Neutral Citation Number: [2019] EWHC 1739 (Admin)

Case No: CO/5088/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/07/2019

Before :

THE HON. MR JUSTICE LANE

Between :

RICHARD CHARLES PRESCOTT **Appellant**

- and –

SOLICITORS REGULATION AUTHORITY **Respondent**

- -

Mr A Gloag (direct access) for the **Appellant**
Mr. R. Mulchrone (instructed by **Capsticks Solicitors LLP**) for the **Respondent**

Hearing dates: 12 JUNE 2019
- -

Approved Judgment

MR JUSTICE LANE :

Introduction

1. The appellant appeals under section 49 of the Solicitors Act 1974 against a decision of the Solicitors Disciplinary Tribunal (SDT), made on 14 November 2018, in which the SDT ordered the appellant to be struck off the roll of solicitors and to pay the costs of the Solicitors Regulation Authority (the respondent) in the sum of £32,000, in respect of its investigation and bringing of the proceedings.

2. In relation to a number of specified matters, the SDT found, beyond a reasonable doubt, that the appellant had acted without integrity in his professional activities as a solicitor. Those findings are not the subject of challenge.

3. In the statement served by the respondent pursuant to rule 5(2) of the Solicitors (Disciplinary Proceedings) Rules 2007, the respondent made the following allegations against the appellant:-

> "1.6 Having received monies for the purpose of discharging professional disbursements he failed to either pay those disbursements to the appropriate recipients and/or in the absence of such payments, transfer the monies from office to client account in breach of Rule 17.1 (1)(b) and (c) AR 2011 and Principles 2 and 6 of the SRA Principles 2011.
>
> The facts and matters relied upon in support of this allegation are set out at paragraphs 91-113 of this statement.
>
> 1.7 On dates including 6 May and 25 August 2016, in the course of litigation, he filed Defences (endorsed by Statements of Truth) which were disingenuous and misleading in response to claims made by professionals for their unpaid fees, contrary to all (or any) of Principles 2 & 6 SRA Principles 2011 and Outcome 5.1 SRA Code of Conduct 2011.
>
> The facts and matters relied upon in support of this allegation are set out in paragraphs 113-126 of this statement."

Dishonesty was alleged with respect to the allegations at paragraphs 1.6, 1.7, however proof of dishonesty was not an essential ingredient for proof of those allegations.

4. At paragraph 20.27 of its judgment, the SDT found allegation 1.6 proved beyond a reasonable doubt, including that the appellant's conduct had been dishonest. The appellant contends that this finding of dishonesty was wrongly made.

5. At paragraph 21.21 of its judgment, the SDT found that allegation 1.7 had been proved beyond a reasonable doubt, including that the appellant's conduct was dishonest, save in respect of what the SDT described as the "H matter". The appellant contends that this finding of dishonesty was also wrong.

Procedural matters

6. The appellant filed his notice of appeal with the Court within the prescribed time limit. It is common ground that he served the notice on the SDT. The respondent, however, asserts that the appellant did not also serve it on the respondent, as he was required to do. The respondent says it only became aware of the appeal when it sought to enforce the costs provisions of the SDT's judgment.

7. It is common ground that the appellant failed to file a certificate of service with the Court. The appellant, however, contends that he did, in fact, serve the respondent, as well as the SDT, on 19 December 2018. He produced a copy of a manuscript letter, bearing that date, the original of which he says he sent to the respondent with the requisite notice.

8. Mr Mulchrone pointed out that this letter does not bear the name of the person or body to which it said to be addressed; nor was there any evidence of postage. The appellant's assertion regarding the letter also had to be viewed in the light of the matters found by the SDT concerning the appellant. The delay which the appellant's procedural failures generated had, Mr Mulchrone submitted, been prejudicial, given that the appellant was or might be insolvent and the respondent was one of his unsecured creditors.

9. Neither side suggested that the Court should hear oral evidence in order to determine whether the appellant did, in truth, serve the respondent, as he claimed, in December 2018. In the circumstances, I decided that I would accept the appellant's position on this matter. The failure to file a Certificate of Service nevertheless remained. The difficulties that have arisen in the present case exemplify why the requirement to file a Certificate of Service with the Court is important. The breach was significant. No explanation for the failure has been forthcoming from the appellant. Taking everything in the round, however, I decided that relief from sanction was appropriate in this case. Both sides were fully ready to engage with the substantive grounds of challenge to the SDT's decision. In the light of my finding regarding service of the notice of the respondent, the failure to file the certificate could not, in itself, be said to have caused the respondent any material prejudice. I therefore heard the parties' submissions on the substantive issues raised in the appeal.

Rule 5 statement

10. Allegations 1.6 and 1.7 contained, as we have seen, allegations of dishonesty on the part of the appellant. So far as allegation 1.6 is concerned, the respondent's rule 5 statement sets out the "facts and matters relied upon in support of this allegation" at paragraphs 91 to 113 of that document. The respondent's forensic investigation officer (FIO) undertook an inspection of the appellant's firm, Prescott's Solicitors, in November 2016 and interviewed the appellant in April 2017. The FIO produced a report dated 15 May 2017. The FIO identified a cash shortage in the client bank account of the firm, as at 30 October 2016, of £149,126.54. As at the date of the FIO report, there remained an ongoing shortage of £66,356.63. The FIO concluded that

the cash shortage in the client bank account had been caused by incorrect transfers from the client account to the office account, totalling £134,454.50; and by funds received for the payment of professional disbursements being incorrectly transferred to (and held in) the office bank account, totalling £14,672.04 (unpaid professional disbursements).

11. The appellant informed the FIO at a meeting in November 2016 that the firm had received claims for unpaid fees from various counsel. The FIO selected several matters for review, where the firm had acted for clients in personal injury matters. The firm had settled costs and disbursements with the defendants and payments in respect of these had been received into its client account. The funds received for the purpose of paying professional disbursements had, however, been transferred from client to office account; but payments to the appropriate third party had not subsequently taken place. The correct recipients of the funds had, accordingly, not been paid and the firm had had the benefit of funds that were properly owed to others (paragraph 93 of the rule 5 statement).

12. At paragraph 94, a table of unpaid counsel fees was set out by reference to six client matters, totalling £14,672.04. In respect of the client matter known as H, the claim had been settled by consent in May 2016. On 13 July 2016, the firm was informed that costs had been agreed in the sum of £45,000. Of this, counsel's fees amounted to £11,459.22. On 5 July 2016, the firm received an interim payment of costs of £30,000 with a final payment of £15,000 being made on 1 August 2016. The sum of £45,000 was paid into the firm's client account but on the 16 August 2016, it was transferred to the office account. However, no payment had been made to counsel for his fees.

13. The appellant, in a letter of 13 April 2017, stated that counsel's fees would be paid "as soon as possible". However, during the interview with the FIO, the appellant confirmed that counsel's fees had not been paid. The appellant was, according to the rule 5 statement, unable to offer any information as to why the transfer of funds in this matter had occurred. I should mention at this point that the appellant was the sole practitioner in his firm and, as such, responsible for its workings. He was the firm's Compliance Officer.

14. In the case of WJ, paragraphs 103-107 of the rule 5 statement noted that there was no evidence that either of the two counsel who had worked on this matter had been paid or that the funds relating to their fees had been transferred back to the client account from the office account. The firm had received a sum of £6,387.20 on 27 February 2017, for costs and disbursements.

15. At paragraph 109, reference was made to a schedule of all unpaid professional disbursements, which showed that the firm "potentially owed fees to counsel of at least £146,215.42 plus costs and interest. The [appellant] accepted that the FIO's schedule was accurate during the interview on 20 April 2017".

16. In addition, the respondent had received complaints for unpaid fees, excluding counsel's fees, totalling some £43,322.48. Paragraph 110 contended that, in this context, the matters of H and WJ "represent examples of common practice of withholding payment and disbursement monies which had been received by the firm but not paid out. The respondent was bound contractually and by his professional

code of conduct to pay 3rd parties their fees and by declining to make these payments he enjoyed the benefit of funds that were properly due to others."

17. At paragraph 113, it was noted that four judgments, totalling £50,425.72, had been made against the firm in respect of claims made by counsel. The appellant said that "he was in the process of appealing these judgments". The appellant also provided details to the FIO about other claims made against his firm. These formed the basis of the allegation at 1.7, to which the rule 5 statement then turned. Amongst these was a claim for unpaid fees by CPL of £2,890 and one by MSA of £1,397.28.

18. At paragraph 114 of the statement, reference was made to the claim by MSA. This claim was heard on 9 December 2016. District Judge Jones ordered judgment against the appellant's firm in the sum of £1,397.28 plus costs of £202.55. The District Judge's order contained the following;-

> "Upon the court noting that Judgment has been entered against this firm of solicitors in circumstances where:
>
> (a) there is clear evidence of liability
>
> (b) liability is denied in a defence endorsed with statement of truth signed by a solicitor defendant
>
> (c) the denial is contradicted by the written commissioning of the work and the subsequent unfulfilled promise of payment
>
> (f) this is the second time this claimant has obtained judgment in this court against this defendant and in similar circumstances
>
> And having regard to the Solicitors' Code of Conduct 2011 and in particular the requirement that a solicitor:-
>
> (a) acts with integrity
>
> (b) behaves in a way that maintains the trust the public places in him and the provision of legal services and
>
> (c) complies with his legal obligations
>
> The Court Manager is directed to direct the Court files in this case and … to the Solicitors Regulation Authority to consider what, if any, further action or investigations may be appropriate".

19. When invited to comment on the judge's complaint about his conduct, the appellant, at interview in April 2017, said that his defence was that the claim was not admitted, rather than being denied.

20. The claim brought by CPL on 9 August 2016 sought the balance of "£2,820 in respect of unpaid fees, together with compensation for the late payment and interest".

21. At paragraph 118 of the statement, it is said that the appellant submitted a defence to this claim, dated 25 August 2016, in which he stated that "it is not admitted that the Defendant entered into any agreement, written, verbal or otherwise with the claimant" and that "it is not admitted that the defendant has failed to pay the sums due in respect of professional services provided by the claimant and the claimant is put to strict proof in relation thereto".

22. In CPL's complaint to the SRA of March 2017, CPL provided the respondent with:-

> (a) a letter from the appellant's firm to CPL, dated 29 May 2015, instructing it to prepare a report on liability and causation;
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> (b) a letter from CPL to the firm, dated 29 March 2016, requesting payment of fees;
>
> (c) a letter from CPL to the firm, dated 29 April 2016, requesting payment of fees;
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> (d) an email from the appellant to CPL dated 18 May 2016 stating that "we thank your (sic) recent telephone call and apologise for the delay regarding your fees. Our cashier is currently on holiday but we confirm we will pass your fee note to her when she returns";
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> (e) a letter from CPL to the firm dated 23 June 2016, chasing payment of outstanding fees;
>
> (f) an email from the appellant to CPL dated 8 July 2016, which stated that "we thank you for your recent telephone call and sincerely apologise for the delay regarding your fee. We will speak to the cashier and ask her to send a cheque to you today or on Monday".

23. In the light of all this, paragraph 120 of the rule 5 statement submitted that the appellant's defence "is plainly misleading and seeks to evade liability for payment of professional fees which the respondent was patently aware of. A solicitor filing a defence, endorsed by a Statement of Truth, cannot act with integrity or maintain the trust the public placed in him and in the provision of legal services if that defence is disingenuous and misleading".

24. At paragraph 121, the statement noted the response of the appellant to the FIO that the claim by CPL against the firm was not admitted in the defence, rather than being denied, and that the claimant was put to strict proof: "however, [the appellant] denied in his defence that an agreement existed between him and the firm and that also he had failed to pay sums due. This can only be regarded as advancing a positive case and one which was untrue and misleading in the light of the evidence provided by [CPL]".

25. Paragraphs 122-126 of the rule 5 statement deal with the claim by counsel, JDR, who sued the firm for unpaid fees, in the sum of £8,156.22 plus costs and interest. As we

shall see, the SDT did not find that dishonesty had been established beyond a reasonable doubt in respect of allegation 1.7, as it bore on the claim by JDR.

26. Under the heading "dishonesty", the rule 5 statement said as follows:-

> "Dishonesty
>
> 127. Dishonesty is alleged in respect of allegations 1.6 and 1.7. The Supreme Court has held in **Ivey (Appellant v Genting Casinos (UK) Ltd t/a Crockfords (Respondent) [2017] UKSC 67** that the appropriate test for dishonesty (Paragraph 74 of the Judgment) is:
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> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."
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> 128. Paragraphs 96 – 101 above detail that in the specimen example of Client H the Firm received its costs including the professional fees of Counsel and the Respondent failed to make payment to Counsel, notwithstanding that he transferred the funds necessary to do so from client to office account.
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> 129. The Respondent would have been aware that funds received by the Firm for the purpose of paying professional disbursements had been transferred from the client to office account, but that payment to the appropriate 3rd party had not subsequently taken place.
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> 130. He would have known this both from the fact that he solely controlled the Firm's accounts so instructed or authorised the transfers from client to office account and also by the volume of complaints received, putting him on notice (if he wasn't already) that there were unpaid professional disbursements. The Respondent was therefore aware that the correct recipient of the funds had not been paid and the Firm had had the benefit of funds that were properly owed to others.
>
> 131. By retaining disbursement monies properly due to others and submitting Defences endorsed with a statement of

truth, which were untrue and misleading, ordinary decent people would objectively regard this as dishonest behaviour.

132. In the course of the proceedings issued by [MR DR] who claimed £11,375.06 primarily for his unpaid counsel's fees, the Respondent submitted a Defence which stated that he 'denied' entering into any agreement. Judgment was secured against the Respondent for the sum claimed.

133. The Respondent admitted to the FIO that he had instructed [MR DR] and should not have 'denied' that. The Respondent claimed that the issue was really about whether payment was due within 30 days or at the conclusion of the matter as he contended. These fees however related to the case of Client H and the Respondent was aware that liability for costs had been agreed by the time he filed his Defence and were later paid in full. Notwithstanding this, the Respondent failed to pay [MR DR] and attempted to bring an appeal against the judgment.

134. The Respondent knew that he had instructed [MR DR] and knew that fees were due to him. He knew that the Firm had received all costs due to them in the matter of Client H by 1 August 2016 and by failing to address the misleading Defence he had submitted on 6 May 2016 and then bringing an appeal on 25 October 2016 based on the erroneous premise that there was no basis for [MR DR's] claim, he must have known that his Defence was disingenuous and misleading. In it is inconceivable that the Respondent did not appreciate that it was dishonest to defend claims by denying that he had instructed counsel when the opposite was true.

135. The Respondent filed a number of other defences in similar circumstances supported by a statement of truth. As an experienced litigator he would be aware of the clear distinction between not admitting (putting to strict proof) facts in pleadings and denials of them.

136. Judges have made it clear that misleading the court is an extremely serious matter and such conduct will be considered gravely. In the case of *Brett v SRA [2014] EWHC 2974 (Admin)* the Lord Chief Justice commented as follows:

"… misleading the court is regarded by the court and must be regarded by any disciplinary tribunal as one of the most serious offences that an advocate or litigator can commit. It is not simply a breach of a rule of a game, but a fundamental affront to a rule designed to safeguard the fairness and justice of proceedings. Such conduct will normally attract an exemplary and deterrent sentence. That is in part because our system for the administration of justice relies so heavily upon the integrity

> of the profession and the full discharge of the profession's duties and in part because the privilege of conducting litigation or appearing in court is granted on terms that the rules are observed not merely in their letter but in their spirit. Indeed, the reputation of the system of the administration of justice in England and Wales and the standing of the profession depends particularly upon the discharge of the duties owed to the court … Where an advocate or other representative or a litigator puts before the court matters which he knows not to be true or by omission leads the court to believe something he knows not to be true, then as an advocate knows of these duties, the inference will be inevitable that he has deceived the court, acted dishonestly and is not fit to be a member of any part of the legal profession."
>
> 137. District Judge Jones concluded that the Respondent's Defences were misleading and noted that this was not the first time he had seen a misleading Defence produced by the Respondent. He stated there was *"clear evidence of liability*" but that "*Liability is denied in a defence endorsed with a statement of truth signed by a solicitor defendant."* And he found that *"The denial is contradicted by the written commissioning of the work and a subsequent unfulfilled promise of payment".*
>
> 138. There was a clear benefit to the Respondent in retaining monies received for payment of professional disbursements rather than pay them to their rightful recipients. The Respondent benefitted significantly given the scale of the disbursement monies retained.
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> 139. Although according to the test set out *in* Ivey *"There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest"*, the Respondent relied on Defences which were untrue in seeking to evade liability for monies he must have known were due for payment to professional he had instructed. The overwhelming and irresistible inference therefore is that he knew the Defences were misleading when he submitted them. The Lord Chief Justice in *Brett* held that where a solicitor does this "… *the inference will be inevitable that he had deceived the court, acted dishonestly and is not fit to be a member of any part of the legal profession."*

The SDT's judgment

27. The SDT's judgment in respect of allegation 1.6 begins at 20.1. After a factual recitation, the SDT noted at 20.10 the submissions of Mr Mulchrone that "the matters of H and WJ represented examples of common practice of withholding payment of

disbursement monies which had been received by the firm but not paid out". At 20.11, the judgment recorded Mr Mulchrone as submitting that by transferring or permitting the transfer of professional disbursement monies to the firm's office account and utilising them other than for a correct purpose, the respondent failed to act within integrity, contrary to Principle 2 and failed to behave in a way that maintained the trust in the public placed in him and in the provision of legal services, contrary to Principle 6.

28. So far as dishonesty was concerned, Mr Mulchrone was recorded as submitting that the appropriate test was that formulated by Lord Hughes in Ivey v Genting Casinos (UK) Ltd t/a Crockford [2017] UKAC 67. He also submitted that the financial position of the firm was relevant to considerations of motive and honesty when assessing the appellant's conduct, as it illustrated the financial position of the firm when or before the respondent failed to pay or transfer disbursement monies (20.13).

29. In this regard, 20.14 referred to documents obtained during the intervention as showing, for instance, that a memorandum to staff of December 2013 stated that "due to lack of funds it is extremely unlikely that December's salaries will be paid by the 24 December 2013"; that HSBC wrote to the appellant to confirm that it had been unable to pay a number of cheques in August 2014, as well as direct debits, owing to insufficient cleared funds within the agreed overdraft limit; and that in October 2016 HMCTS wrote to the firm to say that a cheque paid into court for £140.00 had been returned as unpaid. All this, according to Mr Mulchrone, "pointed to persistent and/or recurring cash flow problems at the firm, of which the respondent, a sole practitioner and manager, would have been aware" (paragraph 20.15).

30. At 20.16, it was noted that a credit check against the appellant of 28 July 2017 showed 19 county court judgments in connection with his name or aliases and linked to the firm's address. These were, according to Mr Mulchrone, illustrative of financial difficulties facing the appellant throughout the relevant period.

31. At 20.17, the SDT summarised the respondent's submissions in respect of allegation 1.6. The appellant accepted that he had breached the Solicitors' Accounts Rules but "he denied that his conduct was in breach of the principles or was dishonest". It had always been the appellant's case that counsel's fees "were not due until the end of the case. That was what he had been taught by his father, and that was the way that the firm had operated for years". The system of paying counsel had broken down, given that an employee, SH, was "rarely in the office". Mr Gloag's submissions on behalf of the appellant were that the appellant's "failure to pay professional disbursements was not intentional and was a result of the chaotic nature of the accounts department following SH's extended leave" (paragraph 20.17).

32. At 20.18, Mr Gloag was recorded as saying that, in respect of the H matter, the appellant's defence had not been contending that the fees were not due; rather, that they were not due until the conclusion of the case. At 20.19, "Mr Gloag submitted that whilst transferring monies for professional disbursements from client to office account and then not paying that disbursement was in breach of the SRA, some members of the Bar would be "amazed" that such conduct could be considered to be dishonest. The debt owed did not go away".

(a) Findings on allegation 1.6

33. The SDT's findings in respect of allegation 1.6 are as follows:-

> "20.20 The Respondent accepted that he had breached the SAR as alleged. The exemplified matter of H provided clear evidence of the Respondent's breach of the SAR. Accordingly, the Tribunal found beyond reasonable doubt that the Respondent had breached the SAR as alleged and admitted. The Respondent accepted that it was his responsibility to ensure that professional disbursements were paid in accordance with the Rules. He also accepted that the table detailing £146,215.42 of unpaid Counsel's fees was accurate. Further he accepted that in a number of cases he had failed to pay Counsel's fees after receipt of the monies to pay those fees. He explained that the non-payment was "not intentional" but was due to the problems with accounts". It was clear that in the exemplified matter of H, the Respondent was fully aware of the amount of costs received, and the disbursements which ought to have been paid. The Tribunal did not accept that the failure to pay those fees was a result of "accounting errors". The Respondent knew that SH, who usually dealt with those matters, was only at the office sporadically. He was the sole operator of the Firm's accounts and it was he who had transferred the monies from client to office account. He did so knowing that the disbursements needed to be paid but he failed to do so.
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> 20.21 The Tribunal considered the chronology in the H matter
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> 20.2.1 April 2016 - Counsel in that matter had issued proceedings against the Respondent (albeit that the proceedings wrongly named the Respondent's Firm as the defendant). "
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> 20.21.2 6 May 2016 - the Respondent filed a defence to the claim.
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> 20.21.3 10 May 2016- Mr H's matter was settled by consent.
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> 20.21.4 5 July 2016 - the Respondent received £30,000 as an interim payment towards the costs.
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> 20.21.5 13 July 2016- the Respondent was informed by his costs lawyers that costs had been agreed in the sum of £45,000.00. That letter included a breakdown of those costs, including the sums agreed for Counsel.

20.21.6 1 August 2016 - the Respondent received the balance of costs in the sum of £15,000.

20.21.7 16 August 2016 – by this date the monies received had been transferred from client to office account.

20.21.8 30 September 2016 - Counsel obtained judgment against the Respondent

20.21.9 25 October 2016 – the Respondent obtained permission to appeal

20.21.10 10 January 2017 - HHJ Lochrane ordered that the Respondent's permission to appeal be set aside.

20.22 The Tribunal determined that the Respondent knew that the monies were owed to Counsel. He was aware, having filed a defence, of the proceedings issued by Counsel for the outstanding fees. Indeed, it was only 4 days after having filed his defence that the matter was settled. The Tribunal determined that at the time of the settlement, the Respondent was fully aware of the amounts owed. It was inconceivable that having settled the matter so soon after filing his defence, the Respondent did not recall that he was being sued for outstanding fees by Counsel in the case. It was also inconceivable that on receipt of the letter from his costs lawyers and receipt of the funds, the Respondent did not realise that he needed to pay Counsel's fees. Even on the Respondent's own case, namely that fees were not due until the matter was concluded, he ought to have paid Counsel in August when he received costs in full. He did not do so. Counsel successfully obtained Judgment on 30 September 2016. At this point the Respondent still did not pay Counsel's fees despite having received the monies to do so over 8 weeks prior to that date. Instead, on 25 October 2016, some 12 weeks after he had received the funds, he obtained permission to appeal against the Judgment. Even as at 20 April 2017, 9 months after receipt of funds to pay, the Respondent had not paid Counsel.

20.23 The Tribunal noted that the Respondent had accepted, both in interview and during his oral evidence that there were other matters where funds to pay professional disbursements had been received, transferred from client to office account, but had not thereafter been used to pay the disbursement.

20.24 That the Respondent had breached Principle 6 was plain on the evidence. Members of the public would expect a solicitor to use monies for the purposed for which those were provided. Such conduct did not maintain the trust the public placed in him and in the provision of legal services. Thus the

> Tribunal found beyond reasonable doubt that the Respondent had breached Principle 6 as alleged.
>
> 20.25 The Tribunal considered that it had become the Respondent's practice to use professional disbursement monies to support his Firm. That much was clear from the level of the shortage on client account. As to the Respondent's position that Counsel's fees should be treated differently to monies received from a client personally, and that the proposed amendments to the SAR would no longer treat monies for professional disbursements as client monies, the Tribunal considered this was a non-point. The Rules, as they stood at the time of the Respondent's conduct (and still stand as at the time of the Tribunal's consideration) were that monies received for professional disbursements are client monies. This was abundantly clear. The Tribunal found beyond reasonable doubt that no solicitor, acting with integrity, would use client money to support his business in breach of the SAR. Thus it found that the Respondent had breached Principle 2 as alleged.
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> 20.26 The Tribunal agreed that the appropriate test for dishonesty was that detailed in Ivey. The Tribunal determined that the Respondent knew that he was using client money to support his business. His position as to the chaotic nature of the accounts did not explain his conduct as regards, for example, the payment to Counsel in the H matter above. Not only did he not pay Counsel in the clear knowledge that the money had been received, he continued to dispute that monies were owed. Not only was this conduct lacking in integrity, such conduct was dishonest. The Respondent knew he had received the monies to pay Counsel's fees, transferred that money into his office account and then utilised those monies for his own purposes. Reasonable and decent people would consider such conduct to be dishonest.
>
> 20.27 Accordingly, the Tribunal found allegation 1.6 proved beyond reasonable doubt, including that the Respondent's conduct had been dishonest”..

34. On allegation 1.7, the judgment set out the passages from the order of District Judge Jones, to which I have already referred. The history of the CPL matter was dealt with at paragraphs 21.4 – 21.6, including the exchange of letter and email correspondence, to which I have made reference. Mr Mulchrone submitted that a solicitor filing a defence, endorsed by a statement of truth, cannot act with integrity or maintain the trust of the public if that defence is disingenuous and misleading.

35. As regards the H matter, although the appellant had denied entering into any agreement with counsel, MR DR, in April 2017, the appellant did concede that counsel was instructed and that the dispute was over the terms of payment.

36. Mr Gloag's submissions on allegation 1.7 are recorded in paragraphs 21.11 to 21.15 of the judgment. In the MSA matter, the appellant denied liability as he did not believe payment was due. To deny liability in the face of clear evidence could not amount to misleading the Court nor did it give reason to suspect dishonesty. If the position were otherwise, Mr Gloag submitted that "it followed that every solicitor conducting litigation for a client who denied the claim contrary to the evidence was also misleading the court. This was, it was submitted would be a remarkable outcome …"

37. Regarding the CPL matter, the defence filed required proof of the agreement and denial of indebtedness. The appellant considered payment was only due at the conclusion of the case. As such, his defence was not misleading nor was there cause to suspect dishonesty. In respect of the H matter, Mr Gloag said it was clear that the appellant had accepted that he had instructed counsel, but that he did not accept he had done so on the basis that fees would be paid 30 days after submission of counsel's invoice. "Furthermore, [the appellant's] technical defence, namely that counsel had sued the wrong entity, was perfectly valid. None of this could be considered to be misleading or disingenuous let alone dishonest". (paragraph 21.14).

38. The SDT's findings in respect of allegation 1.7 were as follows:-

> "21.17 The Tribunal noted that in the MSA matter, the Respondent had denied liability. He had not made clear in that Defence that he disputed the time for payment as opposed to liability for the payment. The Tribunal found that to deny liability for the fees when the Respondent knew that the fees were owed was misconduct. That liability had been denied was evident from the Order of DJ Jones. The Tribunal found the Respondent's submission that as he was acting as a litigant in person Outcome 5.1 did not apply, unattractive. As a solicitor of the Supreme Court, the Respondent was under a duty not to knowingly or recklessly mislead the Court at all times, not just when he was acting as an Advocate or exercising a right to conduct litigation.
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> 21.18 The Tribunal noted that in the CPL matter the Respondent had instructed SPC on 29 April 2016, and had emailed him on 18 May and 8 July 2016 promising to settle the invoice. In his Defence to the claim he did not admit that he had entered into any agreement or that he had failed to pay the sums due in relation to the provision of any professional services. He denied that he was indebted to CPL as alleged or at all. His defence of this matter was, in essence, the same as his defence to the MSA matter above.
>
> 21.19 The Tribunal found beyond reasonable doubt that in denying liability, when the Respondent knew that he owed the monies claimed and had made an unfulfilled promise to pay, the Respondent had knowingly attempted to mislead the Court. Nowhere in the Defences did the Respondent explain that whilst the services had been provided, the monies were not due

> as the case had not been concluded. Nor was such an issue raised with SPC when he emailed promising to settle the invoice. Such conduct breached Principle 6 - Members of the public would not expect a solicitor to file a Defence, on his own account, which he knew to be untrue. That such conduct lacked integrity was plain. No solicitor acting with integrity would file a misleading Defence. The fact that the denials of liability were contained only in the pleadings and not in witness statements was immaterial. The Defences signed by the Respondent contained a statement of truth. Having found that the Respondent had knowingly attempted to mislead the Court, it was evident that the Respondent's conduct had been dishonest. Reasonable and decent people operating ordinary standards of honesty would consider that in knowingly attempting to mislead the Court, the Respondent's conduct was dishonest.
>
> 21.20 The Tribunal noted the Defence in the H matter. Whilst it was not clear that the Respondent was challenging the time in which payment was due, it was clear that he did not dispute instructing Counsel on that matter. It was plain that he denied that the entity named in the Claim was the correct Defendant, as he had denied that the "Defendant named in the Claim form" had entered into any agreement. The Tribunal did not find this to be misleading or disingenuous. Consequently, the Tribunal also found that the Respondent's conduct as regards this matter was not dishonest. Accordingly allegation 1.7 as regards the H matter was dismissed.
>
> 21.21 Accordingly, the Tribunal found allegation 1.7 proved beyond reasonable doubt including that the Respondent's conduct was dishonest save for the H matter, in [sic]"

Caselaw

39. In bare outline, the grounds of appeal of the appellant to this Court assert that the SDT was wrong to find that the appellant had acted dishonestly in respect of allegation 1.6 and allegation 1.7 (except in relation to the H matter) because the dishonesty allegations were insufficiently pleaded by the respondent. It is with that assertion in mind that I consider the caselaw cited in argument.

40. In Constantinides v The Law Society [2006] [EWHC] (75) (Admin), the Divisional Court identified the following failing in the way in which dishonesty was alleged in a rule 4 statement (now rule 5):

> "35. … we do not consider that the allegations of dishonesty were clearly and properly made in the Rule 4 statement. The Rule 4 statement, after alleging conduct unbefitting a solicitor, should have identified that conduct and stated with precision in

> relation to each aspect of the allegedly guilty conduct the respect in which it was said to be dishonest. ”

41. In similar vein, Williams v The Solicitors Regulation Authority [2017] EWHC 1478 (Admin), concerned a challenge to a finding of dishonesty against a solicitor in respect of what was termed “the £3.9 million representation”. The basis of the challenge in the Divisional Court was that allegations underlying the SDT’s findings were not put to the solicitor in cross-examination or questioning by the tribunal. Nor were they mentioned in closing arguments. Carr J (with whom Sir Brian Levenson P agreed) held that there had been a serious failure of procedural fairness in respect of this matter, in that “there was here a pleaded case with some ambiguity; a failure to challenge detailed evidence in cross-examination; and no meaningful reference to the substance to the £3.9 million representation in the course of closing submissions in the context of the discreet finding of dishonesty, or at all) either by the lawyers, or the tribunal)” (paragraph 99). It was, she held, “a combination of these features that rendered the tribunal finding of dishonesty unfair” (paragraph 100).

42. Carr J referred at paragraph 70 of her judgment to HMRC v Dempster [2008] EWHC 63(Ch), where Briggs LJ stated at [26] that:-

> “it is a cardinal principle of litigation that if serious allegations, in particular allegations of dishonesty are to be made against a party who is called as a witness, they must be both fairly and squarely pleaded, and fairly and squarely put to that witness in cross-examination”.

43. Carr J’s judgment in Williams is also helpful in containing a succinct articulation of the task facing me. I respectfully adopt her approach:-

> “55. This appeal proceeds by way of review and not re-hearing. The tribunal is a specialist tribunal, which had the particular advantage of hearing and seeing all the evidence over many days. Interference with its findings will not be made lightly, and will be justified only if those findings are “*plainly wrong*”, or there has been some serious procedural irregularity – see Barnett v SRA [2016] [EWHC] 1160 (Admin) [17]; and Law Society v Salisbury [2008] [EWCH] Civ 1285; [2009] WLR 1286 at [30]”.

44. Finally, the judgment is of assistance in articulating the part that may be played by the issue of motive, in determining whether a person has acted dishonestly:-

> “62… Motive is not a necessary ingredient of dishonesty (or want of integrity) … it may of course be relevant, the importance of its role being fact-specific to each case.”

45. The significance of motive was highlighted by Mann J in MANSOL v Cripps Harries LLP [2016] [EWHC] 2483(Ch):-

> “88. Of particular relevance to a case of fraud such as the present is the question of motive. By and large dishonest

> people are dishonest for a reason. They tend not to be dishonest wilfully or just for fun. Establishing a motive for deceit, or conspiracy, is not a legal requirement, if a motive cannot be detected or plausibly suggested then wrongful intention (to tell a deliberate lie in order to deceive) is less likely. The less likely the motive, the less likely the intention to deceive or conspire unlawfully…"

The appellant's challenge

46. In his written grounds, submitted personally, the appellant alleges that paragraph 131 of the rule 5 statement lacked specificity in referring to "disbursement monies properly due to others" and did not indicate in respect of which claims the allegedly untrue and misleading defences were submitted. In paragraph 110 of the statement, the appellant noted that the matters of H and WJ were said to be "examples of a common practice of withholding disbursement monies", yet only in a small percentage of cases was evidence provided to demonstrate that its disbursements had been received but, regrettably, not paid. Tellingly, in the appellant's contention, in respect of the one allegation of dishonesty which was, he says, pleaded with most precision; namely, that of the H matter and the fees of MR DR, the SDT found that the appellant had not behaved dishonestly.

47. In his skeleton argument, Mr Gloag summarised the challenge to allegation 1.6 as follows: -

> "15. In this case, the appellant was met with schedules and faced with cumulative tables. Allegation 1.6 was wrongly drafted. Each particular allegation of dishonesty should have been extracted from the large body with each one forming its own separate allegations. Each separate act of dishonesty should have been investigated, separately put to the appellant and then separately determined by the requisite statutory body. In this case it was not. The SRA fell into error".

48. Mr Gloag's skeleton submitted that "allegation 1.7 is (like allegation 1.6) wrongly drafted. Each particular complaint should have been separately alleged, put, and adjudicated upon. It was not".

49. In his oral submissions to me, Mr Gloag developed this theme. He was particularly critical of the rule 5 statement, and of the respondent's submissions to the SDT, both of which referred to the appellant's firm as "potentially" owing fees to counsel of at least £146,215.42 plus costs and interest. Instead of pleading each relevant matter specifically, Mr Gloag submitted that the respondent had done this only in respect of a very small number of matters, whilst improperly relying upon imprecise, wider allegations in order to create what he described colloquially as "iffy feeling" about the appellant's activities. He also said that the defence to the claim brought by MSA had not been produced by the respondent. Instead, we had merely the order of District Judge Jones. The SRA had been invited to rely upon what the District Judge had said about the defence, rather than looking at that document itself. The claim brought by

CPL contained only one specific denial; namely, that the appellant was indebted to CPL as alleged or at all; and that CPL was entitled to interest as claimed or at all.

50. Mr Gloag also made reference to the documentation concerning the respondent's intervention in the appellant's firm and the transcript of the proceedings before the SDT. I have taken these into account but do not consider they materially add to the appellant's case, over and above the criticisms advanced by reference to the rule 5 statement and the SDT's judgment. It is, however, necessary to note that, when challenged by Mr Mulchrone, Mr Gloag confirmed that he was not seeking to advance the appellant's case on the basis that Mr Mulchrone had in any way failed in his obligation to put the respondent's case to the appellant in cross-examination at the SDT hearing.

Discussion

51. Having carefully considered Mr Gloag's oral and written submissions, I find myself in agreement with Mr Mulchrone that, upon analysis, they do not show the SDT was wrong to find dishonesty proven to the criminal standard, in respect of allegations 1.6 and 1.7. My reasons are as follows.

52. The judgment of Carr J in Williams makes it plain that, whilst a high degree of specificity is required in pleadings and in what is put by the SRA and the SDT to the person concerned at a hearing, what fairness demands is a fact and context-specific issue. The circumstances of the present appeal are far removed from those of Williams. In particular, the SDT did not go beyond (or behind) the case that was put to it by the respondent in the rule 5 statement and in Mr Mulchrone's oral submissions and cross-examination. The appellant's challenge is, accordingly, confined to the actual case that was put by the respondent.

53. The appellant's practice of withholding fees from counsel and other third parties who were entitled to be paid from funds received by the firm in respect of their professional work was not a matter that was in issue between the parties. The FIO's report, including what was said about the scale of this practice by the firm, was not materially challenged by the appellant. The FIO was available for cross-examination at the hearing but was not called because Mr Gloag had no cross-examination to put to him.

54. The appellant's practice of withholding fees included placing and retaining monies in the office account which ought to have been held in client account, if they were not to be paid to the professionals in respect of the work carried out by them. By putting the money in the office account, the appellant was able to call upon those funds for the purposes of running the firm. In this regard, the questions and answers set out in paragraph 23 of the rule 5 statement, taken from the FIO's record of his interview with the appellant, are highly significant:-

> "TB do you understand the seriousness of there being an ongoing shortage in the client bank account?
>
> RP Yes

> TB …your position is you're going [to] wait for those costs to be settled before you rectify…?
>
> RP Well we may, we may get another interim payment and obviously if we do then I… can settle it out of that interim payment…
>
> TB Can I ask why you don't just settle it out of the interim payment you have already got?
>
> RP We had to use that to cover other things, other outgoings".

55. At paragraph 25, the appellant is recorded as having accepted that the shortage was caused by incorrect transfers from client account to office account, in respect of the payments which I have mentioned earlier.

56. This, then, was the undisputed background, against which the respondent selected the specific cases which formed the basis of allegations 1.6 and 1.7. It was against that background that the SDT had to determine whether the appellant had behaved dishonestly in those specific cases.

57. In answering that question, it was specifically put to the appellant that he had a motive for behaving dishonestly in those specific cases. The unchallenged evidence before the SDT was that, at the material times, the appellant's firm was in financial difficulties. As we have seen from the caselaw, although motive is not an essential feature of dishonesty, its presence can, depending on the facts, go to show that dishonesty is proved.

58. In the light of this, it is not surprising that the appellant's written answer to the applicant's rule 5 statement did not challenge that document on the basis that it was unclear what the respondent's case was against the appellant, as regards dishonesty. Nor was there any suggestion in the appellant's answer that the respondent was improperly attempting to make dishonesty allegations against the background of the appellant's firm (a) not paying professional third parties, when those third parties considered it had an obligation to pay them; and (b) having financial difficulties.

59. The same is true of the position adopted by Mr Gloag on behalf of the appellant, at the hearing before the SDT. Unlike the case of Williams, the deficiencies now said to exist in the respondent's case would have been there before the hearing began; yet they were not drawn to the SDT's attention. The simple reason for this is not any failing on the part of the appellant or Mr Gloag. Rather, it is because there is no merit in the grounds now sought to be advanced before this Court.

60. It is impossible to pass over the appellant's answer to the rule 5 statement without noting this frankly remarkable passage in response to allegation 1.7:-

> "21. Outcome 5.1 in the SRA Code of Conduct 2011 requires a Solicitor to achieve the outcome of not attempting to deceive or knowingly or recklessly mislead the court. However, the context of outcome 5.1 is chapter 5, which concerns a Solicitor exercising a right to conduct litigation or acting as advocate.

> Its purpose is to set out outcomes that achieve a balance between the otherwise conflicting duties owed by a solicitor to his client and to the court.
>
> 22. In none of the proceedings referred to in the supervision report was I exercising the right to conduct litigation or acting as an advocate. I was not representing a client, I was a litigant myself and the obligations in chapter 5 did not apply."

61. I agree with Mr Mulchrone that the only rational inference to draw from these paragraphs is that the appellant did not appear to regard himself as being under an obligation not to deceive, or knowingly or recklessly mislead the Court, in connection with the claims brought by those seeking payment from him.

62. I find that the SDT was fully entitled to conclude, for the reasons it gave, that the appellant acted dishonestly in failing to pay counsel in respect of the H matter, at a point when "the appellant was fully aware of the amount of costs received, and the disbursements which ought to have been paid". The SDT was entitled to reject the appellant's purported excuse, that the failure to pay those fees was a result of "accounting errors". Leaving aside the fact that counsel in the H matter had sued the wrong entity, the SDT, at paragraph 20.22 of its judgment, was entitled to find that the appellant knew that the monies in question were owed to counsel. The SDT's finding in that paragraph, that various alternative scenarios were "inconceivable" was, likewise, open to it.

63. At paragraph 20.25, the SDT engaged precisely with the case put to it on behalf of the appellant that counsels' fees should be treated differently to monies received from a client personally, and that proposed amendments to the SAR meant that monies for professional disbursements would no longer be treated as client monies. This was, as the SDT found, a "non-point". It was clear that, at the relevant time, monies received for professional disbursements *were* client monies. Overall, the SDT was entitled to find beyond a reasonable doubt that no solicitor acting with integrity would use client money to support his business in breach of the SRA.

64. At 20.26, the SDT was entitled to reject the appellant's explanation that it was "the chaotic nature of the accounts" which explained his conduct in respect of payment to counsel in the H matter. This was wholly inconsistent with the stance taken by the appellant when counsel asked him for their money. By not only refusing to pay counsel in the clear knowledge that the money to do so had been received, but also continuing to dispute that monies were owed to counsel, the SDT properly found, to the requisite standard, that such conduct was not only lacking in integrity but dishonest. The appellant transferred the money into his office account in order to use it "for his own purposes". In all the circumstances, applying the test in Ivey, the SDT was manifestly entitled to conclude that "reasonable and decent people would consider such conduct dishonest". The challenge to the SDT's finding of dishonesty on allegation 1.6 therefore fails.

65. On allegation 1.7, the SDT, at paragraph 21.17, described as "unattractive" the appellant's attempt to compare himself with a litigant in person. As can be seen from paragraphs 60 and 61 above, I regard that description as a marked understatement.

66. The appellant contends that the SDT ought not, in effect, to have taken at face value what District Judge Jones said in the Order about the appellant's defence in the MSA claim. I do not agree. On the contrary, the SDT was manifestly entitled to ascribe weight to what a judge said in an Order of the Court. If the appellant had reason to assert that District Judge Jones's statement was inaccurate, he should have said so and adduced evidence to support his assertion.

67. I have already noted Mr Gloag's submission that the finding of dishonesty in respect of the CPL matter rests on a single paragraph in the appellant's defence. That paragraph is, however, plainly sufficient to have entitled the SDT, at paragraph 21.19, to find "beyond reasonable doubt that in denying liability, when the [appellant] knew that he owed the monies claimed and had made an unfulfilled promise to pay, the [appellant] had knowingly attempted to mislead the court". The SDT was entirely aware of the appellant's case that he claimed to think that monies were not due until the case had been concluded. At paragraph 21.19, the SDT noted that this assertion did not appear in the defences; nor was it raised with CPL when the appellant emailed promising to settle the invoice. The assertion was, in short, bogus.

68. Accordingly, the SDT was entitled to find that the appellant "had attempted and had knowingly attempted to mislead the court" and that the respondent's conduct had therefore "been dishonest". Reasonable and decent people operating ordinary standards of honesty will consider that in knowingly attempting to mislead the court, the respondent's conduct was dishonest".

Conclusion

69. In conclusion, I do not find it has been shown that the impugned findings of the SDT were wrong. The allegations of dishonesty contained in 1.6 and 1.7 were pleaded by the respondent with sufficient particularity to enable the appellant to understand and react to the case against him. The unchallenged background showed that the appellant had a practice of not paying counsel and other professionals and of putting monies properly due to them into the firm's client account, where it was used to help run the appellant's financially struggling firm. It was against that background that the specific allegations of dishonesty fell to be addressed. The appellant had a motive for behaving as he did, which was relevant in determining if his behaviour was dishonest, according to the test in Ivey.

Decision

70. This appeal is dismissed.