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Case No: CO/3805/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/01/2021

Before:

LORD JUSTICE POPPLEWELL

and

MR JUSTICE GARNHAM

- -

Between:

David Davies	**Appellant**
- and -	
David Greene	**Respondent**

- -
- -

David Davies (in person)
Ben Hubble QC (instructed by **Kingsley Napsley LLP**) for the **Respondent**

Hearing dates: 24th November 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and others, and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 09:30am on 12 January 2021.

Lord Justice Popplewell and Mr Justice Garnham:

Introduction

1. This is the judgment of the Court.

2. Mr David Davies appeals against the decision of the Solicitors Disciplinary Tribunal ("the SDT"), dated 6 September 2019, to strike out disciplinary proceedings against the Respondent, Mr David Greene. Mr Davies is the sole director of Eco-Power (UK) Ltd ("Eco-Power"), a former client of Edwin Coe LLP ("Edwin Coe"). Mr Greene is a senior partner and Head of Ligation at Edwin Coe. He is currently President of the Law Society.

3. Mr Davies represented himself at the appeal, after an application to adjourn the hearing to enable him to obtain legal representation was rejected. He advanced his case with care, moderation and no little skill. We are grateful to him for his submissions. We are also grateful to Mr Ben Hubble QC, who appeared for the Respondent, for his helpful submissions.

The History

4. In March 2008, Edwin Coe was instructed by Eco-Power to represent it in judicial review proceedings brought against Transport for London ("TFL") and the Public Carriage Office ("PCO"). Eco-Power had developed a system for reduction of vehicle emissions in which exhaust gases were recirculated through the vehicle's engine. That original system was approved for use in London taxis by TFL and PCO by approvals dated 13 June and 16 July 2007. Eco-Power developed a further modified emissions system in which exhaust gases were recirculated not through the vehicle's engine, but only into the vehicle's exhaust pipe. The judicial review was of two decisions of TFL and PCO: the first was a decision to withdraw the approvals for the original system; the second was a decision of 11 September 2007 to withdraw approval for the modified system.

5. The basis of Edwin Coe's instructions was set out in their terms of business signed on 1 March 2008. Eco-Power was the client. Mr Greene was the partner with conduct of the case.

6. In April 2008, the application for judicial review was determined by His Honour Judge Hickinbottom, as he then was. TFL and PCO conceded that the decision to withdraw the approvals for the original system was unlawful, and that decision was quashed. However, the challenge to the decision of 11 September 2007 to withdraw approval for the modified system failed; in that respect the judicial review claim was dismissed. HHJ Hickinbottom's order of 23 April 2008 provided that the parties were to make written submissions in relation to costs, and as to any directions in relation to Eco-Power's damages claim arising out of the unlawful withdrawal of approvals for the original system.

7. Eco-Power sought leave to appeal the dismissal of the judicial review application in relation to the modified system. On 29 July 2008, Laws LJ refused permission to appeal.

8. On 24 November 2008, HHJ Hickinbottom determined the issues of costs and directions in relation to the damages claim on the basis of the written submissions, without a hearing. He ordered Eco-Power to pay 75% of TFL's and PCO's costs in the judicial review. It was unclear to him from the submissions what, if anything, had been agreed between the parties as to what was to happen in relation to the damages claim. Accordingly, he made the following order in relation to it:

> "The Claimant's claim for damages shall be stayed with permission to apply. If the Claimant wishes to pursue that claim, it shall make an application to lift the stay and for directions in that claim, which will be set down for hearing before HHJ Hickinbottom with a time estimate of 30 mins. Each side will lodge and serve any further submissions relating to directions at least 7 days before the hearing."

9. Correspondence between Edwin Coe and Eco-Power followed. We will need to consider that correspondence in a little detail later in this judgment. For present purposes it suffices to note that about a year later Mr Davies confirmed he wanted Eco-Power's damages claim to be pursued. On 16 November 2009, Edwin Coe opened a new file in the name of Mr Davies rather than in the name of Eco-Power. The commercial rationale for the new retainer is said by Mr Greene to be obvious; it meant Mr Davies became personally liable for the fees in the damages action even though the claim was that of Eco-Power. Thereafter, Edwin Coe remained on the record as acting for Eco-Power. In the event, the damages claim was not successfully pursued.

10. On 3 December 2010, Edwin Coe issued an invoice to Mr Davies for the sum £7,218.74 in respect of its fees for acting in the damages claim. Mr Davies refused to pay the invoice, and, in March 2012, Edwin Coe began proceedings (Claim No 2YJ09713) to recover the outstanding fees. Mr Davies' response was that he was not the client; Eco-Power was.

11. Edwin Coe's claim came on for hearing before District Judge Stewart in the Winchester County Court on 12 December 2012. Edwin Coe relied upon a witness statement dated 2 December 2012 from Mr Greene. Mr Greene referred at paragraph 8 to the refusal of permission to appeal by the Court of Appeal in July 2008. Then at paragraph 9-11 he said this:

> "9. I did not hear from Mr Davies for some considerable time. In the meantime the invoices delivered by my firm in relation to the judicial review remained in part undischarged.
>
> 10. On or about 16 November 2009 I spoke to Mr Davies. He asked if we would be willing to act to pursue the damages claim identified on the judicial review against Transport for London, the PCO and the Energy Savings Trust. I had not been in contact with him for some time. He explained what had

> happened in the meantime. He was at the time in negotiation with Transport for London in relation to a modified emission system. He was keen to issue a claim in damages.
>
> 11. At that time we were owed money on the previous file for his company. Mr Davies made it clear that his company had little or no money. It could not afford our fees. I was only willing to take on the claim on the basis that Mr Davies himself would meet our bills. I opened a file in his name and sent him terms and conditions, again, in his own name."

12. Mr Greene gave oral evidence at the trial on 12 December 2012 and was cross-examined by Mr Davies, acting in person. In the course of cross-examination, Mr Greene gave the following evidence:

    i) He said that the position in November 2019 was that the Eco-Power file had been closed "*some time ago …. because you'd stopped instructing us in relation to the judicial review*";

    ii) He then referred to the fact that after permission to appeal had been refused (in July 2008), that was "*an end of that matter as far as we were concerned*. *You came back to us a year, or sometime later in relation to a potential damages claim*".

    iii) Mr Davies asked why there was no letter from Edwin Coe stating that the previous file had been closed or expressly stating that the new retainer would be with Mr Davies rather than with Eco-Power. Mr Greene replied that matters might have been different "*if there had been continuous instruction and we had been continuously instructed with Eco-Power…but the fact is we had finished the Eco-Power file some time considerably earlier and, as I say in my statement, you approached us again I think 12 months later saying could we do a damages claim*."

13. There was in fact a body of correspondence passing between Mr Greene and Mr Davies from autumn 2008 to autumn 2009, to which we return below, but it was not before the Court. Neither party had produced or disclosed those documents. Edwin Coe also produced a chronology that made no reference to these documents.

14. DJ Stewart gave an *ex tempore* judgment on 12 December 2012 ("2012 Judgment") in favour of Edwin Coe. Having set out the history, DJ Stewart said at paragraph 11:

> "Where does all this lead me? It seems to me I can make the following findings in this case with ease. Firstly, one cannot look at any one particular document in isolation from any other. I have to consider the whole course of dealing between these parties and Edwin Coe and the limited company. In my judgment, it is quite clear that there were two separate terms and conditions sent at very different times for different purposes, for Ecopower for the judicial review page 76 are the terms and conditions ...[which] were clearly accepted by that company. Secondly, a year later, or thereabouts, on page 87,

> one sees the terms and conditions. It clearly identifies Mr David Davies to be the client and it clearly shows on that document that there was a new client creation and Mr David Davies became the client."

15. DJ Stewart therefore gave judgment in favour of Edwin Coe against Mr Davies in the sum of £7,218.74 with interest at 2% and costs assessed at £6,800 ("the 2012 Order").

16. Mr Davies sought leave to appeal the 2012 Order. On 7 January 2013, HHJ Hughes QC dismissed the application for permission to appeal on the papers. The application was renewed orally on 11 March 2013. It appears from subsequent submissions that Mr Davies sought, on that occasion, to rely on the fact that there was correspondence between him and Mr Greene between autumn 2008 and autumn 2009. HHJ Hughes' view was that such correspondence made no difference, and permission to appeal was refused.

17. Two and a half years later, on 29 June 2015, Mr Davies issued a further application for permission to appeal against the 2012 Order seeking to set it aside on the following grounds:

> "2. The District Judge was deliberately misled by the evidence of Mr David Greene in that Mr Greene stated that there had been a break in representation where he had not heard from the Appellant for a year.
>
> 3. There was no break in the chain of representation as asserted by Mr Greene. This is shown by emails produced at appendix 1 to these grounds …
>
> 4. This was material to the District Judge's reasoning."

18. That application was superseded by a new action (Case No B00WC127) commenced in the Winchester County Court on 24 September 2015 seeking to set aside the 2012 Order on the same grounds as identified in the June 2015 application for permission to appeal. Four days later, on 28 September 2015, DJ Stewart struck out the claim of his own motion. Mr Davies then issued an application to set aside that strike out order, which came before DJ Stewart on 9 February 2016. Counsel for Mr Davies argued that Mr Greene had acted dishonestly and lied to the Court. He asserted that, in the light of the correspondence between autumn 2008 and autumn 2009, the Court had been misled. It is apparent from the transcript of the hearing that DJ Stewart, unsurprisingly, had had no opportunity in advance of the hearing to read that correspondence, and that he was taken to a few only of them by counsel in the course of the hearing.

19. In giving judgment ("the 2016 Judgment"), DJ Stewart referred to his 2012 Judgment and his conclusion that Mr Davies had become the client. He said at paragraph 6: *"The net result is that I made a clear finding that Mr David Davies had instructed Edwin Coe on the damages claim… He was…the client for Edwin Coe."*

20. The essence of DJ Stewart's reasoning is contained in the following paragraphs (we have corrected the misspelling of both parties' names in the transcription of the judgment):

> "9. What he is saying is that Mr Greene, who gave evidence on behalf of the Claimants in the original action, Edwin Coe, had misled the Court and it is said that so material was the misleading that it was really, effectively, tantamount to giving fraudulent representations to the Court as to what exactly was going on between the parties in the widest sense, that is Mr David Davies, Eco Power and Edwin Coe, between 2008 and 2009.
>
> 10. That does seem to be the pivotal date and I am asked, should the Court of its own initiative set aside this judgment in the light of the fact that Mr David Davies has now put before the Court some very important, he says, emails that exist between the period July 2008 and November 2009… what he says is, that there is significant dialogue between Edwin Coe, notably Mr Greene, and himself when the tenor of the evidence of Mr Greene seemed to be suggesting that they had not heard, Edwin Coe that is, from Mr David Davies, or for that matter Eco Power, for some significant time. The time period being about July 2008 to November 2009.
>
> 11. The emails suggest that there had been dialogue between the parties. That may be the case, but if l apply *Ladd v Marshall*, I have got to see whether this evidence could have been obtained promptly and whether it would have made any material difference. Even if these emails were before me, that does not dislodge the second agreement, the terms and conditions of which reach Mr David Davis, clearly citing he was to be the client and he was then at his election to accept those terms and conditions or to reject them.
>
> 12. By virtue of his conduct, he decided to accept them. Nothing in these emails displaces that. All it shows is there was some dialogue. But that is a million miles away from suggesting that Mr Greene had actually misled the Court. I cannot find anything in those emails that, (a) would have made any difference if they had been before me and secondly, anything in them that suggests that the evidence that Mr Greene gave me, either in writing or in the witness box, any way shows him to be anything other than truthful and I have to say that they do not displace the primary evidence that he gave me…
>
> 14. The second point is, even if they were before me, they would not have made any difference because the rock of Gibraltar in this case is, effectively, the second agreement that went out from Edwin Coe to Mr David Davies citing him to be the client and that is irrebuttable…

> 16. So, all of those are observations that I make. I cannot be satisfied or even begin to allow a plane to leave the runway, so to speak, that there has been any allegation of fraud. In other words, deliberately misleading this Court by Mr Greene. In my judgment, Mr Greene did nothing of the sort.
>
> 17. Even if these emails were before me, as I say, they would have made no difference…Because even if all of this was put before the Court and I could be satisfied that there had been fraud, or the Court had been seriously misled at the original hearing, that might cause me such anxiety to set it aside of my own initiative under the first stage of the test. But this is a million miles from any fraudulent activity or deliberate misleading of the Court."

21. On 16 March 2019, Mr Davies filed a complaint with the SDT. The complaint did not identify which professional rules were alleged to have been breached but made very clear that the allegation was that Mr Greene had deliberately and dishonestly lied to DJ Stewart in the evidence we have cited at the hearing in December 2012.

22. On 20 March 2019, the application was considered by a division of the SDT, pursuant to Rule 6(3) of the Solicitors (Disciplinary Proceedings) Rules 2007 ("the 2007 Rules"). The tribunal decision was as follows:

> "The material provided appeared to the Tribunal to raise prima facie serious allegations predicated on the alleged conduct of the Respondent supported by substantial documentary evidence running to 612 pages. The Tribunal therefore concluded that the complaint warranted further investigation. As the Tribunal fulfils an adjudicative function, as opposed to an investigatory role, it determined that such further investigation should be carried out by the SRA."

23. On the 13 June 2019, the Solicitors Regulatory Authority ("SRA") wrote to the SDT, setting out the factual background to the case, referring to paragraph 11 of DJ Stewart's 2012 judgment and to the fact that on 9 February 2016 DJ Stewart dismissed the application to set aside that decision. The SRA indicated that they had considered the allegations made in the application but said "*We do not intend to initiate our own application. In addition, we do not intend to seek the Applicant's agreement to undertake the existing application*."

24. On 19 June 2019, Mr Davies responded, alleging that the SRA had not given proper consideration to his complaint. In that document, the complaint was widened, albeit that the same evidential material was relied on. Mr Davies alleged that Mr Greene had acted recklessly in misleading the court, as an alternative to the allegation that the conduct had involved deliberate dishonesty. He also alleged that the conduct of misleading the court constituted breaches of Principles 1, 2 and 6 of the Solicitors Regulation Authority Principles 2011. Those Principles are not confined to dishonesty. Principle 1 requires a solicitor to uphold the rule of law and the proper administration of justice. Principle 2 requires him or her to act with integrity.

Principle 6 requires him or her to behave in a way that maintains the trust the public places in them and in the provision of legal services.

25. On 21 June 2019, a differently constituted division of the SDT considered the application and the correspondence from the SRA on the papers, and noted that "*the allegations made by the Applicant were…that the Respondent had lied in a witness statement, provided a misleading chronology and falsely stated during cross-examination that there had been a break in representation for a year during which time he had not heard from the Applicant.*"

26. The SDT determined that there was a case to answer pursuant to Rule 6(3). The SDT's memorandum of consideration, dated 26 June 2019, included the following:

> "The allegations were of serious misconduct. The Tribunal noted that it had been maintained by the Respondent that the Applicant personally was the client in the Damages Claim and by the Applicant that the client was in fact Eco Power. On the information available the Tribunal could not determine one way or the other the contractual arrangement relating to the fees. The Tribunal noted that the Damages Claim was issued in the name of Eco Power, and not the Applicant. On the face of it this suggested that the Firm had been acting for and instructed by Eco Power. Further, the supporting documents indicated there had been continuing correspondence during the period that it appeared the Respondent had indicated he had not heard from the Applicant. For these reasons, the Tribunal determined that there was a case to answer."

27. On 17 July 2019, an application was made on Mr Greene's behalf for the case certified by the SDT to be struck out. The basis of the strike out application was that Mr Davies' lay application was an abuse of process. This was put on three bases:

> "(i) that the Applicant had failed to disclose to the Tribunal the terms of the Judgment of District Judge Stewart sitting in the Winchester County Court dated 9 February 2016 ("the 2016 Judgment");
>
> (ii) that in the light of the 2016 Judgment there was no merit in the application and no conceivable basis on which the Lay Application could be successful; and
>
> (iii) the Tribunal proceedings amounted to a collateral attack on the 2016 Judgment."

28. On 13 August 2019, a further different division of the SDT heard Mr Greene's application to strike out the lay application of Mr Davies, and at the conclusion of the hearing announced its decision to strike it out on the second and third grounds. The first ground was rejected on the basis that, although the absence of the 2016 Judgment made the material provided by Mr Davies "deficient", there was no deliberate lack of candour on his part. The SDT's written reasons were provided on 6 September 2019, the material parts being in these terms:

"11.47 The Tribunal considered that the narrow and specific allegations made by the Applicant in his Lay Application (that the Respondent had lied in a witness statement, provided a misleading chronology to the court, and made false statements during cross-examination) were answered by the 2016 Judgment. Submissions were made on behalf of the Applicant that the 2016 Judgment was essentially irrelevant because it was not alleged that District Judge Stewart had been misled, but instead that the Respondent had made false statements in those proceedings (demonstrated by documentary evidence of correspondence during a period when the Respondent had said there had been none) which raised conduct issues. The Tribunal rejected this submission. The Tribunal considered that the terms of the 2016 Judgment made it clear that precisely the matters said to raise conduct issues had been considered, in the light of the supporting documentation, and had been comprehensively rejected…

Lack of Merits

11.49 …the 2016 Judgment made a material difference to the position presented to the previous Tribunal which considered certification on 21 June 2019. The judgment made it clear that the precise matters said to constitute misconduct had been considered by District Judge Stewart and, following consideration of the relevant supporting material adduced by the Applicant in support of his Lay Application to the Tribunal, and were roundly rejected. The Tribunal considered that not only did District Judge Stewart conclude that he had not been misled, he provided informed and authoritative findings that the Respondent had not been untruthful or in any way fraudulent in his evidence before the civil court. In the light of that finding, which engaged directly with the allegations made by the Applicant, the Tribunal did not consider there was any remote possibility that the Lay Application may succeed. Accordingly, the Tribunal was satisfied beyond reasonable doubt that the strike out application should be upheld on the basis that the Lay Application had no reasonable or realistic prospects of success. The Tribunal determined that the Applicant's Lay Application should be struck out on that basis…

Abusive Collateral Attack

11.50 The Tribunal fully accepted the submissions made about it being improper for it to entertain proceedings brought for the purpose of mounting a collateral attack upon a final decision made by another court of competent jurisdiction in previous proceedings. The Tribunal considered there may be circumstances where an unsuccessful litigant might properly raise issues of professional misconduct arising out of a case which had been lost notwithstanding the court's final

> determination. However, on the facts of the present case, this did not arise. The Tribunal accepted that the Applicant may have genuinely believed that his application raised distinct regulatory issues, but as noted above the Tribunal had rejected the submissions to this effect made on the Applicant's behalf. The Tribunal considered that in this case the potential regulatory issues were precisely those questions considered by District Judge Stewart and on which he made clear findings. There was no meaningful distinction between the issues thoroughly ventilated in the Applicant's unsuccessful set-aside claim and the issues featuring in his Lay Application. Whilst he may not have intended any abuse of the Tribunal's processes, the Tribunal did not consider that his application raised any potential regulatory issues falling out-with Judgment of District Judge Stewart…dated 9 February 2016. Accordingly, the Tribunal considered that to entertain the Lay Application would require it to go behind the decision of a court of competent jurisdiction which would be improper."

The Statute and the Rules

29. Regulation of solicitors is undertaken by The Law Society as the regulator approved by the Legal Services Board, which was set up under the Legal Services Act 2007. Section 1(1) of that Act identifies the regulatory objectives:

> (1) In this Act a reference to "the regulatory objectives" is a reference to the objectives of–
>
> (a) protecting and promoting the public interest;
> (b) supporting the constitutional principle of the rule of law;
> (c) improving access to justice;
> (d) protecting and promoting the interests of consumers;
> (e) promoting competition in the provision of services …;
> (f) encouraging an independent, strong, diverse and effective legal profession;
> (g) increasing public understanding of the citizen's legal rights and duties;
> (h) promoting and maintaining adherence to the professional principles.

30. The professional standards for solicitors, including in particular the SRA Principles 2011(being those in force at the relevant time) and the SRA Code of Conduct, are promulgated by the SRA, which whilst formally a part of the Law Society, operates independently from it in exercising these functions and seeking to achieve the regulatory objectives identified in s. 1 of the 2007 Act.

31. Adjudication of whether there has been a breach of such standards, and if so the appropriate penalty, falls to be determined by the SDT, which is constituted as a statutory tribunal under Section 46 of The Solicitors Act 1974 and comprises some 40 professional and lay members. Complaints may be brought by the SRA, or as in this case, by lay members of the public. The procedural rules governing disciplinary proceedings at the time Mr Davies' lay application was made were contained in the 2007 Rules (SI No 3588 of 2007). The 2007 Rules make provision for deciding whether an allegation discloses a case to answer. Rules 5 and 6 provide:

"5. (1) An application to the Tribunal in respect of any allegation or complaint made in respect of a solicitor…shall be in the form of Form 1 in the Schedule to these Rules.

(2) The application shall be supported by a Statement setting out the allegations and the facts and matters supporting the application and each allegation contained in it…

6. (1) An application made under Rule 5 shall be considered by a solicitor member, who shall certify whether there is a case to answer.

(2) Paragraph (3) applies if—

(a) the solicitor member is minded not to certify that there is a case to answer; or

(b) in his opinion, the case is one of doubt or difficulty.

(3) If this paragraph applies, the application shall be considered by a panel of three members of the Tribunal, at least one of whom shall be a solicitor member and one a Lay member.

(4) If a solicitor member or a panel decides not to certify that a case to answer is established in accordance with this rule, the application shall be dismissed without formal order unless any party to the proceedings requires otherwise.

(5) If it is certified that there is a case to answer, a clerk shall serve the application, the Statement and any documents exhibited with them on each respondent in accordance with rule 10."

32. "Case to answer" is defined in Rule 2 as meaning an arguable or prima facie case.

33. Rule 15 deals with the admissibility of, and weight to be attached to, previous decisions of courts or tribunals:

"15.(1) In any proceedings before the Tribunal which relate to the decision of another court or tribunal, the following rules shall apply if it is proved that the decision relates to the relevant party to the application…

(4) The judgment of any civil court in any jurisdiction may be proved by producing a certified copy of the judgment and the findings of fact upon which that judgment was based shall be admissible as proof but not conclusive proof of those facts."

34. Rule 21 gives the SDT the power to regulate its own procedure:

"(1) Subject to the provisions of these Rules, the Tribunal may regulate its own procedure.

> (2) The Tribunal may dispense with any requirements of these Rules in respect of notices, Statements, witnesses, service or time in any case where it appears to the Tribunal to be just so to do."

The Competing Arguments

35. Mr Davies' argument, both in writing and orally, can be summarised as follows. He says that the SDT's decision of 6 September 2019 to strike out his application was wrong. He accuses the SDT of abuse of process and procedural irregularity in its decision to permit Mr Greene to apply for a strike out after a division of the SDT had decided that there was a case to answer. He says the SDT conducted an improper summary hearing. He says that the SDT chose to ignore factually incorrect statements by the Respondent. He says that the SDT erred in treating the 2016 judgment as conclusive evidence that Mr Greene had not breached SRA rules. He says that the ruling was unjust, improper, inconsistent and unreasonable.

36. In response, Mr Hubble argues that the SDT was entitled, and indeed was right, to strike out the application. He says there was no procedural error by the SDT in so proceeding and so finding. He says that the case certified had no merit and no prospect of success. In such circumstances, a case should be struck out on a summary basis. He makes five principal points.

37. First, he says that the 2016 Judgment provided clear, comprehensive and direct answers to the matters of which complaint is made. The allegation is that Mr Greene failed to disclose communications and misled the Court; yet the court itself said, in the 2016 Judgment, that it was not misled. He argues that that is a complete answer to the case, especially where the Court in question was applying the lower standard of balance of probabilities when considering whether Mr Greene had been culpable of some intent to mislead, whereas this Tribunal would be applying the criminal standard of proof.

38. Secondly, he says that on the merits, there is nothing in the allegations. Once it is understood that a new file was opened by Edwin Coe in November 2009 in the name of Mr Davies, and that he was sent new Terms and Conditions in his own name, there is no confusion about the contractual position. Edwin Coe wanted Mr Davies' personal covenant to pay its fees (rather than the covenant of a company with limited liability); so Mr Davies became the paying client even though the damages claim was in the name of Eco-Power. The fact that the autumn 2008 - autumn 2009 correspondence did not feature in Edwin Coe's disclosure, the high-level chronology or Mr Greene's witness statement in Claim No. 2YJ09713, is unsurprising; the correspondence was not pertinent in circumstances where it was the second retainer which was the one sued upon. It is notable, he says, that Mr Davies did not disclose them either. The fact that Mr Greene spoke in his evidence about Mr Davies coming back a year later in respect of the damages claim is understandable; Mr Greene was being asked in December 2012 about events three to four years earlier in 2008 to 2009; he was not shown the emails themselves by Mr Davies when giving evidence; and whilst there was correspondence between and involving Mr Greene and Mr Davies between autumn 2008 and autumn 2009, there was a gap of about a year in the taking of active steps in the underlying litigation with the decision to press ahead with the damages claim being taken in November 2009.

39. Thirdly, he says that the SDT judgment is consistent with the fact that the civil courts have ruled against Mr Davies on the central issues on no less than four occasions (DJ Stewart in 2012 and HHJ Hughes QC (twice) in 2013 and DJ Stewart again in 2016) and the SRA had declined to investigate or refer Mr Greene on no less than three occasions (February 2013, December 2018 and June 2019).

40. Fourthly, he says that the SDT was right to conclude that the potential regulatory issues were precisely those questions considered by DJ Stewart and on which he made clear findings. Accordingly, to entertain the application would require it to go behind the decision of a court of competent jurisdiction which would be improper. He says that the doctrine of abusive collateral attack applies to disciplinary proceedings, relying on the judgment of Supperstone J in *Baxendale-Walker v Middleton & Others* [2011] EWHC 998 (QB) at [96-100] [349]. In the 2016 Judgment, DJ Stewart not only found that Mr Greene "*did nothing of the sort*" in relation to the allegation that Mr Greene had deliberately misled the Court in 2012 but also that the events in 2012 were "*a million miles from any fraudulent activity or deliberate misleading of the Court*". It follows, Mr Hubble says, that the Judge dismissed in terms the allegation that Mr Greene had given false evidence. Accordingly, the present case is inconsistent with, and an attack upon, the outcome of the two sets of civil proceedings. Mr Davies' remedy was to appeal in those proceedings, which he attempted to do unsuccessfully in relation to the 2012 Judgment. It would plainly bring the administration of justice into disrepute to allow Mr Davies to argue matters all over again years after the event before this Tribunal and to seek to go behind the 2012 and 2016 Judgments.

41. Fifthly, it would be plainly unfair and prejudicial to Mr Greene for him to be vexed with these matters a third time with all the attendant cost, anxiety and harmful publicity. It is quite wrong for Mr Greene to be exposed to these disadvantages when Mr Davies has had every opportunity to make his case before the civil courts, has done so repeatedly and has been ruled against repeatedly. That is all the more so, he argues, given the delay in the prosecution of this case; the material events took place in the period 2008 to 2012 (some 8-12 years ago); it is plainly unrealistic to expect such matters to be investigated fairly now.

Discussion

42. In our view, there is nothing in Mr Davies' complaints of procedural impropriety in the SDT decision to consider the strike out application. Rule 21 gives the Tribunal the power to regulate its own procedure (cf *Law Society v Adcock and Another* [2006] EWHC 3212 (Admin) at [30-32]). Mr Greene had not had any opportunity to be heard or to make representations prior to the certification. The new division of the Tribunal was provided with the 2016 Judgment which was not before the division of the Tribunal which had previously certified the case. It was entitled to consider an application based on that material, and the arguments advanced on behalf of Mr Greene, to consider whether they justified a conclusion that the application should be struck out.

43. In our judgment, the two points of real weight advanced by Mr Davies concern the merits of his underlying allegations, and the SDT's conclusion that the proceedings would be an abuse of process. It is convenient to take those two points in reverse order.

Abuse of process

44. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, Lord Diplock described (at p. 536C) an inherent power which he said:

> "any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

45. At p. 541B, Lord Diplock set out the particular abuse at which the exercise of the power was directed in the case before the Judicial Committee:

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."

46. At p. 541H, Lord Diplock said that "*collateral attack upon a final decision of a court of competent jurisdiction may take a variety of forms*". He identified the applicable principle by reference to the judgment of A. L. Smith LJ in *Stephenson v. Garnett* [1898] 1 Q.B. 677, 680-681 and the speech of Lord Halsbury L.C. in *Reichel v. Magrath* (1889) 14 App. Cas. 665, 668. A. L. Smith LJ said:

> "the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent court."

47. Lord Diplock set out the passage from Lord Halsbury's speech in full:

> "I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again."

48. We accept Mr Hubble's submission that, as Supperstone J concluded in *Baxendale-Walker v Middleton & Others* [2011] EWHC 998 (QB), the principle identified in *Hunter* applies to disciplinary proceedings.

49. Ultimately, the touchstone in applying that principle is whether the twin policies of avoiding unfair harassment and achieving finality in litigation are engaged (see *Koza Ltd v Koza Altin Isletmeleri AS* [2020] EWCA Civ at paras 30 to 37). Accordingly, it will generally be an abuse of the process if it would be manifestly unfair to a party to the later proceedings that the same issues should be re-litigated or where to permit

such re-litigation would bring the administration of justice into disrepute: *Secretary of State for Trade and Industry v. Bairstow*, [2003] EWCA Civ 321, [2004] Ch 1 at [38], *Laing v Taylor Walton* [2007] EWCA Civ 1146 at [12], *Allsop v Banner Jones Ltd* [2021] EWCA Civ 7 at [45].

50. There is room for argument whether DJ Stewart's findings of honesty on Mr Greene's part in his 2016 Judgment can be treated as *obiter.* As emerges from paragraph 11 quoted above, DJ Stewart's dismissal of the application to set aside his earlier judgment was founded in part on his conclusion that there had been a new written retainer in 2009 which made clear on its face that it was between Edwin Coe and Mr Davies himself. That had been his conclusion in 2012 and remained his conclusion in 2016. That finding was based primarily on the documentary evidence demonstrating the existence of the new retainer, rather than what Mr Greene said about the history, and was supported by new material that there were concerns about Eco-Power's ability to pay. That was sufficient to dismiss the application he was hearing, so as to make it unnecessary to make any findings about Mr Greene's honesty. Nevertheless, the District Judge also clearly found (at paragraphs 12-14 and 17-18 of the judgment) that there was no dishonesty in Mr Greene's evidence, which would also have been a sufficient basis on which to dismiss the application before him.

51. However that may be, we see no unfair harassment in the SDT investigating the complaint against Mr Greene simply because of DJ Stewart's conclusions in the civil claim. Adopting the expression of A. L. Smith LJ in *Stephenson v. Garnett*, DJ Stewart was not considering "*the identical question*". We have already observed that the allegation as originally framed in the complaint to the SDT was confined to one of dishonesty and fraud, not merely negligent or reckless untruthfulness; but that by the terms of Mr Davies' 19 June 2019 document, the complaint was broadened to include recklessness as an alternative, and to allege breaches of three of the SRA Principles 2011, which do not depend upon proof of dishonesty: see *Wingate v SRA* [2018] EWCA Civ 366 at [93]-[106]. We think that the SDT was bound to consider whether the conduct complained of breached these Principles, even if it fell short of deliberate dishonesty. Whilst the opinion of DJ Stewart on the veracity of Mr Greene's evidence may well be of interest to the SDT (a matter we return to below), the issue before him was not whether particular allegations of breach of those standards were made out. DJ Stewart was not addressing the question whether Mr Greene's conduct fell short of the relevant professional standards. He was not determining whether Mr Greene should be exonerated or condemned for breach of professional standards. He was not purporting to test Mr Greene's conduct against the SRA's Principles or the SRA Code of Conduct.

52. Nor in our view, can it properly be said that the public interest in the finality of litigation requires that the SDT proceedings be struck out. In this context, it is important to keep in mind that the SDT has a very different function from that of the civil courts. In private law proceedings, like those before DJ Stewart, the civil courts are concerned with the resolution of disputes between individuals. The SDT's role, by contrast, concerns the protection and promotion of the public interest and the interests of consumers, the promotion and maintenance of adherence to professional principles, the protection of the public and the regulation of the profession (see s1(1) of the Legal Services Act).

53. In this respect, it is instructive to consider the application of the abuse principles to criminal prosecutions, because the public interest function of the SDT bears similarities to the public interest in the prosecution of crime. In *R v L* [2006] EWCA Crim 1902, the appellant was prosecuted for the murder of his 3-month-old son, E. After the child's death, his four-year-old stepbrother, J, was taken into care and care proceedings commenced. The judge in the care proceedings found that E's injuries were non-accidental, but he was unable to conclude on the evidence whether one parent was more likely than the other to have inflicted the injuries. The appellant sought a stay of the criminal proceedings on the ground that they were an abuse of process in light of the decision in the care proceedings. That argument was rejected, and he was found guilty of murder.

54. On appeal he argued that it was an abuse of process to allow the criminal proceedings to continue when the care proceedings had already considered the issues. The court, which included Sir Igor Judge, the President of the Queen's Bench Division and Sir Mark Potter, President of the Family Division, dismissed the appeal. Sir Igor said (at [60] – [62]):

> "In our view, once it is appreciated that in the care proceedings the appellant was not being prosecuted, and that he was never at risk of conviction, and that the judge who decided those proceedings lacked jurisdiction finally to exonerate or condemn the appellant and, if to condemn him, to pass sentence, any (public) concerns would be quickly extinguished. Indeed, public concern might be greatly engaged if it were thought that criminal proceedings affecting the public interest, and in this case the death of a baby, had in effect been decided by a court lacking due authority, and not "competent" for the purpose…
>
> The simple reality is that the Crown did not accept the correctness or applicability of (the family court judge's) reservations whether (the) death was a homicide….No doubt before the Crown elected to continue with the proceedings, it reflected, as it always should, long and hard on (the family court's) judgment, and in particular in the context of the public interest test adopted by prosecutors in the Code of Practice, whether the criminal proceedings should be continued. Nevertheless, after such reflection, the decision, and ultimate responsibility for it, remains with the Crown. Accordingly, properly analysed, the decision by the Crown to continue with the prosecution of the appellant, and the eventual verdict by the jury, could not reasonably be regarded as an affront to the administration of justice.
>
> In our judgment there was no abuse of process, and (the) decision that the prosecution should be allowed to continue was right." (Emphasis added)

55. Just as it was held in *R v L* that, in the care proceedings, the appellant was not being prosecuted and was never at risk of conviction, so here in the civil proceedings Mr Greene was not made the subject of disciplinary proceedings and was not at risk of a

disciplinary finding against him. Just as it was held in *R v L* that the Crown was not bound by facts found in the care proceedings because it had no opportunity to participate, so here the body charged with regulating the profession had no ability to participate in the civil decision of the District Judge.

56. Although Mr Davies was both the lay applicant in the SDT proceedings and a party in the civil action, the case before the SDT is a disciplinary complaint in which there is a public interest irrespective of the identity of the prosecutor. Rule 11(6) provides that once a case to answer has been certified, the application and allegations cannot be withdrawn without the consent of the Tribunal: it is not a decision for the prosecutor, whether the latter be a lay applicant or the SRA. The statutory regulatory objectives dictate that there should be a disciplinary inquiry.

57. This difference in function is reflected in Rule 15(4) of the 2007 Rules which provides that in solicitors' disciplinary proceedings, judgments of civil courts are admissible, but not conclusive proof of the facts found. That recognises that when it comes to matters which are relevant to the regulatory functions which the Tribunal is engaged in, it must generally reach its own view: a judgment of a civil court is of no more than evidential weight. It may be of very great evidential weight, depending on the particular facts of the case, but it is not conclusive. It is difficult to see how a complaint can properly be characterised as an abuse merely because it is inconsistent with a civil judgment, when the Rules provide that the civil judgment is not necessarily dispositive of a question of professional conduct.

58. We recognise that there may be cases where a complaint is inconsistent with a civil judgment and the circumstances would make it unfairly vexatious for the solicitor to be required to relitigate in the disciplinary proceedings the issues which had been investigated and resolved in the civil proceedings, despite the difference in function between the respective tribunals. Some solicitors' negligence cases might fall into that category. Each case will depend upon its own facts, and the extent of the vexation. In this case, however, Mr Davies' complaint is not unfairly vexatious of Mr Greene, if it is sufficiently arguable to raise a case to answer on its merits, and a decision by the SDT to continue with disciplinary proceedings against Mr Greene could not reasonably be regarded as an affront to the administration of justice or an abuse or process. The first basis on which the SDT struck out the complaint cannot stand.

Lack of merits

59. The test to be applied in deciding whether there is a case to answer against a solicitor in SDT proceedings is a stringent one. In substance, it is the same as that applicable in deciding whether to withdraw a criminal case from the jury in accordance with *R v Galbraith* (1981) 73 Cr. App. R 124. In *SRA v Nabeel Sheikh*, Davies LJ said at [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*... 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."

60. As emerges from its judgment of 6 September 2019, and in particular paragraph 11.49 set out above, the SDT did not engage with the detail of the evidence relied on by Mr Davies. Instead, the SDT appears to have been content simply to rely on DJ Stewart's findings in the 2016 Judgment. Given the requirement in rule 15(4) that the judgment of a civil court and the findings of fact upon which that judgment was based are to be treated as admissible but not conclusive proof of those facts, and our conclusions on the abuse argument, the SDT was in error in failing to consider the evidence and reach its own view of whether it raised a case to answer. It is therefore necessary for us to do so.

61. The crux of the complaint is that Mr Greene misled the court in two related aspects of his evidence, in order to support Edwin Coe's case that there was a new and separate retainer with Mr Davies for what was a claim by Eco-Power. The first aspect is his evidence that he had not heard from Mr Davies for about a year before the new retainer was agreed on 16 November 2009. The second is his evidence that the file had been closed on the Eco-Power judicial review, and that what Mr Davies had come back with a year or so later was a separate instruction in relation to a damages claim which was distinct from the judicial review instruction.

62. We have concluded that it is arguable that Mr Greene's evidence was misleading in both those respects. The damages claim was part of the judicial review and arose from HHJ Hickinbottom's decision that the initial withdrawal of approval was unlawful. Thereafter, there was regular correspondence between Mr Greene and Mr Davies over the following year about pursuing the damages claim, which involved obtaining expert evidence to quantify it, and pursuing a claim in correspondence against TfL for some £850,000. We will identify some parts of that correspondence, without purporting to recount all of it.

63. In particular, there was correspondence between Mr Davies and Edwin Coe on 30 September 2008 and 6 October 2008 about the fees due to Edwin Coe in respect of the judicial review proceedings. On 1 December 2008, a week after HHJ Hickinbottom's decision on costs and directions for the damages claim, Mr Davies wrote a lengthy email to Mr Greene (and two others) setting out his criticisms of the judge's decision and the way the case had been conducted. Mr Greene replied briefly on 4 December 2008 and more fully on 23 December 2008. In relation to the damages claim he explained that this would normally involve an accountant or similar expert and that Mr Davies would need to put some figures together if it was to be moved forward.

64. In January 2009, there were emails between Mr Greene and Mr Davies about fees. Mr Greene resent the firm's invoice for fees up to 30 September 2008, which had been sent by his assistant under cover of a letter of 6 October 2008 describing it as an interim invoice, and which was addressed to Mr Davies, notwithstanding that it was common ground that at this stage only Eco-Power had been the client pursuant to the retainer of 31 March 2008.

65. On 4 March 2009, Mr Greene emailed Mr Davies about the damages claim and the speed with which it appeared the Court wished to deal with that issue. He also sought payment of the outstanding invoice. Mr Davies replied by way of a number of emails to Mr Greene on 6, 12, 13 and 16 March 2009. Mr Greene replied on 17 March 2009 indicating a willingness to "*take the damages claim forward*".

66. On 3 April 2009, Mr Davies' accountant, Mr Robinson wrote a detailed letter to Mr Greene on Mr Davies' behalf regarding Eco-Power's consequential losses, which was emailed by him to Mr Greene on 6 April 2009. Mr Greene emailed Mr Davies on 6 April 2009, apparently in reply to this correspondence. He emailed Mr Davies again on 17 April 2009 and replied to Mr Davies' accountant also in April 2009 (the precise date is not clear from the copies we have seen), asking him to link the quantification of the damages claim to the unlawful removal of the approvals for the original system.

67. On 21 May 2009, Mr Greene emailed Mr Davies in response to "*notes*" sent to him by Mr Davies apparently relating to the damages claim. Mr Greene emphasised that the damages need to flow from the unlawful wrongdoing identified by HHJ Hickinbottom and concluded "*We are of course pursuing that part of the claim.*" Mr Davies replied on 22 May 2009 and Mr Greene responded on 28 May 2009. He told Mr Davies that he had put the figures prepared by the accountant to TfL and was waiting to hear from them. It appears from a later document from PCO of 22 June 2009 that the amount of the claim advanced was "some £850,000".

68. Emails between the two men followed on 29 May 2009 and 3 June 2009, the latter forwarding a letter dated 1 June 2009 from TfL to Mr Davies, in which TfL asked for clarification of the legal basis on which the damages claim was being advanced. On 8 June 2009 Mr Greene again emailed Mr Davies about the damages claim indicating the two of them had spoken about the issue "*last week*".

69. On 30 July 2009, Mr Davies emailed Mr Greene saying that Mr Robinson was happy to work on a more detailed report and give evidence, and asking Mr Greene to provide details of what was required. Mr Greene emailed Mr Davies on 3 August 2009, telling Mr Davies that the court was exerting pressure "*to get on with things*", and that if they did not list a hearing to pursue it shortly, the court would list it automatically, possibly for dismissal.

70. Mr Greene emailed Mr Davies again on 28 August 2009 about "*a first return date for the damages claim*". Mr Greene advised that the court had listed 4 December as the first return date for directions in relation to the damages claim. He said that as far as the expert evidence was concerned a full and detailed report would be necessary which identified the assumptions which he made and would have to defend in court. Mr Davies responded saying that the last time they had spoken Mr Greene had said that he would be sending an instruction to the expert explaining exactly what was required and asking if that had been done. Mr Greene responded that it was probably sufficient if the expert was sent Mr Greene's first email of that day and then if he had any questions, Mr Greene would be happy to discuss them with him.

71. On 14 October 2009, Mr Greene emailed Mr Davies to say that counsel previously involved was not prepared to act on a contingency basis and that TfL were chasing as to what was to happen at the December hearing. He suggested that it really came down to whether Mr Davies wanted to or was able to pay for further process. Mr

Davies responded later the same day, complaining about Mr Greene's failure to respond to emails or "*the dozens of calls that I have made over the last couple of weeks"*. Mr Greene provided a brief response by email later that day and a somewhat longer response the following day.

72. Further email correspondence followed on 15 October 2009 and 3 November 2009. There were further exchanges of emails between the two on 10, 11, 12 and 16 November 2009. Later on 16 November, Mr Greene sent Mr Davies an email indicating he had opened a new file for the damages claim, and attaching new Terms of Business, which identified Mr Davies as the client. Without drawing attention to that fact.

73. Against that history (and we repeat it is not a comprehensive analysis of the correspondence) we remind ourselves of what Mr Greene said in his witness statement and on oath in the proceedings before DJ Stewart: "*I did not hear from Mr Davies for some considerable time*" and matters might have been different "*if there had been continuous instruction and we had been continuously instructed with Eco-Power…but the fact is we had finished the Eco-Power file some time earlier and as I say in my statement you approached us again I think 12 months later saying could we do a damages claim*".

74. In our judgment, it is at least arguable that the disparity between what Mr Greene said in evidence and the position revealed by the correspondence is capable of supporting a case that the former was not only misleading but deliberately so, and not such as to be explained as a product of mistaken recollection due to the passage of time. Mr Greene was personally involved in regular discussions over this period in relation to a damages claim which was part of the judicial review proceedings and was Eco-Power's claim.

75. We have already observed that the SDT would be bound to consider whether the conduct complained of breached the 2011 Principles identified in Mr Davies' document of 19 June 2019, even if it fell short of deliberate dishonesty. It follows from our conclusion that the complaint raised an arguable case in its original narrower form, that it also does so in its subsequent widened form.

76. It is right to observe that the District Judge's 2016 Judgment has some potential evidential value, but it is of very limited weight. He heard Mr Greene being cross-examined in 2012, whereas the SDT and we have only a transcript, which does not always capture the nuances of oral evidence. However, since the cross-examination had taken place over 3 years earlier, we doubt whether it afforded him a significant advantage over the SDT. He was also in a position to assess whether he had in fact been misled on the earlier occasion. However, it appears that he was referred to only a small sample of the relevant correspondence; and moreover, whether or not the District Judge was misled is not the only potential issue before the SDT; a lie that does not mislead the recipient is still a lie.

77. We therefore conclude that the SDT erred in its decision of 6 September 2019 in not properly examining the correspondence underlying Mr Davies' complaint, and that had it done so it would have been bound to find that there was a case to answer. It is material to note that on the earlier occasion when a different division of the SDT did so, it concluded that there was a case for Mr Greene to answer.

Conclusion

78. In those circumstances, the SDT's decision of 6 September 2019 is flawed both in its analysis of abuse of process and on the merits. Accordingly, this appeal must be allowed.

79. We should make clear that we are not expressing any concluded view that Mr Greene has lied or behaved dishonestly or in breach of professional standards. He has not yet responded to the merits of the complaint. It will be for the SDT to consider whether such a case is made out having heard all the evidence. All we have decided is that the application by Mr Greene did not meet the stringent requirements necessary to justify a strike out, and that the allegations are not so clearly unarguable that there is no case to answer.