Neutral Citation Number: [2019] EWHC 2408 (Admin)

Case No: CO/30/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/09/2019

Before :

LORD JUSTICE DAVIS
and
MR JUSTICE POPPLEWELL

- -

Between :

RICHARD CLEGG	**Appellant**
- and -	
SOLICITORS REGULATION AUTHORITY	**Respondent**

- -
- -

The Appellant appeared **in person**
Geoffrey Williams QC and Andrew Bullock (instructed by **the Solicitors' Regulation Authority**) for the **Respondent**

Hearing dates: 24 and 25 July 2019

- -

Approved Judgment

Lord Justice Davis :

Introduction

1. This is an appeal brought by Richard Clegg against the decision of 12 December 2018 of a panel of the Solicitors' Disciplinary Tribunal that he should be struck off the Roll of Solicitors. He was also ordered to pay costs in the sum of £12,000.

2. The challenge is, in essentials, to the findings of fact made by the Tribunal, following a three day hearing at which the appellant himself gave evidence, and to its conclusions based on such findings: which included conclusions as to want of integrity and dishonesty. It is said that the evidence did not justify such findings and conclusions, on a proper application of the criminal standard of proof (which it was agreed was the applicable standard). In particular, it is said, the Tribunal was not justified in making a finding not only of want of integrity but also of dishonesty on the part of the appellant as it did; and the sanction of striking off from the Roll was likewise, it is argued, unjustified.

3. At the hearing before the Tribunal the appellant had been represented by counsel. Before us, he appeared in person. He has prepared his appeal with a meticulous attention to detail and presented his arguments, both written and oral, fully and forcefully (and, I add, with courtesy). The respondent Solicitors Regulation Authority (SRA) was represented before us by Mr Geoffrey Williams QC, who had not appeared below, and by Mr Andrew Bullock, who had.

4. Whilst I have sought to bear in mind all points made to us, I make clear here and now that I do not propose specifically to rehearse in this judgment every point advanced.

The legal approach on appeals

5. Since the appeal is essentially based on arguments that the Tribunal's findings and conclusions were against the evidence, or against the weight of the evidence, I ought, albeit briefly, to articulate at the outset the approach which an appellate court is required to follow.

6. That approach (which is now well established and is set out in many authorities) is summarised in the decision of the Divisional Court in the case of *Solicitors Regulation Authority v Day and others* [2018] EWHC 2726 (Admin) at paragraphs 61 – 69 of the judgment. The following principles, which to some extent overlap, are clear:

    1) An appellate court is not engaged in an entire rehearing on the facts.

    2) An appellate court will be slow, given the advantages enjoyed by a trial judge or trial panel, to depart from findings of fact, especially when those findings are influenced by a view taken of witnesses who have given oral evidence.

    3) An appellate court will not interfere with the decision reached simply because the appellate court may not itself have made such a decision.

4) An appellate court will only interfere with findings of fact if such findings cannot be explained or justified – put another way, if such findings are ones that no reasonable judge or tribunal could have reached.

5) Likewise, restraint on the part of the appellate court is called for in assessing the evaluative conclusions to be drawn from the findings of primary fact: and the appellate court will generally not interfere with such evaluation unless it involves an error of principle or it falls outside the ambit of what could reasonably and properly be decided.

6) Where the decision is that of a specialist tribunal, regard will be had to that specialisation and expertise.

7. In addition to the various authorities there cited, reference can also be made to the recent judgment of Lewison LJ (with whom Lindblom LJ and Rose LJ agreed) in *ACLBDD Holdings Ltd v Staechelin and others (Note)* [2019] EWCA Civ 817, [2019] 3 All ER 429. Lewison LJ there set out at paragraphs 29 – 33 the required approach and the reasons for that approach. In addition, he pointed out – as is relevant in the present case, given some of the appellant's complaints – that the mere fact that a trial judge has not expressly mentioned some piece of evidence does not mean that it has been overlooked. He also pointed out – again as is relevant in the present case, given some of the appellant's complaints – that a judge is required to give sufficient reasons as to why he has reached his decision but: "they need not be elaborate. The judge's duty is to give reasons for his *decision.* He need not give reasons for his reasons. His function is … not to spell out every matter as if summing up to a jury…". These remarks, with which I respectfully agree, apply equally to tribunals and to the appellate court's approach on an appeal from a decision of a tribunal.

8. I did not in fact understand there to be any real dispute as to the principles this court should apply in this appeal. Further, there was no dispute but that the required approach in law to dishonesty was to be taken as that set out by Lord Hughes in *Ivey v Genting Casinos Ltd.* [2017] UKSC 67, [2018] 1 Cr. App. R 12. As to integrity, the approach is conveniently set out by Jackson LJ in his judgment (with which Sharp LJ and Singh LJ agreed) in *Wingate & Evans v Solicitors Regulation Authority* [2018] EWCA Civ 366. At paragraph 100 he said this:

> "Integrity connotes adherence to the ethical standard of one's own profession. That involves more than mere honesty…"

And at paragraph 102 he then said:

> "Obviously neither courts not professional tribunals must set unrealistically high standards … The duty of integrity does not require professional people to be paragons of virtue. In every instance, professional integrity is linked to the manner in which that particular profession professes to serve the public…"

<u>The allegations made by the SRA</u>

9. The allegations pursued at the hearing by the SRA were as follows:

> "Allegation 1.1 – On 12 May 2015, by entering a defence in civil proceedings brought against his firm by Professor JW (relating to non-payment of the latter's fees in clinical negligence proceedings wherein the Respondent acted for Mrs LW), stating that Mrs LW should be the correct defendant, without informing her of the civil proceedings or his comments therein, he breached or failed to achieve all or any of: Principles 4 and 6 of the Principles and Outcomes 1.1, 3.4 and 1.16 of the 2011 Code.
>
> Allegation 1.2 – Between February 2015 and March 2016, by misleading his client Mrs LW by failing to provide her with full and accurate information regarding Professor JW's claim he breached or failed to achieve all or any of: Principles 2, 3, 4 and 6 and Outcome 1.1 of the 2011 Code."

10. The Principles and the Outcomes contained in the relevant SRA Code of Conduct variously there referred to are as follows in terms of the duties of solicitors:

> Principle 2 – act with integrity
>
> Principle 3 – not allow your independence to be compromised
>
> Principle 4 – act in the best interests of each client
>
> Principle 6 – behave in a way that maintains the trust the public places in you and in the provision of legal services
>
> Outcome 1.1 – you treat your clients fairly
>
> Outcome 1.16 – you inform current clients if you discover any act or omission which could give rise to a claim against you
>
> Outcome 3.4 – you do not act if there is an own interest conflict or a significant risk of an own interest conflict

11. It may be noted that Allegation 1.1 did not involve any assertion of want of integrity or dishonesty. Allegation 1.2, on the other hand, did include an allegation by the SRA of want of integrity. It was further made clear that dishonesty was also asserted with regard to Allegation 1.2.

The factual background

12. The background leading up to these allegations is, in summary, this.

13. The appellant was admitted as a solicitor in 2005. At the relevant times, he was the owner and sole director of a company of solicitors called GMS Law Limited, based in Norwich. Although it was a limited company, I will for convenience here call it "the firm".

14. On 19 May 2011 a woman, who in the proceedings below was called Mrs LW, instructed the firm in a clinical negligence claim arising from the death of her late

husband. A senior solicitor at the firm, PH, at all times had the individual conduct of the proceedings on behalf of Mrs LW. The appellant was not himself involved in those proceedings.

15. The firm was retained on the basis of a written Conditional Fee Agreement dated 19 May 2011. That Agreement, with appended documents, was sent to Mrs LW under cover of a detailed letter signed by PH, on behalf of the firm, of the same date. That letter among other things made clear that, if the claim succeeded, it was rare for the losing party to pay the full amount of the costs incurred; and that "any costs which have been incurred but which are not recovered from the other side you remain liable to pay to this company…". The Conditional Fee Agreement among other things also stated:

> "If you win your claim, you pay our basic charges, our disbursements and a success fee. You are entitled to seek recovery from your opponent of part or all of our basic charges, our disbursements, a success fee and insurance premium…"

The success fee was set at 100%. It was also provided in the appended document that, if Mrs LW lost, she did not pay the firm's costs "but you pay our disbursements."

16. The claim proceeded. It became necessary to instruct experts in various medical disciplines. One such expert so instructed by the firm on behalf of Mrs LW was Professor JW, a distinguished oncologist. He was instructed in January 2013.

17. By April 2014, PH had been given a trial window of 24 November 2014 to 7 February 2015 by the court. The length of the trial was estimated at 7 days. She requested from Professor JW his availability, by letter dated 16 April 2014. She also said that the trial was estimated to last 7 days "although you will not be required for all 7 days – I estimate 3 days".

18. Professor JW confirmed his availability for trial in that window by emailed letter sent to the firm the same day. In that letter he also said this:

> "Please do note my conditions and terms for medico-legal work and in particular my cancellation fees. Should my cancellation fees be unacceptable to your firm please let me know within the next two weeks."

19. The appended conditions and terms among other things stated that Professor JW charged £1,500 per day for court appearances. Under the heading "Payment" this was stated:

> "Thirty days from date of invoice. The instructing solicitors are responsible for the payment of fees and not the solicitors' clients…"

Under the heading "Cancellation of conferences and Court appearances" this was said:

> "All cancellations must be received in writing. If more than 4 weeks notice of cancellation is given, there is no cancellation fee. If 2 – 4 weeks notice of cancellation is given, then half my daily rate is charged. If less than 2 weeks cancellation notice is given, then I charge my full daily rate of £1500 per day."

20. On 23 April 2014, PH on behalf of the firm responded. She informed Professor JW that 12 – 20 January 2015 were mutually convenient dates for all parties for the trial. The letter concluded:

> "I appreciate your terms and conditions and cancellation fee in this regard."

21. Professor JW responded by email on 24 April 2014, saying that he had entered those dates in his 2015 diary. PH in turn replied on 28 April 2014, noting that "you have entered the provisional trial date into your 2015 diary". She concluded: "I appreciate your assistance."

22. There was in due course a meeting of experts. Although we were not given full details, it seems that a settlement figure for the clinical negligence claim was shortly thereafter agreed, in around August 2014, in the sum of £160,000, with £100,000 payable to Mrs LW's son and £60,000 payable to Mrs LW herself. The defendant also agreed to pay costs, to be assessed if not agreed. That settlement was subsequently approved by the court in, as we were told, September 2014.

23. For reasons which have never really been explained, Professor JW was not informed by PH that the claim had been settled and was not informed that, in consequence, the trial fixed for January 2015 would not now need to take place. I entirely accept that that was not the responsibility of the appellant personally at that time. But he did, nevertheless, at a later stage have responsibility for how things were thereafter presented to Mrs LW in the context of the costs issues that developed, as I explain below.

24. At any rate, it seems that the first Professor JW heard of the cancellation of the trial was when shortly before trial (and for which he said he had been preparing) he had a telephone discussion with PH on 9 January 2015. She then told him that the case had settled and the trial was not going ahead. We have no note of that conversation in the papers before us.

25. On 13 January 2015 Professor JW wrote to PH as follows:

> "I would be grateful for the payment of my cancellation fee of £10,500.
>
> You had asked that I make myself available for the Court from 12th – 16th, and 19th – 20th January 2015 inclusive. You informed me at 3:20p.m. on 9th January of the cancellation of the trial. You confirmed in an email dated 23rd April 2014 my terms and conditions and cancellation fee in this regard. Accordingly, I enclose a fee note in this matter.

> Could you kindly note that my fee note for the conference with experts on 29th July 2014 remains unsettled, and that a further supplementary fee note is enclosed with this letter."

26. There was, it is to be gathered, no response. Professor JW then sent a detailed letter before claim to the firm on 13 February 2015. In it he said that he had cleared his diary for the trial, that he had prepared carefully for the trial and that he had only been informed of its cancellation on 9 January 2015. He suggested that "this is an open and shut case and you should not delay payment of my invoice in respect of the cancellation fees". Those continued not to be paid. On 16 April 2015 Professor JW then issued proceedings in the County Court for payment of the sums which he said were due to him, including the cancellation fee of £10,500, representing 7 days at £1,500 per day. The sole defendant was named as "GMS Law".

27. After this, the appellant to an extent became involved. He drafted a Defence to the claim. The claim was denied in its entirety. A number of points (some, on any view, highly technical) were taken. But at the outset this was said at paragraphs 2 and 6:

> "2. The Defendant avers that the correct Defendant should be [LW] – being the Claimant in the underlying Personal Injury action and as such being the person, and the only person, capable of being liable for Disbursements in respect of the Personal Injury Claim in which she was the Claimant under the Indemnity Principle.
>
> …
>
> 6. Under the Indemnity Principle, a Solicitor cannot be liable for Disbursements, the liability must remain with the Client – [LW]."

Then at paragraph 10 of the Defence this was pleaded:

> "10. It is denied that there was any agreement for the Claimant to attend Trial – the Claimant was not instructed to attend Trial. Indeed there was no Trial in the underlying Personal Injury claim."

The Defence was signed by the appellant as a director of GMS Law. In a subsequent, more detailed, Defence dated 7 September 2015, again prepared and signed by the appellant, similar points (including reliance on the indemnity principle) were raised. But they also were supplemented. It was now further said there was no concluded contract with Professor JW at all and, moreover, that had there been a trial he would have attended trial only for 2 or 3 days, not the full 7 days to which the cancellation invoice related. It was also reiterated that Professor JW had not been "instructed" to attend trial. The position of the appellant before us in fact was that he suspected that Professor JW may deliberately have "sat back" pending the trial with a view to garnering a cancellation fee.

28. It is common ground that at no stage (at this time) had Mrs LW been told by PH or anyone else of the existence of these proceedings, let alone been told that the firm, in

its pleaded Defence, was saying that she herself was liable to Professor JW for the cancellation fee as claimed.

29. On 28 January 2016 there was a trial of Professor JW's proceedings in the County Court. The firm was represented by counsel (as was Professor JW). PH attended. She also gave evidence. The appellant did not himself attend.

30. Deputy District Judge Wood found in favour of Professor JW. By his oral judgment given on that date he concluded that, on the correspondence, a contract had been concluded and had been concluded on Professor JW's terms and conditions. Accordingly, since he had not been informed more than 2 weeks before trial that he was not required, he was entitled to his full cancellation fee. As the judgment records, PH had said in evidence that she accepted that Professor JW had been professionally obliged to keep the trial dates free. She had also said that she honestly believed that the firm had no obligation to pay him. But there was, as the judge held, in fact and in law such an obligation. Since Professor JW had duly kept the seven days free, he was – subject to any mitigation – entitled to 7 days at £1,500, that is to £10,500, as "damages". Whether the sums were strictly payable as damages may be queried; but, speaking for myself, I find the overall conclusion as a matter of contract unsurprising. The actual amount payable was at all events then agreed to be £9,422, plus costs.

31. The appellant was informed of the outcome. However, he did not receive the actual transcript of the judgment until June 2016. In that transcript the judge is among other things recorded as observing that it struck him as "extraordinary" that, the case having settled, Professor JW had not been told.

32. Mrs LW had at this time recently come out of hospital, following surgery. On 2 February 2016 the appellant wrote to her. He informed her that he was close to agreeing the amount of the costs payable by the defendant in the clinical negligence proceedings. (The firm's bill of costs had been in excess of £160,000 but it had previously been said to her that it did not expect to recover more than £130,000, and it might well be less. In fact those costs were at around this time then agreed in the sum of £120,000.)

33. Having so stated, the letter then said this:

> "However, before committing to a final figure I wanted to bring a recent development to your attention – as it is in relation to the amount you need to pay one of the Experts by way of Disbursements.
>
> You may recall that there were four different Experts involved in your case. Each of these Experts were of course asked to note the Trial date well in advance (they were all told in May 2014 about a Trial Window listed for January 2015). However, the case settled well before any Trial Preparation began.
>
> However, one of the Experts, the Oncologist [Professor JW] insisted on being paid for the time he had set aside in his diary for the Trial. Even worse, not just the two or three days that he

> would have been required to attend Trial, but the entire 7 day Trial Window.
>
> I defended this claim on your behalf on the basis that [Professor JW] was never actually confirmed to attend the Trial – but on a worst case scenario that he should be paid the two days that he would have attended the Trial.
>
> Unfortunately, and to be clear, I think the Court was completely wrong, the Court said that [Professor JW] was entitled to the entire seven day Trial Window that he had set aside in his diary.
>
> It is fair to say that I think the Court was completely wrong. I also have a particularly low opinion of [Professor JW] – I think he is arrogant, unscrupulous and his entire claim borders on being dishonest. However, I [sic] made all of these points to the Court (apart from the arrogant point) but the Court still bizarrely suggested that the Expert is entitled to be paid for the entire Trial Window.
>
> I say this is a bizarre point because ultimately it will lead to the ludicrous suggestion that every single Claimant has to book and pay all their Experts for the entire Trial Window. Applying this to your case, it would result in you having to pay 28 days' worth of Expert Fees, i.e. potentially you having to book and pay for each of your four Experts for the entire Trial Window – this would in my opinion be ludicrous.
>
> My suggestion is, therefore, to Appeal the Decision by the Court that an Expert is entitled to be paid the entire 7 day Trial Window. I am asking for your instructions because [Professor JW] was an Expert that we instructed on your behalf in relation to your case – and as you are aware you are responsible for paying all Disbursements for the Clinical Negligence Claim. My advice to you is to Appeal the Decision of the Court – and further I am prepared to take forward this Appeal on the same No-Win-No-Fee Agreement that I have with you in relation to the Clinical Negligence Claim itself.
>
> Any appeal is by its very nature difficult because you need to demonstrate that a Judge made a wrong decision. However, it is simply not correct to say that a Claimant has to pay more to their own Expert then they could ever recover from the Defendant in the Clinical Negligence Claim itself."

34. Mrs LW and the appellant then spoke on the telephone on 3 February 2016. There was to be a difference between them in some significant respects as to what was said. I will have to come on to that. At all events, the appellant made an attendance note of that conversation. It started:

> "RC going through the result of the claim by [Professor JW]."

The note then went on to record apparent agreement that it was "entirely wrong" that Professor JW should claim "the full 7 days or anything at all"; but the "slight difficulty" was that the court had decided there was a binding agreement that he should be paid for setting aside the time in his diary.

35. The note also went on to record discussions about prospects for an appeal: in particular, on the point that Professor JW should not recover for all 7 days when, had the trial gone ahead, he would only have recovered for 2 or, at most 3, days attendance. The note went on:

> "[LW], therefore, confirming her instructions to Appeal the Decision, [LW] asking how it would affect her.
>
> RC saying the shortfall of costs, i.e. £12,000.00 shortfall did not take this into account and, therefore, as things stand the shortfall is going to be £12,000.00 plus this £9,000.00. If you win the Appeal then you will get about £44,000.00 possibly more, although I cannot say exactly now, but basically you need to win the Appeal to get anything close to your £48,000.00 net compensation."

The note then went on to deal with requests by Mrs LW for payment of some of the balance of her damages, in the sum of £20,000, and the potential effect on her benefits.

36. This telephone conversation was then followed by a letter from the appellant to Mrs LW of 3 February 2016. A cheque for £20,000, as requested, was enclosed. Among other things, the letter said:

> "Thank you for confirming your instructions to Appeal the Court's Decision that one of your Experts should be paid a 7 day Trial Cancellation Fee – even though he was never specifically instructed to attend the Trial and even though he was told from the outset that he would probably be required for three days only.
>
> I shall, therefore, take the Appeal forward on the basis that the Consultant's own case was that he had booked to attend on two days, our suggestion was that the most he could possibly get was three days. Therefore, your Appeal will ask the Court to reduce down his fees from 7 days or either 2 or 3 days.
>
> We discussed the tactics of possibly Appealing the entire decision, i.e. saying to the Court that he should get nothing at all – but tactically I think it is better to say that you accept he will get something but the Court simply went too far in awarding the full 7 days."

37. An appeal was duly lodged by the firm on 17 February 2016. The appellant settled the detailed Grounds of Appeal. The challenge to the formation of any contract was sustained. Particular objection was made to Professor JW receiving a cancellation fee for the full 7 days: thus recovering, it was said, more than if the case had fought at trial. The point was also maintained that, under the indemnity principle, Mrs LW was the "true client" and that the firm was not liable for the fees. (I add that all points raised were subsequently rejected on appeal by the County Court judge on 29 June 2017, save that there was remitted – very surprisingly, in my view – the issue as to whether the contract had been made by the firm as principal or agent; but that point was not thereafter, in any case, pursued.)

38. On 9 February 2016 the firm wrote to Professor JW. There was enclosed a cheque drawn on client account for £9,422 (the amount which had ultimately been agreed following the court decision) and a cheque drawn on office account for £428.60, by way of costs.

39. Although he accepted both cheques, Professor JW was both concerned and suspicious. He queried by letter to the firm of 19 February 2016 why the cheque had been drawn on client account, saying: "It is quite clear that you cannot pass on the liability to any client." If there was an answer to that letter, it was not before us. On the same day, Professor JW also wrote to the SRA outlining his concerns. The award had been against the firm but payment had been from a client account. He pointed out that the firm had not notified him that the case had settled and "I cannot conceive of any circumstances where the liability should be borne by any client of GMS Law". Professor JW also then wrote to Mrs LW herself on 25 February 2016, expressing his concern that the settlement of his fees, which he considered was the responsibility of the firm, should not come from her account and that such settlement "resulted from their failure to notify me of the cancellation of the trial." Mrs LW did not in fact then raise this concern with the appellant at the time. She first did so, in very strong terms, by letter sent on 20 June 2016, which demanded payment of £9,422.

40. In the meantime, the appellant had sent a further letter to Mrs LW on 25 February 2016. He summarised the position as to her entitlement. He said that had recovered £120,000 from the defendant for costs of the clinical negligence proceedings (against a bill of some £165,000). Although the firm was strictly entitled to look to the client for payment of this shortfall, it seems that it had previously been agreed that she would, in net terms, receive at least 70% of her damages award: that is to say, £42,000 (the previous reference in the letter of 3 February 2016 to £48,000, he explained, had been a slip). The letter also said:

> "I have previously provided you with interim payments totalling £42,000.00, being the 70% minimum of £60,000.00. Therefore there is nothing further due to you unless the Appeal is successful in which case something more will be due, however, I cannot say how much at this stage"

41. On 6 March 2016, Mrs LW sent an email to the appellant seeking payment of more to her. (She made no reference to the points made by Professor JW in his previous letter of 25 February 2016 to her.) On 10 March 2016 the appellant wrote to her explaining in some detail that she had no further entitlement. In the course of that letter, however, he also said:

> "Having said all of the above there is still the possibility of you receiving further funds – but if, and only if, the appeal against the Expert Fee of [Professor JW] is successful"

A little later on in the letter he said:

> "You will only receive further compensation if the appeal is successful."

42. Thereafter, after receiving Mrs LW's letter of 20 June 2016, the appellant responded at some length by letter of 26 July 2016 to the effect that absorbing Professor JW's fee by the firm would have no impact on the amount due to her, because of the shortfall between the assessed costs and the solicitor and own client costs. He set out the figures in some detail. It is also to be noted, in this regard, that a subsequent complaint by Mrs LW to the Legal Ombudsman resulted in an adjudication in 2018 in favour of the firm on this point. Whilst it was found that payment to Professor JW should not have been made from client account, and whilst the firm had failed to take the correct action to avoid the cancellation fee being incurred, nevertheless that money would in any event have gone towards the shortfall in the firm's fees and so Mrs LW would not have been entitled herself to receive that sum in any event. That position, I add, had by the time of the hearing before the Tribunal also been accepted by the SRA.

43. That, then, sets out the background to the allegations pursued before the Tribunal.

The Tribunal decision

44. I turn to the decision of the Tribunal on the allegations pursed before it.

45. The decision is, on the face of it, thorough and detailed. (Complaints to us by the appellant that the decision had not, for example, sufficiently quoted from the documentation did not impress me.) It sets out the allegations and competing submissions and arguments in detail and, on the face of it, gives full reasons. At the outset, I note, the Tribunal directed itself by reference to the criminal standard.

(a) Allegation 1.1

46. So far as Allegation 1.1 is concerned, the appellant had (sensibly) admitted before the Tribunal breach of outcome 1.1 and 1.16 and Principles 4 and 6. The Tribunal correctly so concluded, applying the criminal standard. The facts spoke for themselves. In the course of defending the firm, which was the named – and correct – party to Professor JW's claims, the appellant had in terms sought to present Mrs LW (his firm's own client) as the party liable; and he also had done so without informing her. That was patently a breach – and a serious one – of those Outcomes and Principles.

47. The appellant had, however, disputed that there was a breach of Outcome 3.4. There was, on any view, a significant risk of an own interest conflict. For the appellant to think, as the Tribunal accepted that he did, that reliance on the indemnity principle was purely a "technical" defence was no answer. As the Tribunal found: "He had

exposed her to the risk of litigation in order to protect the Firm. The actual conflict he had created was glaringly obvious."

48. However, I need not say more on this, as the Tribunal's conclusions on this allegation are not now disputed on this appeal. Nevertheless, as Mr Williams observed, Allegation 1.1 provides relevant context for Allegation 1.2. On the other hand, it can fairly be pointed out on behalf of the appellant that the Tribunal accepted, indeed the SRA had conceded, that there was nothing inherently improper in the appellant defending the claim in the way that he did. Moreover – and this too is relevant – the Tribunal found that the appellant did not in fact himself intend that Mrs LW should herself bear any of the cancellation fees incurred.

(b) Allegation 1.2

49. As to allegation 1.2, it was the case of the SRA that the appellant had deliberately withheld information from Mrs LW. Indeed, it was, the SRA's case that he had positively misled her, by causing her to think that she was party to the County Court proceedings in respect of which the appeal was being pursued and in respect of which her instructions had been sought; and had also failed to tell her that the claim was for cancellation fees pursuant to Professor JW's terms and conditions (of which she was not told), when no such fees could or would have arisen had only the firm given notice that the trial was not going ahead once settlement was achieved in August 2014 (of which oversight she also was not told). That, it was said, connoted not just a want of integrity but also dishonesty.

50. The appellant's case before the Tribunal, in very short summary (albeit much more fully recorded in the Tribunal's decision), was – and the appellant gave evidence to this effect – that there had been no conscious or deliberate decision to mislead. It was among other things – to my mind, rather remarkably – maintained that under the Conditional Fee Agreement Mrs LW was in law responsible for all disbursements, whether or not they had been reasonably incurred on her behalf. At all events, when defending the claim of Professor JW for cancellation fees the appellant had, it was said, thought that the firm was doing so on her behalf, and was defending her against liability for the cancellation fee: he himself, it was said, had had no intention of making her a judgment debtor in the proceedings and no intention of making her think that she was a defendant in those proceedings. It was further said that, in the telephone conversation of 3 February 2016, he had explained in full why the claim of Professor JW had succeeded, including Professor JW's complaint that he had not been notified by the firm in time of the cancelled trial hearing. Further, it was emphasised to us that the judgment for the cancellation fee had been discharged out of the costs recovered from the defendant in the clinical negligence proceedings: the money had never been deducted from Mrs LW's damages.

51. The essence of the SRA's case had, it would appear, been reduced to six "bullet points": as recorded in paragraph 18.18 of the Tribunal decision. Two of these were rejected by the Tribunal. One was that, in his letter of 2 February 2016, the appellant had deliberately misled Mrs LW by referring to a "recent development": when (as it had been alleged) he had been aware of the issue for some 9 months and had never told her of them. But the Tribunal concluded that that reference was intended to be a reference to the court judgment of 26 January 2016, which could indeed be said to be a recent development. The second point which was rejected was that the appellant had

deliberately misled Mrs LW by falsely saying that she may receive more even if the appeal succeeded. But the appellant gave evidence to the effect that he would "in his discretion" have paid her some (unidentified) part of the money accruing if the appeal succeeded; and the Tribunal was prepared to accept that was so.

52. The remaining four points raised against the appellant, and to an extent overlapping, were these:

- Made a deliberate and conscious decision to withhold information relating to Professor JW's claim from Mrs LW over a period in excess of nine months

- Made a deliberate and conscious decision to inform Mrs LW that he was defending the claim brought by Professor JW on her behalf, when he knew that Professor JW had issued the claim against his firm and not against Mrs LW

- Made a further conscious decision to withhold any criticism of the firm made by DDJ Wood from Mrs LW

- Informed Mrs LW that Professor JW's claim was an attempt to recover more fees than he would have been entitled to had the trial gone ahead, when he was aware that Professor JW's claim arose out of the firm's failure to inform him, with sufficient notice, that he was no longer required to attend the trial or keep the trial window free.

53. The Tribunal, after fully setting out the respective cases on these issues, made detailed findings on those issues. It found that in the letter of 2 February 2016 the appellant had failed to inform Mrs LW that the claim of Professor JW was against the firm (and not her) and had failed to inform her that the claim was based on terms and conditions whereby Professor JW had been asked to set aside the time in his diary and when the firm thereafter had failed to notify him of the cancellation of the trial so as to avoid any cancellation fee. It was found by the Tribunal that the letter was "apt to mislead" and it was also found that Mrs LW had indeed been misled. The Tribunal further found unacceptable and not credible the appellant's explanations in evidence as to why he had sought her "instructions" and as to why he had referred to a "No win, no fee" agreement for the costs of the proposed appeal, rather than saying that the firm would take all liability for all costs whether the appeal failed or succeeded. Paragraph 18.35 of the decision concluded in this way:

> "Further, not only was the letter misleading as regards the statements made, it was also misleading in terms of its omissions. Nowhere in the letter did the Respondent make the basis of the Professor's claim clear. Nor did he explain the full basis on which he defended the claim. In particular, he failed to notify Mrs LW of the Indemnity Principle defence he had advanced. He did not explain why the DDJ had found that the Professor was entitled to claim for the full 7 days."

54. As to the phone call of 3 February 2016, the Tribunal rejected the appellant's evidence that he had given full and proper details of the basis of Professor JW's claim and of the reasons for its success before the County Court, as comprehended

(according to the appellant) in his succinct record in the attendance note "RC going through the result of the claim by Professor [JW]." It preferred the evidence of Mrs LW on this. In reaching that conclusion the Tribunal found that, had there been such detail so given in the course of the conversation, it would have expected it to have been set out in the (otherwise detailed) attendance note; it would also have gained some reflection in the appellant's letter of that date, sent immediately after the telephone conversation; and it would not have caused Mrs LW to write and complain in the way that she did in June 2016.

55. The Tribunal further found that (although it is to be accepted that the appellant did not know the precise terms of DDJ Wood's judgment and had no transcript) he knew enough to draft very detailed Grounds of Appeal on 17 February 2016. Thus he by then had "fully understood the salient reasons for DDJ Wood's findings". But he did not correct the impression given to Mrs LW.

56. At paragraph 18.44 the Tribunal then made these findings:

> "The Tribunal found that the correspondence with Mrs LW had been misleading in two ways; (i) the Respondent had failed to provide Mrs LW with full and accurate information as to Professor JW's claim or the findings of DDJ Wood; and (ii) the information he did provide misled Mrs LW into believing that she was a party to the proceedings. The Tribunal noted that the Respondent had omitted to provide any information that could lead to Mrs LW forming the impression that the Firm was in any way to blame for incurring the disbursement."

57. In such circumstances, a breach of Principles 3, 4 and 6 were found, on the application of the criminal standard: as was a failure to achieve Outcome 1.1.

58. On the issues – critical for the purposes of this appeal – of integrity (Principle 2) and of dishonesty the Tribunal's conclusions were as follows (and it is necessary to set them out in full):

> "18.48 The Tribunal found that a solicitor acting with integrity, knowing what the Respondent knew at the time, would have informed his client of the basis of the claim, namely that in the knowledge of the Professor's terms and conditions, the Firm had failed to inform him that he was no longer required for the trial in sufficient time so as to avoid the cancellation fees. Further, a solicitor acting with integrity would have made it clear to the client that she was not a party to the litigation and that the claim was being defended in part on the basis that the correct Defendant to the litigation was the client and not the Firm. Nor would a solicitor acting with integrity provide misleading information such that the client would believe that she was a party to the litigation. Instead the Respondent sought to garner the support of his client for his position by providing her with misleading information, and failing to outline the circumstances and background to the Professor's claim in full. He was not scrupulous in giving Mrs LW an accurate picture.

> The Respondent's conduct was demonstrable of [sic] a failure to abide by the ethical standards of the profession. Accordingly the Tribunal found that the Respondent had failed to act with integrity in breach of Principle 2 of the Principles.
>
> 18.49 Pursuant to the test in Ivey, the Tribunal considered the Respondent's state of mind at the time of his conduct. The Tribunal found beyond reasonable doubt that the Respondent had deliberately and consciously withheld the full details of the claim from Mrs LW. He had purposefully given her the misleading impression that she was the Defendant in the proceedings by stating that he was defending the claim on her behalf, seeking her instructions for an appeal and suggesting that the appeal could be funded by a No Win No Fee agreement, in circumstances where he knew that it was the Firm that was that Defendant. He had also deliberately and consciously failed to inform her of the basis of the Professor's claim and the reasons that DDJ Wood found in the Professor's favour. He had also purposefully failed to inform her that part of the Firm's defence was that Mrs LW was liable for the cancellation fee. The Tribunal accepted that when referring to recent developments, the Respondent was referring to the Judgment of DDJ Wood, and that he might well in his discretion have provided Mrs LW with further monies in the event of a successful appeal.
>
> 18.50 The Tribunal then considered whether ordinary decent people would consider the Respondent to have acted dishonestly. The Tribunal found beyond reasonable doubt that ordinary and decent members of the public would find that by deliberately withholding information from Mrs LW, and in providing her with misleading information in relation to the Professor's claim and the Firm's appeal, the Respondent's conduct was dishonest. Accordingly, the Tribunal found allegation 1.2 proved beyond reasonable doubt, including that the Respondent's conduct had been dishonest."

59. On sanction, the Tribunal amongst other things said this:

> "The Tribunal did not find that the Respondent had been motivated by financial gain, and accepted that he may well have made an additional payment to Mrs LW had he been successful in the litigation. His motivation for his misconduct may have been to protect the reputation of the Firm and PH. His actions were planned; he deliberately omitted information in his correspondence with Mrs LW that might have led to her to believe that the disbursement had been incurred as a result of the Firm failing to notify Professor JW of the cancellation. He consciously omitted relevant information and positively asserted misinformation. He had total control and responsibility for the circumstances giving rise to the conduct. All

> correspondence and conversation with Mrs LW on the matter was with the Respondent. He was an experienced solicitor who was the sole Director and shareholder of the Firm."

60. The Tribunal went on to say of the misconduct that it was "deliberate, repeated and had continued over a long time." The insight of the appellant was "limited". This was a single client matter and a single episode in a previously unblemished career, as was accepted. Nevertheless, overall and given the nature and extent of the dishonesty, there were no exceptional circumstances which would justify a departure from the sanction of striking the appellant off the Roll. A lesser sanction would not be appropriate.

Disposal

61. The appellant is clearly most aggrieved at this outcome. But, having considered all the many points raised by him, I have to conclude that there is no proper basis, on a proper application of the principles relating to appeals based on a challenge to factual conclusions, for this court to interfere with the Tribunal's decision.

62. There are certainly a number of points that could be made in the appellant's favour. For example, it might initially have appeared, on the face of things and especially to a non-lawyer, that he was indeed seeking to deduct from Mrs LW the amount of Professor JW's cancellation fee (which was the impression Professor JW, and Mrs LW herself in due course, seem to have formed). But analysis shows that is not so: if only because of the size of the short-fall between recovered costs and incurred costs. Thus on that basis Mrs LW was always going to recover the full 70% of the £60,000 damages, irrespective of Professor JW's claim. The Tribunal found in terms, indeed, that the appellant was not in this respect motivated by financial gain. Further, whilst it is difficult in the circumstances to see how, on the face of it, Mrs LW ever could financially have benefited from a successful appeal, the Tribunal was also prepared to accept the appellant's explanation that, in his discretion, he would have paid a further sum to her had the firm's appeal succeeded. Yet further, the Tribunal found that the appellant genuinely believed that Professor JW was not entitled to claim for the full 7 days when (had the trial gone ahead) he could only have claimed for his 2 – 3 days actual attendance.

63. Nevertheless, as Mr Williams observed, a financial motivation is not always a necessary pre-requisite to a finding of lack of integrity and dishonesty. And here, having regard to the communications between the appellant and Mrs LW, the findings of the Tribunal were that the appellant had consciously and deliberately suppressed from Mrs LW the underlying reason for the claim to such a fee – namely the terms and conditions to which the firm had subscribed and the failure of PH to stand Professor JW down in sufficient time before the trial – and that the appellant had deliberately led her to think that she was party to the appeal, and not simply the firm. The reference to "no win, no fee" simply reinforced that. In truth, it was a very misleading form of words; and the Tribunal was entitled to reject the appellant's explanations.

64. Perhaps rather surprisingly, the appellant before us nevertheless maintained an attack on the honesty of Mrs LW. That was particularly surprising given that the appellant admitted that the salient letters from him were unclear and confusing and, as he

himself put it, did not "involve a good choice of words." He emphasised, for example, that she had convictions for dishonesty at around this time. He also queried, again by way of example, why, having the letter of Professor JW to her of 25 February 2016, she only first raised her complaints with the appellant on 20 June 2016, and did so at that time notwithstanding there had been intervening correspondence and his explanations in the meantime. Indeed, he queried the actual honesty of her claim in that letter of 20 June 2016, in such circumstances. By way of contrast, he said, he was a solicitor of unblemished record and he also had the support of the character evidence of Mr Dean.

65. The appellant in this regard also referred us to various passages in the transcript of her oral evidence. These, he said, indicated that Mrs LW – in the light of the telephone conversation of 3 February 2016 in particular – did know from the appellant the basis of Professor JW's claim, contrary to her assertions in evidence to the contrary. Thus at one stage Mrs LW in cross-examination seemed to accept that she appreciated that Professor JW was bringing his claim because he had not been "cancelled properly". There was then a – perhaps not very helpful – intervention from the Chairman. When counsel reverted to the point, Mrs LW (who of course, as must be remembered, was not herself a lawyer) then said she did not take it as a cancellation, just that the expert was saying that he had booked out time for the hearing of the trial which never happened. But, notwithstanding the various references to the transcripts which the appellant made, I can see nothing which disentitled the Tribunal from ultimately reaching the factual conclusions which it did reach. Such conclusions were not contrary to the evidence and they were, in my judgment, conclusions which were reasonably open to the Tribunal, viewing the evidence as a whole. In this regard, I also note that in cross-examination the appellant had among other things denied trying to conceal the error of PH from the client (indeed, he at one stage also stated that he did not believe PH to have been negligent). But in my opinion the Tribunal was not required to accept his evidence.

66. To the extent that the appellant maintained before us that the evidence was such that the Tribunal could not reach such findings on a proper application of the criminal standard, I do not agree. Not only was the Tribunal entitled to assess Mrs LW's evidence (and the appellant's evidence) as it did, but also the SRA's case was by no means entirely, or even primarily, dependent on Mrs LW's evidence alone. To the contrary, the course of events and the terms of the correspondence emanating from the appellant at the time (both in what it said and in what it did not say) could be taken as, of themselves, lending very strong support to the SRA's case. Further, the reasons given by the Tribunal were, in my judgment, sufficient to explain its conclusions.

67. The appellant among other things complained that he was treated by the Tribunal as knowing, at 3 February 2016, of the full text of DDJ Wood's judgment (including the reference to "extraordinary"): when he did not. But the Tribunal never found that he did. Its point was that his knowledge of the judgment, as reported to him, was such that he was able on 17 February 2016 to draft the very full grounds and argument on appeal as he did.

68. Ultimately, as I see it, the many points taken before us by the appellant, whether considered individually or cumulatively, simply do not justify this court in interfering with the factual findings and conclusions of the Tribunal. The Tribunal was reasonably entitled to assess and evaluate the evidence as it did. The fact that the

appellant himself strongly disagrees with such assessment and evaluation is not, I am afraid, enough. The law, by reference to the case of *Ivey*, was then correctly applied by the Tribunal to the facts as found. The further suggestion by the appellant that the Tribunal had failed to ascertain the appellant's state of mind at the relevant time is also unsustainable, when one looks at the decision read as a whole.

69. In the course of his argument, both written and oral, the appellant, as I understood him, accepted that, at least to a certain extent, a finding of want of integrity was justified. I was not at all sure from his address to us whether he really did, within himself, truly accept it - to a considerable extent he in fact sought to categorise events and perceptions as resulting from misunderstanding, from unfortunate but unintentionally inapt drafting by him of letters and from "taking the eye off the ball". But the Tribunal was, in my opinion, entitled to conclude that things were far more serious than that.

70. I also rather struggled to understand the appellant's insistence on the application of the indemnity principle to the claim of Professor JW. The terms and conditions explicitly made the responsibility for discharge of the fees of Professor JW (cancellation or otherwise) that of the firm. Of course, if Professor JW's fees were properly and reasonably incurred then the firm could, under the Conditional Fee Agreement, thereafter look to its client for reimbursement. But it is difficult to comprehend how a solicitor could reckon to achieve such reimbursement from the client when it was the firm's own omission (viz. in failing to stand Professor JW down) that gave rise to the cancellation fee in the first place. The emphasis which the appellant placed on Professor JW being instructed "on behalf of" Mrs LW seems to me to be entirely misplaced in that context. In truth, the principal vice lay in the failure – found by the Tribunal to be conscious and deliberate - properly to inform the client of that omission.

71. I do not propose to say more. In the final analysis, the appellant's various complaints really become a series of jury points. In this case, however, the Tribunal was (as it were) the jury. It reached, applying the criminal standard, its own conclusion on the evidence – a conclusion which it was, in my judgment, entitled to reach.

72. As to sanction, the appellate court will always pay respect to the view taken by a specialist panel, which is particularly well equipped to assess the standards to be expected of a solicitor and the need to maintain public confidence in the profession. The appellant, while conceding, to some extent, a finding of want of integrity, said that on that basis a reprimand would have been an appropriate sanction. That would, in my opinion, have been unrealistic. In any event, the Tribunal had found not only a serious want of integrity but further had found – as it was entitled to - dishonesty. In such circumstances, I need not consider further Mr Williams' suggestion that the want of integrity (as here found) would of itself have merited the sanction of striking off. It is sufficient to say that the findings both of want of integrity and also of dishonesty justified, in the circumstances of this particular case, the sanction of striking off. Here too, on the application of proper principles, there is no proper basis for an appellate court interfering.

73. In the overall result, I would for my part dismiss this appeal.

Popplewell J:

74. I agree.