Neutral Citation Number: [2020] EWHC 3062 (Admin)

Case No: CO/593/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/2020

Before :

LORD JUSTICE DAVIS
and
MR JUSTICE EDIS

- -

Between :

SOLICITORS REGULATION AUTHORITY	**Appellant**
- and -	
NABEEL AMER SHEIKH	**Respondent**

- -
- -

Mr James Ramsden QC and Ms Sarah Bousfield (instructed by **Capsticks Solicitors LLP**) (neither of whom appeared below) for the **Appellant**
Mr Ian Stern QC (instructed by **RSW Law**) for the **Respondent**

Hearing dates: 27th and 28th October 2020

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Approved Judgment

LORD JUSTICE DAVIS :

Introduction

1. This is an appeal by the Solicitors Regulation Authority ("the SRA") challenging a decision of a panel of the Solicitors Disciplinary Tribunal ("the SDT") filed on 24 January 2020. The decision was, following the conclusion of the presentation by the SRA of its case, to the effect that there was no case to answer on all allegations made. The proceedings were accordingly dismissed. The SDT was very critical of the SRA: it said, among other things, that it had failed to make a proper enquiry; that the manner in which the proceedings were brought was "inadequate, wrong and represented a shambolic approach"; and that, overall, it was further appropriate to order the SRA to pay costs, in an assessed sum.

2. On this appeal, which relates to only certain of the allegations originally pursued, the SRA for its part submits in effect that the SDT misconceived its functions and misunderstood or misapplied the approach required when assessing a submission of no case to answer.

3. The background and context is most unusual. At all relevant times, the respondent to this appeal, Mr Nabeel Sheikh, was a solicitor and partner in the firm of Neumans LLP ("Neumans"). The firm acted for a client, Mr Hitendra Patel, on an appeal against conviction to the Court of Appeal (Criminal Division): the respondent having overall charge of the matter. The appeal was allowed and a Recovery of Defence Costs Order ("RDCO") was made in favour of Mr Patel on 20 January 2010. Neumans then lodged a Bill of Costs in the sum of £2,916,396, the largest Bill the Court of Appeal (Criminal Division) had, we gather, ever received.

4. Concerns were raised. The court directed Master Egan QC (the then Registrar of Criminal Appeals) to conduct an investigation. He produced a lengthy report (with annexes) dated 20 May 2015. He considered that there was clear evidence of fraud in the making of the claim for costs. The matter was ultimately referred back to the Court of Appeal (Criminal Division). On 19 December 2016 that court revoked the RDCO and ordered repayment of the sum of £500,000 which had been paid on account. Such orders were not opposed by Mr Patel or Neumans. The court also directed that the papers be referred to the Director of Public Prosecutions and the SRA.

5. It was the proceedings instituted by the SRA, following their appraisal of the papers so referred, which were the subject of the SDT's ruling that there was no case to answer on the part of the respondent.

6. Before us, the SRA was represented by Mr Ramsden QC and Ms Bousfield, neither of whom had appeared below. The respondent, Mr Sheikh, was represented by Mr Stern QC. He had appeared below, indeed it was doubtless his arguments which had persuaded the SDT to hold that there was no case to answer on any of the allegations.

The required approach

7. Before embarking on an outline of the facts it is, I think, convenient if I should summarise at the outset the required legal approach, first where a court is sitting on

appeal from a decision of the SDT and, second, where a submission of no case to answer is being evaluated.

8. As to the approach which the appellate court should take in deciding on appeal whether or not a decision of the SDT is wrong, that has been set out and established in a number of decisions: see, for example, *SRA v Day* [2018] EWHC 2726 (Admin) at paragraphs 64 to 68 of the judgment; *SRA v Good* [2019] EWHC 817 (Admin) at paragraphs 29 to 32 of the judgment. I need not repeat the applicable principles here. I bear them all in mind. It is in particular, however, necessary to bear in mind that this appeal is by way of review, not rehearing; and that this court must show appropriate respect for the evaluative conclusion, on the evidence, of a specialist panel (and one which, in the present case, Mr Stern was anxious to emphasise was also an experienced panel).

9. As to the required approach in dealing with a submission of no case to answer – it being common ground that the criminal standard of proof applies to these proceedings – the test is still conveniently taken from the decision of the Court of Appeal (Criminal Decision) in *Galbraith* (1981) 73 Cr. App. R 124. In summary, a case will be withdrawn if (a) there is no evidence to support the allegation against the defendant or (b) where the evidence is sufficiently tenuous such that, taken at its highest, a jury properly directed could not properly convict. On the other hand, if, on one possible view of the evidence, there is evidence on which a jury could properly convict then the matter should be allowed to proceed to verdict.

10. The principles of *Galbraith* have sometimes, and not necessarily always to advantage, been the subject of further explanation or gloss. Thus in the context of a case based on inference it has, for example, been said that deciding that there is a case to answer should involve the rejection of all realistic possibilities consistent with innocence. But it is wrong to over-refine matters. As has been pointed out, the question is to be assessed by what *a* reasonable jury, not all reasonable juries, could, on one possible view of the evidence, conclude: see *Goddard* [2012] EWCA Crim 1756. As put by Hallett LJ in *Khan* [2013] EWCA Crim 1345 at paragraph 16 of her judgment:

> "It is essential to focus on the traditional question whether or not there is evidence (taking the prosecution case at its highest) upon which a reasonable jury, properly directed, could infer guilt."

Background facts

11. The respondent was admitted as a solicitor in 1998. In due course he joined the practice of a firm called Sabir Selby, based in London. There was ultimately a dispute between the partners. His partner left the firm in 2008. He then carried on the practice (the firm being owned by himself and his wife), now under the name of Neumans. The respondent was Compliance Officer for Legal Practice and Compliance Officer for Finance and Administration, as well as being Senior Partner.

12. On 28 June 2017 the Adjudication Panel of the SRA resolved to intervene into Neumans practice. By decision of 31 July 2017, Newey J, sitting in the Chancery Division, upheld the decision to intervene and continued the intervention. By that time the respondent had resigned as a partner. The intervention had in fact been essentially

based on the Bill of Costs which was to be the subject of these subsequent disciplinary proceedings. The applicable test in the intervention proceedings was agreed to be whether there was "reason to suspect" that there had been dishonesty. After a very full review of the evidence, which among other things included the Report of Master Egan QC of 20 May 2015 and an Intervention Report of John Quentin, a regulatory supervisor with the SRA, dated 17 May 2017, Newey J decided that the intervention should be maintained. Of the respondent the judge, based on the materials before him, said this at paragraph 48 of his judgment:

> "He was evidently a major influence within the firm as well as having a 50% share in it and, on the face of it, there is very good reason to suspect him of having been complicit in a serious fraud involving large sums of money. The apparent rule breaches are also of grave concern."

13. An appeal to the Court of Appeal from the decision of Newey J was dismissed. Neumans itself was placed into administration.

14. The events leading up to this outcome were, in summary, these.

15. The firm, then called Sabir Selby, had been retained in 2006 to act for Mr Patel, who carried on a very substantial pharmaceuticals business. Mr Patel was facing a number of criminal charges, which included charges of placing on the market medicinal products without holding the relevant authorisation. It was not disputed that the proceedings were potentially of considerable complexity. Others had also been charged and split trials in the Crown Court had been directed.

16. Under a retainer letter dated 30 January 2006 the firm set out its charging rates. It also requested from Mr Patel a payment of over £500,000 on account. Thereafter it issued eight invoices between 20 March 2006 and 16 November 2007, claiming in total £400,089.04 plus VAT. The bills were accompanied by schedules setting out the work done. Credit notes were issued in August 2006 and November 2007 reducing the sum to £275,042.03p. By January 2007 higher charging rates had in fact been agreed. Total costs in connection with the proceedings had by then been estimated to be in the region of £1,250,000 plus VAT: of which leading and junior counsel's fees were put at £350,000 plus VAT.

17. Between March 2006 and October 2006, the firm had issued 3 invoices to Mr Patel in the sum, excluding pence and VAT, of £25,661, £165,964 and £45,062 respectively. These do not, on their face, purport to be records of requests for payments on account: they purport to be statutory interim invoices.

18. As was in due course to be stated, in around January 2007 Mr Patel and the respondent then orally agreed that Neumans' fees were to be capped at £275,000 plus VAT ("the Capping Agreement").

19. Following the Capping Agreement, 5 invoices were issued between March 2007 and November 2007 (out of the 8 in total above mentioned) in the sum, ignoring pence and excluding VAT, of £41,439, £29,231, £17,577, £40,675 and £34,476 respectively.

20. The trial of the other accused had been estimated to last a few weeks. In the event, it took nearly 9 months. A paralegal from Neumans had attended trial by way of noting brief. The trial of Mr Patel himself then started on 19 November 2007. However, after discussions with the Crown, Mr Patel entered pleas of guilt to 2 of the 14 charges on the indictment: and this was acceptable to the Crown and to the court. He was formally convicted by the jury, on his pleas, on 28 November 2007. Sentence was adjourned.

21. During the course of the sentencing proceedings in 2008 (and at a time when the partnership dispute within Sabir Selby was ongoing) it was stated in open court that Mr Patel's solicitors' costs had been capped at £275,000. In the result Mr Patel was sentenced to a fine, with certain ancillary orders.

22. Mr Patel subsequently sought to appeal against his conviction: the essential ground being that the trial judge had wrongly ruled that the two offences to which he had pleaded guilty were strict liability offences.

23. At some stage in early 2009, Mr Patel and Neumans entered, as it was said, into an oral agreement. By this oral agreement, it was agreed that the Capping Agreement be superseded, so that there was now no cap on Neumans' fees in place and, moreover, so that the firm's hourly charging rates were to be increased with retrospective effect. Quite why Mr Patel should have entered into such an agreement, which on the face of it was very much against his interest, was to be the subject of much critical observation by Master Egan QC and by the SRA. One obvious inference at least was to the effect that the Deed of Variation had been to an extent prompted by the forthcoming appeal and the prospect, if successful, of a RDCO. At all events, the agreement was to become the subject of a subsequent Deed of Variation dated 13 October 2009 (prepared by specialist costs counsel). That Deed among other things recited that Mr Patel had declined the opportunity to take independent legal advice.

24. The appeal against conviction was heard by the Court of Appeal (Criminal Division) at the end of October 2009. At the conclusion of that hearing, the court announced that the appeal was allowed, with reasons to follow. Judgment was handed down on 12 November 2009; and, on the application of Mr Patel (by Neumans), a RDCO was made, under s. 16 (9) of the Prosecution of Offences Act 1985, on 20 January 2010. The effect of that RDCO was that Mr Patel could recover his reasonable legal expenses from central funds.

25. On 27 June 2011 (nearly 18 months later) Neumans submitted a Bill of Costs in the sum of £2,916,396 plus VAT. The Bill of Costs was signed by the respondent as partner. He certified it, in the relevant respects, as "accurate and complete" and as not breaching the indemnity principle. Thereafter a sum of £500,000 was paid out of central funds on account, by way of interim payment.

26. The size of the Bill of Costs caused great concern, indeed suspicion. Concerns included, but were not limited to, a possible breach of the indemnity principle. In consequence, among other things, Mr Patel was (exceptionally) ordered to file an affidavit concerning his liability and his claim for costs. In an affidavit sworn by him on 30 May 2012, the Capping Agreement and Deed of Variation were then clearly identified. Subsequently, by decision of 6 July 2012 the Court of Appeal (Criminal Decision) directed that an investigation be undertaken by Master Egan QC (the

Registrar of Criminal Appeals, being the relevant "determining authority" under the relevant rules for these costs purposes). The court, pending that investigation, adjourned further consideration of continuing the RDCO: see [2012] EWCA Crim 1508, [2012] 5 Costs LR 873.

27. After protracted investigation, the report of Master Egan QC was delivered on 20 May 2015. I will come on to discuss some of its contents and conclusions.

28. On 19 December 2016 the matter eventually returned to the Court of Appeal (Criminal Decision), differently constituted. By this time, the Lord Chancellor, as previously directed, had lodged a statement of case. This in essentials was founded on the report of Master Egan QC, as well as on various witness statements. The Lord Chancellor sought revocation of the RDCO. No substantive response was received to the Lord Chancellor's statement of case or supporting evidence. At the hearing both Mr Patel and Neumans were represented (separately) by counsel. No opposition to revocation of the RDCO was made. The RDCO was duly revoked. Mr Patel and Neumans were jointly and severally ordered to repay the £500,000 interim payment (this was done). In giving the judgment of the Court ([2016] EWCA Crim 2001), Simon LJ summarised the position as identified in the report of Master Egan QC and in the Lord Chancellor's statement of case and summarised the allegations (including dishonesty) there made. Simon LJ then said this at paragraph 33 of his judgment.

> "The present position is as follows. The Lord Chancellor submits, and Mr Patel and Neumans both accept, that the DCO should be revoked. In our view, this is plainly right. The facts are set out in the Lord Chancellor's case and in the witness statements of Mr Fitzgerald-Morris, including the points by reference to the detail in the Registrar's report and the conclusions are clear. They have not been answered by either Mr Patel or Neumans and they are in no position to contest the facts. If the true facts had been known, we are clear that the court would not have made the original DCO. Additionally on the basis of largely unchallenged facts, as they have now belatedly emerged set out in the Lord Chancellor's case and evidence, we are quite satisfied the DCO should be revoked and we so order."

The papers were also directed to be referred to the Director of Public Prosecutions and the SRA.

The Report of Master Egan QC

29. The report of Master Egan QC of 20 May 2015 was lengthy, and was also accompanied by substantial annexes. The materials available to him had included (amongst others) the Bill of Costs, with boxes of accompanying materials; answers from Neumans to interrogatories served by the Criminal Appeals Office; the 8 invoices previously rendered by Neumans; extensive correspondence; and the affidavit of Mr Patel dated 30 May 2012.

30. Master Egan QC directed himself (correctly) that he was an investigator, not fact finder. He made clear that his report was based on the documents and that he had

examined no witnesses. After a full review of the chronology and of the materials before him, he among other things noted that of the 3,047 hours which were the subject of the Bill of Costs, 2,783 hours were not recorded on the firm's iLaw system. He recorded that the Bill of costs had now included an additional claim for 282 hours for the respondent's work up to March 2006, in addition to the hours which had been the subject of the first invoice. He also recorded, by way of example, that the Bill of Costs had claimed an additional 274 hours on top of the hours of which had been the subject of the second invoice. Both such invoices, of course pre-dated the Capping Agreement. He also noted, by way of further example, that over 24 hours' work had been claimed for examining in March 2006 365 pages of two exhibits, AS100 and AG200, when such exhibits had been served only in May 2006. He yet further noted, by way of example, that there was a claim for over 66 hours examining 2 lever arch files (described as "scans of medicinal products and logos") in March 2007, with a further claim of over 33 hours in July 2007 for examining the same two files for the purposes of a conference; and so on.

31. The firm had accepted that the claim for fees had involved reconstructing the records as work had not, it said, been fully recorded on the iLaw system. What was said was that, by reason of the Capping Agreement, there had been no purpose in continuing to make full entries on iLaw and so such entries had not thereafter been made. Nevertheless, iLaw had in fact on occasion certainly been used after the Capping Agreement. For example, 358 hours were claimed by the Bill of Costs in respect of 45 days work between February 2006 and July 2007: which work was ostensibly the subject of iLaw entries giving a figure of just 18.5 hours. The explanation given was that iLaw had become redundant "save for internal accounting purposes", because of the Capping Agreement, and "bears no semblance (sic) to the hours claimed." On the face of it, this did not explain why all the hours as now claimed had not been inputted into iLaw at least prior to the date of the Capping Agreement, when iLaw was being used as the chargeable time record; and does not explain how, years after the event, many more hours could be claimed which were not shown on iLaw at the time or included in the first two invoices rendered. Nor does it really explain why iLaw continued in some respects to be used after the Capping Agreement. Nor were the asserted "internal accounting purposes" coherently explained.

32. Master Egan QC also strongly queried the validity of a claim of £300,000 included in the Bill of Costs for the noting brief (more than almost all counsel appearing substantively at the trial). He in fact challenged the validity of the Capping Agreement, which had not been reduced into writing and when a statement on behalf of the respondent's then partner had been put in alleging that the Capping Agreement had in truth been a mere device to drive down the value of the work-in-progress and so reduce any payment to her on any acquisition by the respondent of her share. Master Egan QC also challenged the validity of the Deed of Variation, saying that it simply made no sense for Mr Patel to have entered into it.

33. One particular focus of Master Egan QC was on the 8 invoices. These were not disclosed or included with the Bill of Costs lodged on 27 June 2011. Nor were they provided during subsequent correspondence, which had requested all relevant documents (including any interim invoices). Nor were they referred to in Mr Patel's affidavit. They were only, after further request, provided on 7 April 2015. It was then claimed on behalf of the firm that these invoices were a "red herring"; had been raised

"purely for internal accounting purposes"; and had been rendered "obsolete" after the Deed of Variation. However, after an initial request in September 2011 by the Criminal Appeals Office for interim invoices, the specialist costs lawyers (Masters) instructed by the firm in connection with the Bill of Costs had, as it was subsequently discovered, on 6 October 2011 included a tracked change to the draft response, directed to the respondent, stating:

> "Nabeel, it is important that no evidence of interim invoices appear on the file."

34. The explanation for this subsequently given by the firm in correspondence in 2015 was that there had been "some confusion on the part of" the costs lawyer; that the interim invoices would have been "misleading"; and "we assume that [the costs lawyer] did not wish the court to be confused by misleading references to interim on account invoices when a final invoice had been raised in accordance with the Deed." What was not explained, for example, was that, as I have said, two of the invoices predating the Capping Agreement had, on their face, been ostensibly based on the iLaw records. Thus, since those invoices were on their face so calculated it immediately put into question how a subsequent claim for very many more hours work in the same period, but which were not the subject of iLaw entries, could genuinely be made. The subsequent Capping Agreement affords no explanation for this. A clear inference, at all events, is that there had been a conscious decision at that time not to disclose the invoices when lodging the Bill of Costs.

35. It is not necessary here to set out in more detail the close analysis contained in the report of Master Egan QC. The overall conclusion was that there was "clear evidence of fraud" in the claim for costs. It is plain that the Court of Appeal (Criminal Division) accepted and acted on this report thereafter in revoking (without opposition) the RDCO.

The proceedings in the SDT

36. Following referral of the matter by the Court of Appeal (Criminal Division) to the SRA on 16 January 2017, an investigation was started. A detailed statement pursuant to rule 5 of the Solicitors (Disciplinary Proceedings) Rules 2007, accompanied by a Statement of Truth, was served on 14 May 2018.

37. The allegations raised included, among others, allegations against the respondent as to the propriety and validity of the Capping Agreement and the Deed of Variation and of the affidavit of Mr Patel. Those are not the subject of this appeal. But also included were the following allegations:

> "1.3. On or about 27 June 2011, the Respondent caused a bill of costs and supporting materials (together "the Bill of Costs") to be submitted to the Court of Appeal pursuant to a Defendant's Costs Order made by the Court of Appeal in the Proceedings, which sought payment of £2,916,396 plus VAT, when the Bill of Costs:

….

c) made claims as to the work undertaken for Client A [Mr Patel] which did not reflect the work actually undertaken;

d) did not include documents and information which ought properly have been provided to the Court, including, in particular:

i. eight invoices sent by the Firm to Client A and settled by Client A;

ii. a purported "Capping Agreement" in relation to the Proceedings; and

iii. a purported "Deed of Variation" in relation to the Proceedings.

and by reason of the matters set out at 1.3 a) to d) above or any of them, breached one or more of Rules 1.02, 1.06 and 11.01 of the Solicitors Code of Conduct 2007.

….

Dishonesty

2. It is the SRA's case that the Respondent acted dishonestly in respect of the matters set out at allegations 1.1 to 1.3 above, or any of them. Dishonesty is not an essential ingredient to the allegations at 1.1 to 1.3 above and it is open to the Tribunal to find those allegations proved with or without a finding of dishonesty."

38. Rule 1.02 of the Solicitors Code of Conduct 2007 requires that a solicitor must act with integrity. Rule 1.06 is a requirement not to behave in a way that is likely to diminish the trust the public places in the solicitor or the legal profession. Rule 11.01 includes, among other things, requirements not knowingly to mislead a court, to draw to the court's attention relevant materials where the court may otherwise be misled and not to construct facts supporting a client's case.

39. The Rule 5 statement served on 14 May 2018 by the SRA, 87 paragraphs in length and with Annexes, summarised the background fully. It set out the various allegations made and the basis for them. It made detailed reference to the various court proceedings and to the report of Master of Egan QC. An Answer on behalf of the respondent, 17 paragraphs in length and not supported by a Statement of Truth, was served on 18 July 2018. The Answer did not deal with the specifics of all the allegations made. But it made clear that it was being maintained that the Capping Agreement and Deed of Variation were made in good faith and were valid; that the complexity of the case justified the Bill of Costs (and the capped fee of £275,000

would have been a gross underestimate); that the amount claimed in the Bill of Costs had been calculated by professional costs lawyers; and that the respondent (and Mr Patel) considered the amount claimed to be reasonable. It was, among other things, also said that "nothing should have turned" on the omission to provide the 8 invoices.

40. On 17 May 2018 the SRA had served a notice under Rule 13 (4) of the 2007 Rules seeking an indication as to whether the facts and documents contained in the Rule 5 statement were in dispute. No response to that was served. On 17 December 2018 a witness statement of John Quentin, who had also made the report in the intervention proceedings, was served by the SRA. That records (he having had access to all the firm's records following the intervention) his investigations into the firm's iLaw records. These included investigations into the time recorded by the respondent as being spent, in this period, on other client matters.

41. For this purpose, Mr Quentin analysed time recorded on attendance notes for the Patel case; time recorded on iLaw for the Patel case; and time recorded on iLaw for all other client matters in the relevant period. The period taken was 12 January 2006 to 11 January 2008. His analysis was contained in three spreadsheets, which he exhibited. His analysis based on the records among other things indicated that work was shown as done on 640 days on all client matters. The average working day was 88 units (a unit being 6 minutes) with a longest day of 289 units. The longest continuous period of working without any days off was 210 days. In that same period, so far as the Patel matter alone was concerned, his analysis showed that work was shown as done on that particular case on 484 days; and of those days worked the average working day was 67 units, with a longest day of 205 units. He also noted a disparity of time claimed under the Bill of Costs of 86.2% as compared to what was actually recorded on iLaw.

42. In accordance with the Rules, the case was certified by a member of the SDT as fit for a full hearing. At the actual hearing, which started on 11 November 2019, the SRA was represented by an employed barrister within the firm instructed by the SRA. The respondent was represented by Mr Stern QC. We were told that the SRA was only made aware that the respondent was going to be legally represented by Mr Stern a day or so before the hearing. Mr Stern told us that he himself had only been instructed some 2 or 3 weeks before the hearing.

43. The SRA presented its case by reference to the documents. Mr Quentin was present and tendered for cross-examination but was not cross-examined. The respondent himself (who, as I have said, had put in no response to the Rule 13 (7) notice) had not served any witness statement. Nor had there been served any statement from, for example, the costs lawyer at Masters involved in the preparation of the Bill of Costs. The indications thus are that no evidence was designed to be called on the respondent's behalf. In the result, and notwithstanding the lack of response to the Rule 13 (7) notice, Mr Stern, and presumably as a pre-planned tactic, made a submission of no case to answer at the close of the SRA's case. It may be that was also designed to avoid the prospect of an adverse inference being drawn had the matter been left to go to closing speeches, with the respondent having given no evidence. The hearing then concluded on that basis on 15 November 2019. The decision was announced on the last day of the hearing, with reasons for the decision being reserved.

The decision of the SDT

44. The written decision of the SDT, filed on 24 January 2020, on the submission of no case to answer extends over 65 pages. In a number of places, it has to be said, it reads as though it were a final decision after a fully concluded process.

45. The SDT set out the allegation and issues and background. It referred in some detail to the various court proceedings, to the report of Master Egan QC and to the various responses given by the firm. It recorded the respective submissions at exhaustive length.

46. After reviewing the evidence, the SDT found that there was no case to answer on any of the allegations. These had included, amongst other allegations, the alleged invalidity of the Capping Agreement and the Deed of Variation and an allegation that the respondent had improperly influenced the contents of Mr Patel's affidavit. Mr Ramsden QC told us that the SRA has on pragmatic grounds not sought to renew their case on any of those matters on this appeal: which, as I have said, is confined to Allegations 1.3 (c) (d) and 2.

47. In that regard, the SDT, accepting Mr Stern's submissions, considered that the report of Master Egan QC "presented both fact and opinion". As to that, it said: "when an opinion was expressed the Tribunal disregarded the same." It said that the SRA had, among other things, "relied upon opinion evidence from Master Egan which he was not entitled to give as he was not an expert."

48. As to the Bill of Costs and Allegation 1.3, the SDT said this at paragraph 116.4 and 116.5:

> "116.4 The final statute bill of costs was prepared at the request of the CACD. The Tribunal determined that the Respondent sought expert advice from costs specialists Masters to settle the Bill. On the basis of the documentary evidence before it and submissions made, the Tribunal accepted that Masters had to reconstruct the matter files, in respect of time spent, from the Respondent's attendance notes as iLaw did not accurately reflect the time expended. The reconstruction exercise took a considerable period of time and it was plain that the Respondent relied upon/was steered by Masters in that regard as well as the manner in which the Bill was prepared. The Tribunal was satisfied that having sought specialist advice from costs draftsmen and counsel, the Respondent was entitled to rely upon the same. The Tribunal noted that the Applicant made no criticism of RM or TH of Masters approach or advice given as to Client A's costs.
>
> 116.5 With regards to the Bill itself the Tribunal noted that only Part 1, in relation to work undertaken by Charles Russell Solicitors, had been taxed. Part 2, in relation to

> the Respondent and the Firm, had not been assessed or taxed. The Tribunal found that the Bill had been submitted, queries raised, enquiries answered which led to the DO referring the Bill to Master Egan for investigation. The Tribunal scrutinised the conclusions reached by Master Egan, which was predicated on documents received and misconceived assumptions, for example that the Deed was a sham, the absurdity of the Deed, the inability to accept that Client A agreed to an increased costs liability and that any time not recorded on iLaw simply was not done on a case of this size and complexity. JQ's analysis of iLaw was of limited assistance to the Tribunal as it expanded upon Master Egan's conclusion which the Tribunal did not accept. Leaving aside the Tribunal's findings at paragraph 116.2 above it was a matter of concern to the Tribunal that JQ's evidence related to the obtaining of the iLaw records and the electronic interrogation of the same was in fact expert evidence with no explanation of his experience or expertise as is required of a witness undertaking technical work."

49. As to allegation 1.3 (c), the SDT said that it was being invited to accept Master Egan's conclusions in the absence of reference to the source material. In then dealing with the Exhibits AS100/AG200, it said this:

> "The Tribunal was cognisant of the fact that the Respondent accepted that there was an error on the Bill in relation to the exhibits. On that basis…no Tribunal properly directed could find beyond reasonable doubt that the hours in respect of the exhibits were falsely claimed".

And dealing with the example of the 2 lever arch files it said this:

> "The Applicant invited the Tribunal to infer that "an excessive amount of time was spent on tasks with very little output." One example of 100 hours spent reviewing two lever arch files was given and was predicated on Master Egan's conclusions. Master Egan erroneously reported that the time claimed was between 17 March and 23 July 2007 when in fact it was 17-23 March 2007. Master Egan did not review the lever arch files in question. The applicant invited the Tribunal to accept the conclusions reached by Master Egan. The Tribunal, having not been taken to the underlying documents, was unable to assess their significance to the criminal proceedings which were successfully defended. As such, the Tribunal concluded that, properly directed, it could not find beyond reasonable doubt that the time spent reviewing the files was excessive."

50. It went on to say that it would not in this respect draw inferences "based on the opinion evidence of Master Egan, who was not a witness in the proceedings and who

was not an expert, to substantiate a case to answer." It went on rather dismissively to refer to "assumptions made by Master Egan, adopted by the LCD and relied upon by the Applicant…." with regard to the evidence as to alleged excessive times purportedly spent in conferences, as claimed in the Bill of Costs. In that regard, the SDT also said that the challenge of the SRA as to false times spent on conferences "was not borne out by [Mr Patel's] affidavit, also relied on by the [SRA]". But that is an extraordinary proposition, albeit perhaps revealing as to the SDT's approach in this case. The SRA had never relied on the contents of Mr Patel's affidavit. Rather it was in the Bundle as the SRA was, as one of its allegations, saying that the affidavit had been improperly procured or influenced by the respondent.

51. In dealing with Allegation 1.3 (d), the SDT referred to the involvement of Masters, the specialist costs lawyers. In that regard it made what seems to be another primary finding of fact in favour of the respondent, notwithstanding that this was at the stage of being a submission of no case to answer. It said this at para 120.2:

> "Having found that the Respondent sought guidance from costs specialists Masters in respect of the Bill and the Deed, the Tribunal concluded that the Respondent was entitled to rely upon the same. The Costs Section of the CACD asked Masters, by way of letter dated 5 September 2011, for copies of all invoices. Masters did not disclose them. The Tribunal accepted that it was Masters who advised the Respondent not to disclose the invoices so as not to confuse matters."

52. Thereafter this section of the determination seems to proceed mainly by reference to purported primary findings of fact: for example, that the Deed of Variation had been legitimately entered into under s. 59 of the Solicitors Act 1974; and that the respondent's conduct was "led by advice from Masters and Counsel". It also acceded to Mr Stern's submission that no solicitor seeking to conceal any of the documents would have instructed specialist costs lawyers: albeit that kind of point would ordinarily in a criminal court be treated as a jury point.

53. At all events, having concluded that there was no case to answer in respect of any of the allegations, the Tribunal inevitably found that Allegation 2 (dishonesty) also fell away.

54. In regulatory proceedings, costs do not always follow the event. In particular, the SRA, as regulator, ordinarily will not be ordered to pay costs of an unsuccessful application unless its conduct has been (put shortly) unreasonable. In the present case, however, the SDT ordered payment of costs. It did not mince its words. It found that there had been a lack of independent investigation and that the manner in which the proceedings were brought before the Tribunal was "inadequate, wrong and represented a shambolic approach" to the very serious underlying issues. It made an order for payment of costs by the SRA in the sum of £62,698.20.

Disposal

55. I am of the clear view that both in its approach and in its conclusion on these issues, the SDT fell into serious error. Its conclusion cannot possibly stand in these respects. It was plainly wrong. Because that is my clear view, and because this was an

acceptance of a submission of no case to answer which must be set aside, I think it best if I say relatively little.

56. I do not understand the SDT to have gone so far as to say there was no evidence to support these particular allegations. The question therefore was whether the evidence adduced by the SRA was of too tenuous a character to be capable of sustaining a conclusion to the criminal standard that the allegations were proved. The evidence has to be taken at its highest: and an allegation should be left for decision where on one possible view of the facts there was evidence upon which such a conclusion could properly be reached: see *Galbraith*.

57. I have to say that one gets no sense here of the SDT seeking to take the SRA's case at its highest or asking itself whether on one possible view of the facts a conclusion to the criminal standard could properly be reached. Indeed, the sense one gets – as illustrated by some of the passages set out above – is precisely to the contrary.

58. There are these considerations.

59. The SDT is an independent panel. It was, I readily accept (and as Mr Ramsden accepted), in no way bound by the report of Master Egan QC or by the views of the Court of Appeal (Criminal Division) in acting on that report or by the views of Newey J in upholding the intervention (on a "reasonable cause to suspect" basis). But that does not make those reports and judgments irrelevant. On the contrary, they had to be taken into account for these purposes: even if the ultimate decision for these purposes was that of the SDT.

60. The way in which the SDT here approached the report of Master Egan QC was not, in my opinion, acceptable. They were wrong, with respect, to accede to the submissions to them of Mr Stern on this. Master Egan QC was not to be equated with some sort of self-appointed expert professing an "opinion" whose opinion was, in its view, to be "disregarded". He was a judicial officer expressing conclusions in that capacity (albeit for investigatory purposes) on the documents provided to him. Moreover, it was also plainly wrong in effect to dismiss his conclusions on the asserted basis of "misconceived assumptions" by reference to the Capping Agreement, the Deed of Variation and iLaw. The report and conclusions of Master Egan QC, however, went well beyond those matters: as did the allegations made by the SRA.

61. Second, the SDT was completely wrong to dismiss out of hand the evidence of Mr Quentin. It was not, as the SDT purported to hold, expert evidence with no explanation of expertise. On the contrary, it was evidence of fact based on Mr Quentin's analysis of the documents and of his recording what they showed. By wrongly dismissing that evidence out of hand the SDT deprived itself of consideration of potentially powerful evidence set out in the spreadsheets (and not challenged by cross-examination) in support of the SRA's case.

62. Third, the SDT, inexplicably to my mind, purported to make final findings of fact adverse to the SRA's case without seemingly asking whether a contrary conclusion was reasonably sustainable. For example, it purported to find, at the half-way stage, that the respondent had relied entirely on Masters, the costs lawyers, in causing potentially important documents not to be disclosed lest they might "confuse matters". But if that was the respondent's position, then he should say so in a witness statement

and be prepared to be cross-examined. Bare assertions to that effect – not assertions against one's interest but assertions in favour of one's interest – as raised in correspondence or as advanced through submissions of counsel cannot have weight when it is open to the individual to give evidence.

63. Moreover, it is in any event a clear inference that Masters, the specialist costs lawyers, would have relied on the respondent for instructions and information. The comment in the tracked change of 6 October 2011 is of itself potentially most revealing and of itself indicative of the respondent fully understanding what was going on and participating in the suppression of highly inconvenient, and potentially damaging, interim invoices. There was no real explanation proffered for this, aside from vague assertions of "confusion" or misunderstanding. Indeed when it was put to Mr Stern in argument by Edis J that, on the respondent's own case, the invoices were works of fiction his answer, as I noted it, was to accept: "Well, they did not reflect the reality".

64. It is in any event well-established that the signature of a solicitor (an officer of the court) to a Bill of Costs is an important matter. It is no empty gesture. A solicitor will not be allowed to disassociate himself from all responsibility by saying that he relied on costs draftsmen: see *Gempride Ltd v Bamrah* [2018] EWCA Civ 1367. Such a claim of reliance, if accepted, perhaps may, or may not, bear on an issue of dishonesty: but here, in any event, the SRA's case was also framed under Principles 1.01, 1.06 and 11.1.

65. All this vitiates the SDT's approach. But that approach also had meant that the specifics of various of the allegations were not properly appraised for the purpose of assessing whether there was a case to answer. Thus on allegation 1.3 (c) there was no burden on the SRA to show what was a reasonable amount to charge. What it was required to show was that the Bill of Costs had been improperly inflated by claims for work not done. For this purpose it was irrelevant that the Deed of Variation had been adjudged by the SDT to be genuine and legally effective. That may be so; but, as Mr Ramsden pointed out, it does not follow at all that it was not thereafter capable of being used as a platform for an improper, and potentially dishonest, claim for unwarranted costs. By way of example (and even accepting the proposition, as held by the SDT, that it could not necessarily be said that any time not logged on iLaw necessarily was not properly claimed) there are these points, all ostensibly made out on the documentation placed before the SDT, on one view of the facts:

(1) Given that iLaw *was* in use for preparing two of the interim bills of costs submitted for the period *prior* to the Capping Agreement, on what basis could a further 500 hours then be claimed for work done in that self same period, as sought to be claimed in the Bill of Costs?

(2) A demonstrably unsustainable claim was made for 100 hours work done on exhibits AS100/AG200 before they had even been served. It was no function of the SDT, at the half-time stage and having regard to all the other evidence, simply to accept uncritically (as it did at paragraph 119.3) the assertion made in correspondence and submissions that this was "human error".

(3) It was also quite wrong simply to reject at the half-way stage, for example, the point that the respondent had unjustifiably claimed over 100 hours of time in

reviewing just two lever arch files of (by their description, anodyne) documents on the basis that the SDT had not itself been taken through those two files. That approach seems not to place that individual allegation into the context of the totality of the evidence.

66. Moreover, where a prosecution case is circumstantial and cumulative, it is common defence strategy to seek to undermine each strand of the evidence cumulatively relied on, saying that a different inference as to each strand can be drawn and so on. But a jury does not have to be sure as to each individual strand of the evidence: what matters is whether, on the totality of the evidence, it is made sure of guilt. With respect, I get no impression at all of the required "holistic" approach being taken by the SDT in this case in its appraisal of the submission of no case to answer on these allegations.

Conclusion

67. I do not propose to say more. In my view the reasoning of the SDT was seriously flawed in its approach as to the evidential status of the report of Master Egan QC and as to the statement of Mr Quentin. That in itself vitiates its conclusion. But in any event, taken as a whole the evidence adduced by the SRA had, in my judgment, demonstrably disclosed a case to answer on these particular allegations. The decision of the SDT to accept the respondent's submission that there was no case to answer on them was not reasonable. It was plainly wrong and revealed an inadequate understanding of the proper application of the principles of *Galbraith*, and other such cases, to the allegations and evidence advanced by the SRA.

68. It also follows that the decision of the SDT on costs cannot stand.

69. I would therefore allow the appeal. The matter will have to be remitted for a fresh hearing before a differently constituted panel of the SDT.

MR JUSTICE EDIS:

70. I agree.