the payments were proper."

292. Ms Robertson says, in our view with justification, that the whole emphasis of the way the matter was presented to the tribunal was that the payments were either known or suspected to be "bribes". Recklessness would only arise if the "knowledge" allegation was not substantiated (which it was not) but a suspicion of a bribe existed and no investigation undertaken. The majority rejected the suggestion that it had been established beyond reasonable doubt that MD and SM "suspected" that the payments were bribes (or, more accurately, found that there was "relatively little evidence to support the assertion that the Respondents suspected them to be bribes" and thus

insufficient evidence to establish suspicion beyond reasonable doubt). Accordingly, the issue of recklessness did not arise. The Tribunal had noted that the alternative case "required the Applicant to prove actual suspicion on the part of the Respondents."

293. In those circumstances, express rejection of this aspect of the case on recklessness was not required: it was implicit from the other findings.

294. Finally, however, Mr Dutton has advanced the argument, based upon a concession by both MD and SM when giving evidence that the making of payments of this kind was "unusual" (and thus, he contends, arguably "improper") and that of itself demanded an investigation into their propriety. Failing to pursue such an investigation was reckless, he argues: and he invites us to make that finding.

295. It is to be observed that Allegation 1.19 does not contain such an allegation. There is not even a pleading, for example, that MD and SM "ought to have known or suspected…" The justification for advancing such an argument, so it was contended before the Tribunal, was to be found in paragraph 266 of the Re-Amended Rule 5 Statement, the material part of which was in these terms:

> "… the "work leave" payments … were approved and/or authorised by [MD and SM] in circumstances where:
>
> they suspected the payments to be bribes, including in respect of bribes to public officials in Iraq; and/or
>
> no reasonable steps had been taken to verify the authenticity or propriety of the expenses claimed, knowing or suspecting them to be improper and/or highly unusual."

296. The allegation we are invited to say the Tribunal ignored and that we should find established depends on the "or" of the second and third "and/ors" set out in the above provision being operative. That is, in our view, a highly unsatisfactory way of advancing what is effectively a third limb of the case against MD and SM. However, be that as it may, even as pleaded there was a need to establish a suspicion of the payments to be "highly unusual". The Tribunal put it (at paragraph 151.39) in this way:

> "At various stages in the Rule 5 Statement and the submissions the Applicant had referred to enquiries that the Respondents should have made. As far as the Tribunal could see, these enquiries were all supposed to have been made because the relevant Respondent was actually suspicious of the payments. There did not seem to be any clearly pleaded allegation or submission that a Respondent should have made enquiries in circumstances where they were not actually suspicious. The Tribunal was reinforced in this view by paragraph N5 of the Applicant's Closing which stated that "All that is required is that [MD] and [SM] believed or suspected that the payments were or might be bribes or otherwise improper"."

297. The majority held (for example, at paragraphs 151.49 to 151.54) that such suspicion had not been established.

298. In our judgment, the point sought to be relied upon by Mr Dutton (which could readily in our view, have been rejected on the basis that it was not properly within Allegation 1.19) is met by that conclusion.

299. We have dealt with these arguments in some detail and, it may be, rather more detail than should have been required. We have, all the same, not specifically dealt with every point that has been raised, merely those that seemed to go to the substance of the arguments advanced by Mr Dutton. In many respects, ultimately, this has been an attempt to invite this court simply to say that the majority's assessment of the credibility of the witnesses and of the evidence was perverse: an invitation that will only rarely be accepted.

300. In our view, the decision of the majority on this issue was one they clearly were entitled to reach on the evidence before the Tribunal; and there was nothing flawed (or materially flawed) in their process of reasoning to justify setting aside any of the findings.

Conclusion

301. Dissatisfaction on the part of the SRA with the outcome of the very protracted hearing before the Tribunal below cannot of itself ground a successful appeal. As will be gathered from what we have said, in almost all material respects the challenge has, on analysis, been as to the Tribunal's findings of primary fact and its evaluative assessment of those facts in determining whether or not there had been proved to be professional misconduct. To the extent that points of law arose (for example, on Allegations 1.12 – 1.15) either there were no errors of law on the part of the Tribunal or any errors were not material to the conclusion on each allegation.

302. If the SRA were to succeed on these allegations, it in essentials needed to persuade the Tribunal to make adverse findings on the reliability of the respondents' evidence and to persuade the Tribunal that the explanations offered in evidence by the respondents with regard to each such allegation were to be rejected. This the SRA failed to do. There is, overall, no proper basis on which the appellate court, on established principles, can legitimately interfere with the assessment of the evidence and the evaluative judgment of the Tribunal on any of the allegations which are the subject of this appeal.

303. The outcome is that this court unanimously concludes that all the grounds of appeal fail. The appeal is dismissed.

Annex 1

1.1 At a press conference on 22 February 2008 the First Respondent made and personally endorsed, and the Second Respondent permitted to be made and personally endorsed by the First Respondent, allegations that the British Army had unlawfully killed, tortured and mistreated Iraqi civilians, including their clients, who had been innocent bystanders at the Battle of Danny Boy, in circumstances where it was improper to do so and thereby breached Rules 1.02, 1.03 and 1.06 of the Solicitors Code of Conduct ("CoC") 2007 .

1.2 The First, Second, Third and Fourth Respondents failed during the period between September 2007 and August 2013 (in respect of the First and Second Respondents), the

period between October 2008 and August 2013 (in respect of the Third Respondent) and the period between 31 March 2009 and August 2013 (in respect of the Fourth Respondent) to provide a copy of the document known as the OMS Detainee List (or ensure that a copy was provided by their clients) to Public Interest Lawyers ("PIL") and thereby breached Rules 1.01 and 1.06 of the CoC 2007, and Principles 1 and 6 of the SRA Principles 2011.

1.3 The First, Second, Third and Fourth Respondents failed during the period between September 2007 and July 2009 (in respect of the First and Second Respondents), the period between October 2008 and July 2009 (in respect of the Third Respondent) and the period between 31 March 2009 and July 2009 (in respect of the Fourth Respondent) to ensure that a copy of the OMS Detainee List was provided by their clients to the Administrative Court and thereby breached Rules 1.01 and 1.06 of the CoC 2007, and Principles 1 and 6 of the SRA Principles 2011.

1.4 The First, Second, Third and Fourth Respondents failed during the period between November 2009 and August 2013 to ensure that a copy of the OMS Detainee List was provided by their clients to the Al-Sweady Inquiry ("the Inquiry") and thereby breached Rules 1.01 and 1.06 of the CoC 2007, and Principles 1 and 6 of the SRA Principles 2011.

1.5 The First and Second Respondents (in respect of the period between April 2008 and January 2015) and the Fourth Respondent (in respect of the period between 31 March 2009 and January 2015) made and maintained allegations of unlawful killing, torture and mistreatment and also took steps on behalf of the Al-Sweady claimants (as defined below) to seek settlement in the form of damages and costs in respect of these allegations and continued acting for them when it was improper to do so and thereby breached Rules 1.01, 1.04 and 1.06 of the CoC 2007 and Principles 1, 4 and 6 of the SRA Principles 2011. It is further alleged that the First and Second Respondents acted in breach of Rule 1.02 CoC 2007 and Principle 2 of the SRA Principles 2011.

1.6 The First, Second and Fourth Respondents failed during the period September 2007 to August 2013 (in respect of the First and Second Respondents) and during the period 31 March 2009 to August 2013 (in respect of the Fourth Respondent) to establish and maintain proper and effective arrangements for the management and identification of documents in relation to the Al-Sweady claims (as defined below) as a result of which they failed to identify the significance of the OMS Detainee List and thereby breached Rules 1.01, 1.04, 1.05, 1.06 of the CoC 2007, and Principles 1, 4, 5 and 6 of the SRA Principles 2011.

1.7 The First, Second and Fourth Respondents failed during the period between June 2007 to August 2013 (in respect of the First and Second Respondents) and during the period 31 March 2009 to August 2013 (in respect of the Fourth Respondent) to establish and maintain proper and effective arrangements with PIL for the sharing of information and documents held by the Fourth Respondent on behalf of the Al-Sweady claimants, their mutual clients, and thereby breached Rules 1(c), (d) and (e) of the Solicitors' Practice Rules 1990 ("SPR 1990"), Rules 1.01, 1.04, 1.05, 1.06 of the CoC 2007, and Principles 1, 4, 5 and 6 of the SRA Principles 2011.

1.8 On or around 27 August 2013 the Third Respondent destroyed an original document comprising a handwritten English translation of the Arabic version of a document

known as the OMS Detainee List and which had evidential significance to the Inquiry, and thereby acted in breach of Principle 5 and Principle 6 SRA Principles 2011.

1.9 The First and Second Respondents entered into on behalf of and/or approved the entry into by the Fourth Respondent of an improper fee sharing arrangement with Mr Younis pursuant to an agreement dated 23 March 2009 which constituted a breach of Rules 1.01, 1.06, 8 and 9.01(4) of the CoC 2007.

1.10 From 31 March 2009 onwards the Fourth Respondent remained a party to the improper agreement of 23 March 2009 and/or financial arrangements and in making payments pursuant to this agreement to Mr Younis took steps to fulfil that improper agreement and thereby acted in breach of Rules 1.01, 1.06, 8 and 9.01(4) of the CoC 2007 and Principles 1 and 6 SRA Principles 2011 and Chapter 9 of the CoC 2011 as in force at the relevant time.

1.11 The Fourth Respondent entered and the First and Second Respondents entered into on behalf of and/or approved the entry into by the Fourth Respondent of an improper fee sharing arrangement with Mr Younis pursuant to an agreement dated in or around 27 April 2010 between the Fourth Respondent, PIL and Mr Younis and thereby acted in breach of Rules 1.01, 1.06, 8 and 9.01(4) of the CoC 2007.

1.12 The First and Second Respondents entered into on behalf of and/or approved the entry into by the Fourth Respondent of an improper fee sharing arrangement with Mr Younis pursuant to an agreement dated 23 March 2009 which was an improper arrangement in that it was an arrangement for the payment of a referral fee in respect of historic cases and thereby acted in breach of Rules 1.01, 1.06, 8 and 9.02 of the CoC 2007.

1.13 From 31 March 2009 onwards the Fourth Respondent remained a party to the improper agreement of 23 March 2009 and/or financial arrangements and in making payments pursuant to this agreement to Mr Younis took steps to fulfil an improper agreement in that it was an arrangement for the payment of a referral fee in respect of historic cases and thereby in breach of Rules 1.01, 1.06, 8 and 9.02 of the CoC 2007 and Principles 1 and 6 SRA Principles 2011 and Chapter 9 of the CoC 2011 as in force at the relevant time.

1.14 The Fourth Respondent entered and the First and Second Respondents entered into on behalf of and/or approved the entry into by the Fourth Respondent of an improper fee sharing arrangement with Mr Younis pursuant to an agreement dated 27 April 2010 between the Fourth Respondent, PIL and Mr Younis which was, in respect of the arrangement between the Fourth Respondent and Mr Younis, an improper arrangement in that it was an arrangement for the payment of a referral fee in respect of historic cases and thereby acted in breach of Rules 1.01, 1.06, 8 and 9.02 of the CoC 2007.

1.15 The First and Second Respondents authorised and/or approved the payment of a prohibited referral fee of £25,000 to Mr Younis on or around 23 December 2008. The payment was prohibited and improper in that it was (i) a contingency fee in respect of claims arising as a result of death or personal injury to a third party whose business, or part of whose business, was to support claims arising as a result of death or personal injury; (ii) made pursuant to an agreement (constituting a financial arrangement) which was not compliant with rule 9.02 CoC 2007; and/or (iii) a referral fee in respect of

historic cases, and thereby acted in breach of Rules 1.01, 1.02, 1.06, 8 and 9.01(4) of the CoC 2007.

1.16 The First and Second Respondents authorised and/or approved payment by the Fourth Respondent of a prohibited referral fee of £50,000 to Mr Younis on or around 30 March 2009. The payment was prohibited and improper in that it was (i) a contingency fee in respect of claims arising as a result of death or personal injury to a third party whose business, or part of whose business, was to support claims arising as a result of death or personal injury; (ii) a referral fee in respect of historic cases; and/or (iii) made in part on behalf of PIL in relation to publicly funded cases in circumstances where such a payment was prohibited and thereby acted in in breach of Rules 1.01, 1.02, 1.06, 8 and 9.01(4) of the CoC 2007.

1.17 The First and Second Respondents deliberately acted so as to facilitate and conceal PIL's regulatory breach alleged at Allegation 1.16 and failed to report that regulatory breach and thereby acted in breach of Rule 1.02, 1.06 and 20.06 of the CoC 2007 and O(10.4) of the CoC 2011.

1.18 From 31 March 2009 onwards the Fourth Respondent continued the concealment of PIL's regulatory breach alleged at Allegation 1.16 by its failure to report the serious misconduct by PIL and of the First Respondent and the Second Respondent in accordance with its obligations under Rule 20.06 of the CoC 2007 and O(10.4) of the CoC 2011.

1.19 The First and Second Respondents authorised and/or arranged the payment of sums of money by the Fourth Respondent which they knew or suspected to be improper and failed to take proper steps to satisfy themselves that such disbursements were proper and thereby acted in breach of Rules 1.02 and 1.06 of the CoC 2007. It is also alleged that they acted dishonestly in respect of this allegation although that is not a requirement for this allegation to be proved.

1.20 The First and Second Respondents (in the period between August 2007 and December 2015) and the Fourth Respondent (in the period between 31 March 2009 and December 2015) authorised and/or made payments to Mr Younis and Mr Jamal without ensuring that a proper system was maintained to account for the sums paid to each of these third parties. In authorising and/or making such payments without ensuring that the Fourth Respondent had a proper system for managing and accounting for expenditure, the First, Second and Fourth Respondents each breached Rules 1.05 and 5.01(j) of the CoC 2007 and Principle 5 of the SRA Principles 2011 and O(7.2) of the CoC 2011 and/or and rule 32(1)(c) Solicitors Accounts Rules 1998.

2. In respect of the First and Second Respondents, it is alleged that by reason of each or all of the matters set out at paragraphs 1.1, 1.5, 1.15, 1.16, 1.17, 1.19 above and the facts relied upon in support of them each of the First and Second Respondents acted without integrity in breach of Rule 1.02 of the CoC 2007 and Principle 2 of the SRA Principles 2011 by reason of the seriousness of the said breaches and/or the First and Second Respondents' reckless disregard of their professional obligations. For the avoidance of doubt in the case of allegation 1.19 if the First and Second Respondents were not dishonest (as alleged in paragraph 1.19) they were reckless.

Annex 2

14/15 MAY 2004: THE INCIDENT AT THE BRITISH ARMY BASE AT ABU NAJI, SOUTHERN IRAQ

Press Conference: Friday 22nd February

Martyn Day
Leigh Day and Co

Phil Shiner
Public Interest Lawyers

Phil Shiner

What Martyn Day and I are about to reveal was shocking to us when we first heard it and we would be very surprised if it did not shock the nation. We are about to make available evidence that in May 2004 in a British Army base in Abu Naji in Southern Iraq, British soldiers may well have been responsible for

- The executions of up to 20 Iraqi civilians.
- The torture of many of these 20 before death.
- The torture of nine other survivors.
- Horrific bodily mutilations prior to some of the executions.

There is an important context to this incident. It is a matter of public record that there were serious systemic failings in the UK's detention policy during the UK's occupation of South East Iraq. The conclusions of the Secretary of State for Defence in the light of the Aitken report released at the end of January are that:

- There is no evidence of systematic abuse.
- There were a few isolated incidents of abuse committed by a few rotten apples.
- The military justice system involving soldiers investigating other soldiers and then different soldiers deciding whether any soldiers should be prosecuted before a Panel of soldiers is fit for purpose.

From our work we are clear that he is completely wrong. Leaving aside the evidence you are about to hear the public record shows that whilst in custody with UK forces:

- Iraqi civilians were killed
- Manyf Iraqis were tortured, abused or subjected to degrading or humiliating treatment.
- All Battle Groups were using hooding and stress techniques as Standard Operating Procedure.
- The five techniques banned by the Heath Government in 1972 returned (that is hooding, stressing, deprivation of sleep, deprivation of food and water, and the use of noise).
- Our interrogators were trained to use hooding and stressing and these were written policies.

Do not believe for one second that we make these allegations lightly or without the evidence available to substantiate every single word of what we say. Do not believe for one second those with most to hide – those who got the law and policy completely wrong – those who would have you believe there is nothing to face up to. Do not believe those who would have you think it was just a few rogue soldiers and just one man, Baha Mousa, who was tortured to death.

What went on whilst UK forces had the custody of Iraqi civilians is a disgrace, a stain on our nation, and a terrible stain on the reputation of all the good soldiers who have operated in Iraq and who behaved themselves properly and in accordance with the law.

It is with the heaviest of hearts that I have to say that killings, executions, torture, and abuse, sexual and religious humiliation of civilians became all too common during the British occupation of Iraq– all whilst these civilians were in the custody of UK forces. It is the law in this country that in custody cases such as these there is a particularly high burden on the State to explain itself. There is the clearest evidence available of systematic abuse and systemic failings at the very highest levels of politicians, the civil service and the military. There has also been a deliberate and so far effective cover-up so that the vast majority of the British public are blissfully unaware of what was done in their name. Until we as a nation face up to this evidence we cannot hope for the fundamental reforms required to ensure these things can never happen again. We do not want to be talked about in the same vein as the Japanese in the Second World War or the Americans at My Lai, but unless we stand up and say as a nation that this cannot happen in our name- that is where we seem to be headed.

Martyn Day
Four weeks ago, Phil Shiner and I travelled over to Istanbul to meet with five of the survivors of what happened on 14 & 15 May 2004 at Abu Naji. Our two firms are instructed to bring a damages claim in relation to the events of the 14/15th May 2004 and further to call for a public enquiry into the events of that day.

We travelled to Turkey with the anticipation that the five were alleging that they had been tortured and abused while in British custody and were obviously very aware of the alleged mutilations to the bodies of the Iraqis killed on 14/15 May. We had no inkling of what the five witnesses were to tell us over the four days that we interviewed them.

We are providing you with the full versions of their statements through until they left Abu Naji on 15 May. I am going to describe in general terms how they ended up being caught up in the battle that raged on 14 May and then Mazin Younis, who took on the task of interpreting for us during the four days in Istanbul and who is the President of the Iraqi League, will read out some of the passages from those statements to give you all an understanding of the horrific allegations that our clients are making as to what happened on the night of 14/15 May.

[Slide of area]
All five of our clients are labourers who have largely lived, through their lives, in the town of Majar. In the afternoon of 14 May, a battle raged between the British Army and the Mehdi Army of the Iraqis.

Our five clients all say that they were simply in the vicinity of the battle and had absolutely nothing to do with the Medhi Army. In support of this is the fact that when eventually they were brought before the Iraqi courts all of them were found not guilty of the charges by the

trial judge or their convictions were quashed on appeal. Four of the men say that they were farmers who had land or animals in the immediate vicinity of where the battle was taking place and this being harvest time, they were all working with many other Iraqis in the fields at the time when the battle commenced. One of the men said he was out collecting a present being tubs of yoghurt, for a wedding he was going to later that day.

All of the clients say that when the shooting started they took cover and once the shooting ended they were swept up by British Army soldiers and beaten, kicked, and generally assaulted and then taken into the APC carriers that then took them back to the British Army Camp at Abu Naji. They were handcuffed and blind folded and each of them was then interrogated on one or two occasions and when they were not being interrogated they were sat down on a chair. Mazin Younis will now describe what each of the five witnesses say that they heard from that point.

Order of Witnesses
Witness Statement of Hussein Jabbari Ali (paras 28- 31 stopping at 'I started calling for Haidar and Hamid but I got no answer')
Witness Statement of Hussain Fadhil Abass (paras 19- 25 stopping after words 'It is not something I will ever forget'.)

Witness Statement of Atiyah Sayid Abdelreza (para 25- 27)

Witness Statement of Madhi Jassim Abdullah (para 10 from words 'About an hour after my return-- - - - ' to para 11)

Witness Statement of Ahmad Jabber Ahmood (- para 20- 22)

Phil Shiner
What you have heard is evidence that these 5 survivors have witnessed seemingly in three separate venues at close hand:

- The execution of up to 15 men
- Between 4 and 5 of these executions involving shots at close range and the remainder some sort of strangulation or throat cutting.
- Some of these executions preceded by torture or mutilations that are so horrific that our clients could not describe the prolonged screaming without breaking down.

These five survivors have been badly beaten and abused. Some of the beatings out in the fields or at Abu Naji were so vicious that it is a wonder the victims survived themselves. If what we have taken as evidence is true the perpetrators of these crimes were merciless and unbelievably brutal and cruel.

But what they have heard is unbearable to contemplate. I show you now the image from a video taken by a member of the community as the body bags were returned to the local hospital the next day, and as the body bags are opened up. It is a horrific image apparently showing a dead man with a missing eye that has been removed or gouged out.
Was this what the first witness heard: men having their eyes gouged out and screaming in agony before final dispatch? Was it eyes gouged out plus other mutilations and then final dispatch?

Clearly these and other pressing questions must be answered in public.

Martyn Day

There are massive contradictions between what these five Iraqis have said as against what the British Army have said. Some 12 British Army soldiers and officers were given medals for what happened in the battle that preceded these events in Abu Naji. The burning question for us as a nation is whether these 24 hours represented the British Army at its best or the British Army at its worst.

We have tried to examine as best we can the evidence of what the Iraqis are saying as against what we know the British Army to have said in terms of the events of that day. The Army says that it picked up 20 bodies from the battlefield, with nine prisoners, took them back to Abu Naji for identification purposes and then released the bodies the following day to the Iraqi medics from Majar hospital. In addition to what we have seen from the British Army, we have the evidence of the death certificates and have talked with some of the people from the hospital who attended on the bodies that were picked up from Abu Naji. We now set out a section of the video that was taken at the time when the bodies were taken back from Abu Naji to the Majar hospital.

VIDEO FOOTAGE SHOWN

We fully accept that what we see is a group of very traumatised Iraqis, obviously very upset by the bodies that returned from the British Army camp at Abu Naji. This evidence needs to be looked at alongside the death certificates that the doctors at the hospital set out in relation to the dead bodies.

We provide you in the press packs with copies of the death certificates and their translations. Of the 27 death certificates, 20 were in relation to the bodies that were returned to the Iraqis from Abu Naji on 15th May. Those death certificates show the following.

[Show Photos]

Here are the two men who the certificates say had their eyes gouged out:

Here is a man who is said to have had his penis cut off

Here is one of the men who died from a single shot to the head or from a bullet administered very close to the body.

Here is a man with evidence of torture to the right side of his body.

In addition there are other cases, which allege torture including strangulation, facial mutilation: a broken arm, a broken jaw and the man seen in the video footage with his arm almost severed.

The evidence from the Iraqi doctors gives strong supporting evidence to the allegations of the five men that they heard the torture and executions of a whole series of Iraqis during that night of 14 and 15 May.

The position of the Iraqis and the British soldiers could not therefore be more diametrically opposed.

For the British Army version to be true there are two possibilities:-

a) the five Iraqis and the doctors have got together to conspire against the British – to try and paint them in a bad light. If this was the case, it is the only instance that I know of where it has been alleged that any conspiracy has taken place by Iraqis in this way never mind one on such a massive scale- and why would this be happening now?

b) the second possibility is that the doctors were exaggerating what they saw or misunderstood the injuries and that the five Iraqis are simply mistaken- they were hearing something else happening- but what mitigates against this is the detail of the statements- and the clarity of what the doctors saw. How does a penis drop off? How are eyes gouged out? There does not seem to us much to suggest that the doctors did get it wrong.

For the Iraqi version of events to be true, soldiers and officers from the British Army would have to have conspired to cover up one of the most atrocious episodes in British Army history.

In gauging the possibility of this happening the British Army has quite some explaining to do as to four rather fundamental coincidences that need to be put in place for their version of events to be accepted. Those four coincidences are

1. That a totally unusual if not unique decision was made to bring into the Abu Naji camp the dead bodies of the Iraqis killed. Was that order made and if so why and still further why is it that up to nine bodies were left on the battle front if this was such a key issue for the British Army?

2. A number of the medals were awarded because of the bravery of the British soldiers as a result of a bayonet charge that supposedly took place. It has been recognised that in this day and age a bayonet charge is phenomenally unusual but presumably, from the Army's view, it goes someway to help explain some of the injuries that the dead suffered.

3. The nature of a number of the injuries of the Iraqis would seem to us to be highly unusual in a battlefield, i.e. quite how so many of the Iraqis sustained single gunshots to the head and from seemingly at close quarter, how did two of them end with their eyes gouged out, how did one have his penis cut off, some have torture wounds, etc.

4. Perhaps the most remarkable coincidence of all is that in this battle, according to the British Army, the Iraqis they took to Abu Naji seem to have either been killed out right or to have survived with not a scratch. Again we are not military men but

> it seems to us highly unusual that you would end a battle with people being in these two extreme positions with absolutely no one being wounded.

Further, from our experience of what happened with the Mousa cases, the Camp Breadbasket incident, the drowning boy incidents, and the total failure of the subsequent court martials, to successfully prosecute anyone who had not admitted guilt or been caught in the act, the notion of British soldiers getting together and conspiring to avoid prosecution has worked in the past.

Phil Shiner and I have a combined experience of 60 years of interviewing clients in the field. For us both the evidence of these five witnesses was entirely compelling. Additionally, we have had each of our five Iraqi clients assessed by an independent psychiatrist who is very clear that each of the men has suffered a very traumatic incident here. When putting all this together with the supporting evidence of the Iraqi doctors and the death certificates and when comparing this totality of evidence with the coincidences that would need to occur for the British Army's story to be accepted we have to say that on the basis of the evidence currently available we are of the view that our clients' allegations, that the British were responsible for the torture and deaths of up to 20 Iraqis, may well be true.

Phil Shiner
Martyn Day and I spent five days with these witnesses. We have analysed their evidence alongside evidence from other sources and we have concluded that, on balance, our clients' version is the true one. As Martyn Day has stressed the Ministry of Defence's explanation does not make sense and aspects of it are frankly absurd (the notion of making young soldiers, presumably traumatised by having to bayonet these men to death in hand to hand combat, share the same APC back to base with bloody and gory corpses in order that these barely recognisable faces can be identified is simply incredible).

However the Royal Military Police have already conducted, they say, a lengthy and painstaking investigation of its own involving interviewing over 200 witnesses. They found **no** evidence of criminal wrongdoing. They say all of the 20 were killed in combat and no one was tortured.

It is this same flawed military system that so spectacularly failed in the Mousa incident. Even ex-Chief of Defence Staff, Mike Jackson, and the present one, Richard Dannatt admit that, with the military process now exhausted, no one is any the wiser who killed Baha Mousa.

Thus, our two firms now call on the Attorney General to intervene. She has overall supervisory control of the Army Prosecuting Authority. She has the ultimate say-so as to whether anyone should be prosecuted for what are domestic crimes (if proven) including war crimes under the International Criminal Court Act 2001. We require the Attorney General to take this matter away from the military and put it immediately in the hands of Scotland Yard. Our five clients – and other key witnesses – stand ready to be interviewed by Scotland Yard at short notice here in the UK.

Martyn Day

The role of the RMP in investigating not just this incident but previous incidents in Iraq is far from impressive. In briefings by the Army this week it would appear it is looking to hide behind the RMP's investigation. But in this case the RMP did not even interview these five witnesses, five of only nine survivors from Abu Naji, about the events of that terrible night. That is why they are looking to interview them again now. Further, to our knowledge there was no attempt

to try and carry out post mortems on the bodies to see if what the Iraqi doctors were saying was correct. Absolutely central evidence if a genuine attempt was being made to establish the veracity or otherwise of these allegations.

As Phil Shiner and I have said, on the evidence we have seen, we believe that our clients' allegations are likely to be true, but what is crucial is that an immediate and thorough investigation is carried out into what happened. We have no faith that the RMP will carry out that investigation with the requisite skill and determination, but more importantly, neither do our clients. In today's parlance we no longer consider that when it comes to Iraq that the RMP is fit for purpose!

Scotland Yard must be given the task of carrying out this investigation but further there must be a public enquiry into these events. The key question for the British people is whether or not our army was responsible for an act of immense bravery or acts of terrible brutality. Whether or not there is enough evidence to prosecute individual soldiers, it will only be by an open public enquiry that this question will be answered.