Neutral Citation Number: [2024] EWHC 1150 (KB) (Admin)
Case No: AC-2023-LON-002637

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2024

Before :

MR JUSTICE EYRE

- -

Between :

Solicitors Regulation Authority Limited	**Appellant**
- and -	
Hon – Ying Amie Tsang	**Respondent**

- -
- -

Louis Weston (instructed by **Capsticks Solicitors**) for the **Appellant**
Greg Treverton-Jones KC (instructed by **Caytons Law LLP**) for the **Respondent**

Hearing date: 23rd April 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 17th May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr. Justice Eyre:

Introduction.

1. The Respondent is a solicitor. The Appellant ("the SRA") brought misconduct proceedings against her arising out of her conduct in 2015 and 2016. Those proceedings were based on a single allegation ("the Allegation") that the Respondent had failed to advise her clients of the high risks involved when investing in a number of fractional property development schemes. The proceedings were governed by the Solicitors (Disciplinary Proceedings) Rules 2019 ("the Rules") and culminated in a hearing on 10th – 11th July 2023 before the Solicitors Disciplinary Tribunal ("the Tribunal"). For the reasons set out in a judgment of 17th August 2023 the Tribunal dismissed the Allegation and ordered the SRA to pay the Respondent her costs in the sum of £74,950.

2. The SRA does not challenge the dismissal of the Allegation but it does appeal against the costs order. Originally there were four grounds of appeal. Grounds 1 – 3 related to the decision to order the SRA to pay the Respondent's costs. That decision was said to have been perverse as being outside the range of conclusions properly open to the Tribunal (ground 1); as having involved the Tribunal in taken account of irrelevant matters (ground 2); and as having been flawed by a failure to take account of relevant matters (ground 3). Ground 4 challenged the amount of the costs awarded.

3. On 19th April 2024 I gave permission for amendment of the grounds of appeal to add ground 5. This was a further challenge to the quantum of the costs award. It was made on the footing that the Tribunal had been misled as to the amount of costs incurred to the extent of the sum of £15,500 which was included in the Respondent's costs schedule but which did not, the SRA says, reflect costs which were properly recoverable. I stayed further consideration of ground 5 and will consider directions for its resolution on the handing down of this judgment.

4. The headline issues between the parties are as follows. First, the correct test to be applied by the Tribunal in considering whether to make a costs order against the SRA. Second, whether applying that test it was properly open to the Tribunal to make a costs order against the SRA in the circumstances here. Third, whether the approach taken to the amount of the costs award was wrong. As will be seen resolution of those issues will involve consideration of a number of subsidiary questions.

The Background to the Tribunal Hearing.

5. Although expressed as relating to the period from 2015 to 2018 the Allegation was directed to the Respondent's actions in 2015 and 2016. In that period the Respondent acted for clients investing in fractional property development schemes. These were schemes in which the buyers paid a substantial deposit for an unbuilt property with the deposit being used to build the property. Investment in such schemes involved a high degree of risk not least because to the extent that security was provided by the seller it was security over an unbuilt property. The Tribunal identified the following typical features of such schemes at [13.1]:

> "The case involved Ms Tsang's role when acting for buyers in relation to a number of 'fractional' property development schemes. The typical features of these schemes were that:

> • the schemes were large new-build residential properties comprising a large number of individual residential units
>
> • in addition to or instead of funding from traditional lenders, funding was provided by stage payments generated from advance, off-plan sales of individual units to individual purchasers. In other words, purchasers step into the shoes of the lender
>
> • as such, the stage payments were between around 30-80% of the purchase price, rather than the usual 10% deposits
>
> • purchasers could sometimes choose the proportion of funds which they paid in advance, and thus the risk that they were taking on
>
> • by definition, the individual units were unbuilt at the time they were purchased
>
> • in return for this risk, purchasers had the potential to obtain financial reward. For example, to the extent that many units were sold on a buy-to-let basis, purchasers often had the benefit of a minimum rental guarantee representing a rate of return on their investment of usually between around eight and ten percent
>
> • purchasers were usually overseas buy-to-let investors, often based in East Asia"

6. The Respondent had acted for a total of 451 clients in relation to three such schemes with sums totalling £27,748,916 passing through her client account as a result.

7. Production notices were served on the Respondent by the SRA in April and October 2017. However, the SRA's forensic investigation of the matter did not start until October 2019 with the consequent report being dated 21st January 2020.

8. The Respondent had ceased independent practice in March 2018. Thereafter, she was engaged in working for another firm of solicitors though the evidence before the Tribunal was that the bulk of her clients had followed her to the new firm.

9. Further questions were raised of the Respondent in April 2020 and there were further exchanges between the SRA and those acting for the Respondent during 2020.

10. On 27th April 2021 the SRA issued a notice to the Respondent recommending referral of the matter to the Tribunal and an addendum was issued on 4th June 2021. The Respondent replied on 12th July 2021 and made further responses in the course of 2021.

11. In November 2021 HH Judge Hodge KC sitting in the Business and Property Courts in Manchester heard the case of *Various North Point Pall Mall Purchasers v 174 Law Solicitors Ltd.* On 10th January 2022 the judge handed down his substantial reserved judgment. The claim in that case had related to one of the schemes in which the Respondent's clients had invested and the Respondent had been joined to the proceedings as a Part 20 Defendant.

12. The issue before Judge Hodge was whether the deposits which had been paid away by the defendant as stakeholder should have been paid away in the circumstances which had arisen. Judge Hodge found that the stakeholder was not liable for having paid away the deposits. However, he addressed the contribution claim against the

Respondent on the alternative assumption that the stakeholder had been found liable. The judge said that in those circumstances the Respondent would have been liable to contribute on the basis of her negligence. That negligence was confined to the Respondent's omissions in relation to the securing of the deposits. This appears from [117] of his judgment where Judge Hodge said:

> "...If 174 were held to have acted in breach of the stakeholder contract in releasing the claimants' deposits without a first legal charge in favour of the buyer company, then a finding is inevitable that ATC were similarly in breach of their professional duties to their own clients in failing to secure that 174 retained those deposits, and for failing to alert its clients to what was going on and to seek their informed instructions in relation to such release, or otherwise failing to alert them to 174's breach..."

13. Although Judge Hodge found that if the claim had succeeded against the defendant the Respondent would have been found to have been negligent in those particular circumstances and in those limited respects he set out a positive assessment of her general approach saying, at [23]:

> "...Based upon my own assessment of Ms Tsang's evidence, and her demeanour in the physical witness box, I cannot accept any of the criticisms directed at her by any of the claimants, or by Mr McIlroy, that Ms Tsang had ever sought to minimise the risks involved in buying into this development to her clients. I found Ms Tsang to be a competent, thoughtful, open, careful and honest solicitor, who did not obfuscate or speculate in her evidence when she was in any doubt about her recollection. ... On the basis of what I have seen of her at this trial, I am satisfied that Ms Tsang would never consciously or deliberately have failed to act in the best interests of any of her clients simply in order to conclude a sale or to secure further instructions..."

14. The SRA's decision to refer the matter to the Tribunal was made on 13th July 2022. Its application under rule 12 applying for the Respondent to be required to answer the Allegation as set out in the accompanying statement was made on 5th December 2022. The SRA's statement was then considered in accordance with the procedure under rule 13 to which I will refer below and certified as disclosing a case to answer.

15. The Respondent served her answer on 10th January 2023.

The Hearing before the Tribunal.

16. The hearing began on 10th July 2023 and the Tribunal was made up of two solicitor members and a lay member.

17. The Allegation was:

> "Allegation 1.1 - Whilst in practice at Amie Tsang & Company Limited ("the Firm") between around 2015 and 2018 she failed to advise her clients investing in three property development schemes about the high risks inherent in the Schemes and, in so failing, breached Principles 4, 5, 6 and 10 of the SRA Principles 2011, and failed to achieve Outcomes 1.2 and 1.5 of the SRA Code of Conduct 2011"

18. There was no dispute as to factual matters and the hearing consisted of legal submissions as to the approach to be taken as a matter of law.

19. In the representations which had been appended to the Respondent's Answer of January 2023 reference had been made to the lengthy period between the first production notice in April 2017 and SRA statement of April 2022. At the start of the

hearing Mr Treverton-Jones confirmed that the Respondent was content for the matter to be determined on its merits and that she was not seeking an order striking out the Allegation for abuse of process or as not disclosing a cause of action. Nonetheless, the Tribunal raised with Mr Tankel, who appeared for the SRA, the question of the delay and whether it had harmed the Respondent's Article 6 right to a fair trial.

20. Mr Tankel sought to address the Tribunal's concerns. He accepted that there was "no criticism at all of the conduct of the Respondent" and that "she has … always co-operated in full and promptly". Mr Tankel accepted that the progress of the matter by the SRA was "slower than ought to have been the case" and characterized its actions as "could have been better" but denied that there had been unreasonable delay in the circumstances. The interval of 2½ years between the initial request for information in 2017 and the opening of the investigation in October 2019 was because of the sickness of the SRA's investigator which meant that the investigator was off work for a number of periods of 3 - 4 months. After the investigation had been opened "each milestone took a few months to take place" in Mr Tankel's words. Mr Tankel was unable to explain why steps which should have been taken within 3 – 4 weeks took 2 – 3 months.

21. For the Respondent Mr Treverton-Jones said that the delay had been inordinate and inexcusable. However, he did not ask for the matter to be struck out on that basis. Mr Treverton-Jones took that approach because the Respondent's position was that the Allegation turned on a question of law and so she could not point to prejudice caused by the delay other than the fact of having had the Allegation hanging over her for a longer period than would otherwise have been the case.

22. In the light of those submissions the Tribunal found that there had been unreasonable delay on the part of the SRA but decided to proceed to hear the case.

23. The thrust of Mr Tankel's submissions was that the Tribunal should not approach the matter by reference solely to the Respondent's duty under her retainer with any single client. Instead account was to be taken of wider picture having regard to the nature of the developments; the large number of clients; and the large sums of money involved. The SRA's concern was said to be "not … necessarily with the advice that was given to any single individual [but] with that approach that was taken to the cohort [sc of clients] as a whole". It was in those circumstances that the steps which the Respondent should have taken were to be considered with the terms of her retainer. The SRA submitted that when matters were seen in that light the Respondent should have gone further than she did in advising her clients as to the risks involved. The misconduct was said to have consisted in her failure to provide that further advice. Mr Tankel contended that if the matter was to be viewed through the focus of the scope of the Respondent's retainer then the further advice was to be seen as "absolutely central to the retainer … or … reasonably incidental to it." However, his primary submission was that the starting point for consideration of the Respondent's duties should not be the scope of retainer but the nature of the transactions seen as a whole.

24. For the Respondent Mr Treverton-Jones submitted the SRA's approach was wrong in law. He said that the Respondent's professional obligations were governed by the extent of her retainer in the particular cases. Provided that she properly performed the obligations imposed by the retainer there was no scope for a finding that there had been misconduct on the part of the Respondent. He submitted that she had performed

those obligations and that the scope of what the Respondent was required to do was not to be extended simply because of either the number of transactions or the total sums involved.

The Tribunal's Judgment.

25. The Tribunal dismissed the Allegation on 11th July 2023. It did so without giving reasons at that stage. Oral submissions as to costs were invited and the Tribunal made its costs award immediately after those submissions again without setting out its reasons.

26. The reasons for the dismissal of the Allegation and for the costs award were given in the Tribunal's judgment of 17th August 2023.

27. In the judgment the Tribunal summarised the parties' contentions in some detail and then set out its conclusions.

28. The Tribunal was critical of the approach taken by the SRA to the inferences to be drawn from the undisputed evidence. At [13.115] it said:

> "The Applicant, had not called any witnesses and the submissions which had been made by it appeared to the Tribunal to represent a species of *res ipsa loquitur*, more commonly deployed in the tort of negligence where the facts pointed blatantly in one direction. The principle of *res ipsa loquitur* was inappropriate, in this jurisdiction, where the livelihood and reputation of respondents were at stake. Furthermore, it was, in any case, far from self-evident that the facts pointed in only one direction in support of the Applicant's allegations."

29. Although there has been no appeal against the Tribunal's dismissal of the Allegation Mr Weston criticised this part of the judgment. He submitted that it showed a misunderstanding of the SRA's case which had not been based on an invocation of the *res ipsa loquitur* maxim. However, that criticism is itself based on a misunderstanding of this part of the judgment. The Tribunal was not saying that the SRA's case had been to say that the *res ipsa loquitur* maxim applied but rather that the SRA had been seeking to say that the circumstances were such that the only proper conclusion was that of misconduct. The Tribunal was expressing its disagreement with that assessment of the position and explaining its view that the circumstances did not give rise to the inference for which the SRA contended let alone doing so with the force asserted. That is apparent from the final sentence of [13.115] and the point is made clear by the following three paragraphs.

> **"**In the present matter, Mr Tankel submitted that negligence, amounting to professional misconduct, had not been part of the Applicant's case. The Applicant's case had rested upon the core submission that Ms Tsang's misconduct arose from her alleged failure to give advice which adequately matched the particular risk profile of the transaction and that Ms Tsang wrongly considered that because (in her view) some of her clients were sophisticated, therefore they did not require relevant advice.
>
> The Applicant called no evidence from any client or anyone else and did not adduce any evidence regarding the vulnerability or lack of sophistication of Ms Tsang's clients. The Tribunal had therefore been in no position to assess the practical impact of Ms Tsang's advice upon her clients.

> The Applicant's case rested on nothing more than (i) extracts from Thomson Reuters Practical Law which postdated the relevant transactions by 7 or 8 years, (ii)unsubstantiated suppositions as to sophistication or otherwise of the Applicant's clients; (iii) an unsubstantiated assumption that foreigners, who, it was alleged wer Ms Tsang's clients, required greater protection merely because of the fact that they were foreign; and (iv) reliance upon its Warning Notice on investment schemes, a document which post-dated the events with which the Tribunal was concerned, which Mr Treverton-Jones had characterised as an element of "Dog Law" and which, as Mr Treverton-Jones had pointed out, been amended on no less than three subsequent occasions."

30. At [13.119] the Tribunal found that there was no evidence that the Respondent had not followed the admonition in the Warning Notice to ensure that her clients fully understood the risks they were taking.

31. At [13.120] the Tribunal noted that the Respondent had met each client and had explained to them "in terms and language they would understand the issues, risks and red flags [of] which they needed to be aware". At [13.121] the Tribunal set out the relevant parts of the information which had been provided to her clients by the Respondent.

32. At [13.122] and [13.123] the Tribunal found that there was no evidence that the Respondent's clients were vulnerable or that they were anything other than:

> "... commercially minded investors, who wanted high returns on their investments and were prepared to take upon themselves the risks in achieving that objective and who did not want to pay a large amount in legal fees to obtain any more advice than they had received."

33. At [13.124] the Tribunal said that it had "due regard" to the judgment of Carr LJ (as she then was) in *Spire Property v Withers* [2022] EWCA Civ 790. The reference to that judgment at [13.124] was brief but that is to be explained by the fact that at [13.99] in its summary of the Respondent's case the Tribunal had set out paragraphs [56] and [57] of the judgment in full. In those paragraphs Carr LJ had explained that a solicitor's contractual duties were limited to those tasks which were within the scope of the solicitor's retainer albeit including those matters which were "reasonable incidental" to such tasks.

34. Having made it clear that this was the legal basis on which the Allegation was to be considered the Tribunal then said:

> "Whilst the information in Ms Tsang's client documentation may not have reached the exactitude envisaged by the later Warning Notice there had been sufficient information in her communications with her clients to flag the relevant risks in what was at the time a developing area of commercial activity. It was important to note that Ms Tsang ensured that communication with her clients was left open and she entreated them to email her if they had further queries so this was clearly not a case where the solicitor was abandoning the client to their own devices.
>
> The Tribunal considered that Ms Tsang had gone as far as she was reasonably able under the terms of her retainer, for which she charged a modest fee, to set out the wider risks. As a matter of law, she had not been required to explain the commercial risks faced by her clients if the developments failed and she had not been required to carry out investigative tasks beyond the scope of the retainer,

> however, she appeared to have done her best to have set out the commercial risks for clients' benefit."

35. At [13.127] the Tribunal simply said that it did not find the Allegation proved. However, it is apparent from the immediately preceding paragraphs that the Tribunal was saying that the Respondent had fulfilled the terms of her retainer and that as a matter of law she was not required to go further (and in particular not required to undertake the steps for which the SRA had contended).

36. The Tribunal then set out the competing contentions as to costs. It referred to the matters to which rule 43 drew attention. Reference was then made to the decisions in *Competition & Markets Authority v Flynn-Pharma* [2022] UKSC 14, [2022] 1 WLR 2972 and *Baxendale-Walker v Law Society* [2007] EWCA Civ 233 [2008] 1 WLR 426 which I will consider further below.

37. At [40] – [44] the Tribunal explained its understanding of the approach to be taken thus:

> "As set out in its Guidance Note on Sanctions (10th Edition) the Tribunal recognised that the starting point to be adopted by the Tribunal in considering whether costs should be awarded against the Regulator/Applicant is:
>
> > 'In respect of costs, the exercise of its regulatory function placed the Law Society in a wholly different position from that of a party to ordinary civil litigation. Unless a complaint was improperly brought or, for example, had proceeded as a "shambles from start to finish", when the Law Society was discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs followed the event' (per Laws LJ, *Baxendale-Walker v The Law Society* [2007] EWCA Civ 233).
>
> Where a Respondent seeks to pursue an application for costs against the Regulator, the Tribunal will have regard to the following principles:
>
> > • an order that the Applicant pay a successful respondent's costs on the grounds that costs follow the event should not ordinarily be made on that basis alone;
> >
> > • there is no assumption that such an order will automatically follow;
> >
> > • 'to expose a regulator to the risk of an adverse costs order simply because it properly brought proceedings which were unsuccessful might have a chilling effect upon its regulatory function' (per *Baxendale-Walker*, above).
>
> The Tribunal considered the balance to be struck between:
>
> > • the financial prejudice to the successful Respondent in the particular circumstances if an order for costs is not made in their favour; and
> >
> > > 'the need for a regulator to make and stand by honest, reasonable and apparently sound decisions made in the public interest without fear of exposure to undue financial prejudice if unsuccessful' (per Bingham LCJ, *Bradford MDC v Booth* (2000) 164 JP 485 DC).
>
> The Tribunal also had regard to the judgment of the Court of Appeal in *Perinpanathan v Westminster Magistrates Court* [2010] EWCA Civ 40, which requires the Tribunal to examine the conduct of the Applicant to consider whether its conduct had been unreasonable or otherwise justified a costs order being made against it.
>
> **The Principle**

> The Tribunal had a wide discretion as to the award of costs under Rule 43 (1). In *Baxendale-Walker*, Laws LJ, who was then the President of the Queen's Bench, had held 'Unless the complaint is improperly brought, or, for example, proceeds… as a "shambles from start to finish", when the Law Society is discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs follow the event'. The words "for example" were noted by the Tribunal. Mr Tankel had acknowledged, in reply to a question from the Chair, that "shambles from start to finish" was but one example of circumstances where costs might be awarded against the SRA, albeit costs should not ordinarily be awarded against the SRA on the basis of costs following the event."

38. The reference to Laws LJ was an error and the relevant judgment in *Baxendale-Walker* was given by Sir Igor Judge P but subject to that slip the Tribunal's understanding of the approach to be taken was, for the reasons I will explain below, correct.

39. The reasoning which followed has been subjected to a detailed critique from Mr Weston and it is appropriate that I quote it in full. The Tribunal said:

> "Whether or not this case could properly be characterised as having been a shambles from start to finish, it was questionable, whether it had been properly brought, given the body of caselaw to which the Tribunal's attention had been drawn by Mr Treverton-Jones, regarding a solicitor not being under a duty to step outside the bounds of their retainer and/or expertise.
>
> In this case the Tribunal had not been presented with any compelling evidence by the Applicant that Ms Tsang had 'failed to advise' or that her clients or some of her clients had been vulnerable or unsophisticated and that they had suffered harm. There was, however, evidence which pointed towards the fact that Ms Tsang had provided some advice to her clients as to the risks of such an investment despite this being outside the limits of her retainer.
>
> The Tribunal noted the inordinate delay in prosecuting the case on the part of the Applicant. That delay had not only contributed to the considerable anxiety and stress that would have been suffered by Ms Tsang, but had contributed to the damage to her reputation and her practice substantially and unjustifiably. The Tribunal gave due weight to the judgment of Auld LJ in *Aaron v Law Society* [2003] EWHC 2271 (Admin) at paragraph 84 in which Auld LJ had held:
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> > 'Disciplinary proceedings before the Solicitors' Disciplinary Tribunal are analogous to criminal proceedings. The uncertainty that springs from and festers with unnecessary and unreasonable delay can, in itself, cause great injustice to practising solicitors, whose livelihood and professional reputations are at stake. Nor does such delay serve the solicitors' profession as a whole. It is in their interest and that of the members of public whom they serve that their regulatory body and the Tribunal should be prompt, as well as otherwise effective, in the enforcement of the high standards of their profession.'
>
> The considerable stress to Ms Tsang, the harm to her practice and the damage to her reputation caused by the proceedings and exacerbated by the Applicant's delay, were highly relevant to the issue of costs. It was also relevant that the Applicant did not have a basis in law for its allegation, had called no witnesses and had relied almost entirely on extracts from Thomson Reuter's Practical Law which post-dated the relevant events by many years and which were of limited relevance, as no evidence had been adduced as to which of the ranks of lender or investor referred to in Practical Law equated to Ms Tsang's clients.

> The Tribunal considered the point that the matter had been certified as showing a case to answer. Certifying a case merely means that there is an 'arguable case'. This is a decision made on the papers and in the absence of the Respondent's account and the testing of evidence at a hearing. It is a binary decision made in summary manner. The bar is low, and the Tribunal expects the Applicant not to bring speculative matters to it but ones in which there has been a full analysis of the underpinning law and facts.
>
> An essential mistake of law on the Applicant's part, as found in the present case, undermined the presumption that the case had been properly brought.
>
> As to the submission that the Applicant had been encouraged by the Tribunal to pursue this matter on the basis of its previous decisions with respect 'off plan' and 'failure to advise cases' was not accepted by the Tribunal.
>
> First, it was well established that previous decisions of the Tribunal provide only limited assistance as each case is fact sensitive.
>
> Second, the previous cases were different as there had been admissions and the underlying facts relating to the misconduct were more serious in nature and distinguishable on this basis from Ms Tsang's case."

40. Having set out that reasoning the Tribunal dealt shortly with quantum of the costs. It noted the expense of legal professionals; accepted that the importance of the matter to the Respondent had justified the engagement of leaders in this specialist field; and noted the "huge volume of documentation" which the SRA had put forward. In light of those matters the Tribunal accepted that the costs incurred by the Respondent had been "neither unreasonable nor disproportionate" and awarded the full amount of the Respondent's costs schedule subject to a deduction to reflect the fact that the hearing had lasted two days rather than the three which had been anticipated.

The Grounds of Appeal.

41. The first ground of appeal is that the decision to award costs was "wrong and perverse" because the Tribunal "reached a decision no reasonable Tribunal could have reached in the proper exercise of [its] discretion" in light of the following considerations:

> "The Appellant's decision to take the case to hearing was made reasonably, properly and in good faith having regard to all the evidence and there was no or no reasonable basis to find that it was not.
>
> The SDT found only that it was *questionable, whether [the case] had been properly brought* (Judgment ¶45) and did not make a finding that it was improperly brought.
>
> There was no mistake of law by the Appellant, *essential* or otherwise, and the SDT did not identify what finding of error of law it considered to be *essential* (Judgment ¶49).
>
> If the Appellant did make an error of law, that, of itself, was no reason to find that the case was improperly brought or brought in bad faith such to justify an adverse costs order."

42. Ground 2 alleged perversity and/or error of law in that the Tribunal took account of the following matters which are said to have been irrelevant to the issue of a costs award:

> "The First Respondent's had suffered considerable stress because of the disciplinary proceedings,

That the First Respondent had suffered damage to her reputation because of the disciplinary proceedings,

That the First Respondent had suffered harm to her practice because of the disciplinary proceedings, and

That there had been an inordinate delay in the allegations coming to hearing. Any delay was only relevant to costs caused by such a delay, not to the overall costs of the proceedings.

That there was an absence of *compelling evidence* (Judgment ¶46). There is no requirement for the Appellant to adduce compelling evidence to establish that its decision to pursue an allegation was reasonable and/or properly made."

43. Ground 3 was the converse of ground 2 and alleged that there had been a failure to take account of or to give adequate weight to the following relevant considerations:

"Admissions by the First Respondent.

Findings against the First Respondent (as principal of Key Manchester Limited), in *Various Development B1 Purchasers v 174 Solicitors v Key Manchester Limited (formerly Ms Tsang and Company Limited)* [2022] EWHC 4 (Ch) at ¶¶115, 116, 117, 118-119, and 125-126 a case which arose from allegations in respect of one of three developments the subject of the case determined by the SDT.

That the Appellant had pursued similar allegations before the SDT leading to Approved Orders under Rule 25 of the *Solicitors (Disciplinary Proceedings) Rules 2019* in other disciplinary cases and that thereby the Appellant:

a. acted reasonably in taking the same or similar disciplinary action in similar circumstances, and

b. had a reasonable expectation that such allegations raised triable issues of misconduct.

The Appellant's case had been certified under Rule 13 of the *Solicitors (Disciplinary Proceedings) Rules 2019.*

Additional features of the case against the First Respondent identified the in the Appellants Rule 12 Statement at ¶¶17-21 in respect of Developers A and B which required advice from the First Respondent."

44. Ground 4 challenged the amount of the costs awarded contending that there was an error of law and/or a failure to exercise discretion properly in that:

"The SDT made no or no proper assessment of the First Respondent's costs as the SDT was required to do under Rule 43(4) of the Solicitors (Disciplinary Proceedings) Rules 2019 and did not have the information that would have allowed it to do so. The only discount on the full sum claimed for the whole case was for the loss of one day's refresher when the case went short by one day.

The SDT failed to consider, if it was right that the Appellant had acted improperly in bringing case to hearing, the time when the continuance of the case became improper and to apportion costs to that period only.

Identified no costs incurred by the First Respondent attributable to any identified delay of the Appellant."

45. I have summarised the effect of the stayed ground 5 above.

The Circumstances in which Costs can be awarded against the SRA.

46. Rule 43 of the Rules gives the Tribunal a wide power to award costs. Despite the width of the power as expressed in that rule it is common ground that there are constraints on the Tribunal's power to award costs against the SRA.

47. There was agreement as to the relevant authorities but disagreement as to their effect. For the SRA Mr Weston submitted that for a costs order to be made against the SRA it was necessary for there to be a finding that the proceedings had been improperly brought (absent a finding that the proceedings had been so mishandled as to be a "shambles from start to finish"). Where proceedings had been properly brought in the sense of the SRA having made a reasonable decision to proceed in good faith there was, he said, no scope for a costs order. Mr Treverton-Jones KC for the Respondent contended that the Tribunal's costs discretion was not so narrowly constrained. He accepted that there had to be a good reason for an award of costs against the SRA but submitted that this was not limited to those cases where there was a finding that the proceedings had not been properly brought.

48. The starting point is the decision of the Court of Appeal in *Baxendale-Walker*. There the Appellant had faced two allegations of professional misconduct one which he had admitted and the other which was dismissed by the Tribunal. The Law Society had in those proceedings been exercising the jurisdiction now exercised by the SRA. The Tribunal had ordered the Law Society to pay 30% of the Appellant's costs. The Divisional Court had reversed that decision and ordered the Appellant to pay 60% of the Law Society's costs. Giving the judgment of the Court of Appeal Sir Igor Judge P summarised the approach of Moses LJ in the Divisional Court thus at [29]:

> "...Moses LJ approached the problem on the basis that it was not in dispute that in bringing the proceedings against the appellant the Law Society was acting as a disciplinary body, or regulator, taking proceedings in the public interest in the exercise of its public function. Accordingly, he concluded that the principles relating to costs differed from those which applied in ordinary civil litigation. He continued:
>
> > 'Absent dishonesty or a lack of good faith, a costs order should not be made against such a regulator unless there is good reason to do so. That reason must be more than that the other party had succeeded. In considering an award of costs against a public regulator the court must consider on the one hand the financial prejudice to the particular complainant, weighed against the need to encourage public bodies to exercise their public function of making reasonable and sound decisions without fear of exposure to undue financial prejudice, if the decision is successfully challenged.'"

49. That approach had been criticised by Waller LJ who had said in *Law Society v Adcock* [2006] EWHC 3212 (Admin) that there was no presumption in favour of the regulator in such a case but that the regulator's position was one of the circumstances which was to be taken into account in the determination of costs issue.

50. The Court of Appeal upheld the approach taken by the Divisional Court and as articulated by Moses LJ saying at [38] – [39]:

> "In *Gorlov v the Institute of Chartered Accountants in England and Wales* [2001] EWHC Admin 220, a Panel of the Appeal Committee of the Institute of Chartered Accounts refused to award a chartered accountant the costs of disciplinary proceedings in which he was ultimately successful. Jackson J accepted that given the regulatory nature of the Institute, a professional body, acting in the public interest, Mr Gorlov's success before the Appeal Panel was a factor in his favour,

> but not decisive. He identified the obligations vested in a professional body as `a factor which points against any automatic award of costs in disciplinary proceedings which fail'. We need not address the eventual outcome of the proceedings in *Gorlov*, which was fact specific.
>
> In our judgment Jackson J was right to equate the responsibilities of the Institute in *Gorlov* with the regulatory actions of the licensing authority in Booth. As Bolton demonstrates, identical, or virtually identical considerations apply when the Law Society is advancing the public interest and ensuring that cases of possible professional misconduct are properly investigated and, if appropriate, made the subject of formal complaint before the Tribunal. Unless the complaint is improperly brought, or, for example, proceeds as it did in *Gorlov*, as a `shambles from start to finish', when the Law Society is discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs follow the event. The `event' is simply one factor for consideration. It is not a starting point. There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow. One crucial feature which should inform the Tribunal's costs decision is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage. Accordingly, Moses LJ's approach to this issue did not go further than the principles described in this judgment"

51. It is to be seen that the Court of Appeal was saying that the rule that costs follow the event was not applicable in cases such as this; that the necessary good reason had to be something more than the fact that the allegation in question had been dismissed; and that the fact that the proceedings had been brought in exercise of a regulatory responsibility was a "crucial factor". Particular weight needs to be given to the direction that costs should not ordinarily be made on the basis that costs follow the event. That is significant because that principle is the general basis for the award of costs. However, it is also of note that the Court was expressly giving examples of circumstances in which a costs order should not be made and did not lay down an exhaustive list of the circumstances which would justify a costs order.

52. Reference is also to be made to the decision of the Supreme Court in *Competition & Markets Authority v Flynn-Pharma*. Flynn-Pharma had appealed to the Competition Appeal Tribunal challenging a decision of the Competition and Markets Authority fining it for an infringement of copyright law. The tribunal had upheld that appeal and had ordered that the Authority pay part of Flynn-Pharma's costs. The Court of Appeal had overturned that order on the basis that the appropriate starting point was that "no order for costs should be made against a public body that has been unsuccessful in bringing or defending proceedings in the exercise of its statutory functions".

53. Lady Rose, with whom the other members of the Supreme Court agreed, held that the true principle did not extend as far as the Court of Appeal had said explaining, at [97]:

> "In my judgment, there is no generally applicable principle that all public bodies should enjoy a protected status as parties to litigation where they lose a case which they have brought or defended in the exercise of their public functions in the public interest. The principle supported by the Booth line of cases is, rather, that

> where a public body is unsuccessful in proceedings, an important factor that a court or tribunal exercising an apparently unfettered discretion should take into account is the risk that there will be a chilling effect on the conduct of the public body, if costs orders are routinely made against it in those kinds of proceedings, even where the body has acted reasonably in bringing or defending the application. This does not mean that a court has to consider the point afresh each time it exercises its discretion in, for example, a case where a local authority loses a licensing appeal or every time the magistrates dismiss an application brought by the police. The assessment that, in the kinds of proceedings dealt with directly in Booth, *Baxendale-Walker* and *Perinpanathan*, there is a general risk of a chilling effect clearly applies to the kinds of proceedings in which those cases were decided and to analogous proceedings."

54. At [122] Lady Rose noted a written intervention which had been made by the SRA and said:

> "...Of course, the CMA's statutory functions involve it in much other work but these are the kinds of decisions that it takes as a competition enforcement authority that might trigger an appeal and result in an adverse costs order. It is in a very different position from a local authority or other licensing authority. In its written intervention, the SRA points out that it undertakes about 120-130 prosecutions a year. It is funded predominantly by practising certificate fees and other fees paid by the solicitors' profession. Although, following *Baxendale-Walker*, it is not usually subject to an adverse costs order where the solicitor is successful, it does usually recover its costs from the unsuccessful solicitor when the Disciplinary Tribunal upholds the complaint. These costs can be considerable and if they were not recovered by the SRA from the unsuccessful solicitor, the costs would have to be borne by the profession. I recognise the importance of the *Baxendale-Walker* authority for the continued proper functioning of the SRA and I do not regard this judgment as casting any doubt on the correctness of that decision."

55. At [88] Lady Rose had noted without disagreement the assessment of the Court of Appeal that the effect of *Baxendale-Walker* was that where it applied no order as to costs was the "starting point or default position".

56. The effect of those authorities is not that the circumstances in which a costs order can be made against the SRA are limited to those in which the proceedings have been improperly brought. The improper bringing of proceedings is not the only thing which can be capable of being a good reason for the award of costs. Such a limitation was not set out in *Baxendale-Walker* either in the Divisional Court or in the Court of Appeal and would be inconsistent with the fact that Sir Igor Judge P expressly contemplated that there would be other circumstances which could lead to the making of a costs order.

57. As a consequence my understanding of the state of the law is that there is a substantial restriction on the award of costs against the SRA but the Tribunal's power was not as narrowly constrained as the SRA now contends it was. The principle that costs follow the event is displaced in cases of this kind and, instead, when an allegation is dismissed the starting point is that there should be no order as to costs. For costs to be awarded against the SRA there must be a good reason justifying the departure from that starting point. In considering whether there is such a good reason the fact that the proceedings were brought in exercise of the SRA's regulatory function is to be seen as a crucial factor and regard is to be had to the risk that the making of adverse costs

orders will have a chilling effect on the exercise of the regulatory jurisdiction. However, those factors are not conclusive. Good reasons are not confined to those cases where the proceedings have been improperly brought or so badly conducted as to have amounted to "a shambles from start to finish". However, those examples are to be seen as indicating the kind of matters which can amount to a good reason and for other matters to amount to a good reason they must be of a comparable gravity.

The Approach to be taken on this Appeal.

58. The appeal is by way of review (by reason of CPR Rule 52.21(1)). The approach to be taken is that explained by the Court of Appeal in *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642, [2003] 1 WLR 577 at [14] – [23] and in *General Medical Council v Bawa-Garba* [2018] EWCA Civ 1879, [2019] 1 WLR 1929 at [60] – [67]. The question is whether the decision below is wrong. On such an appeal the court has to exercise caution before interfering with findings of fact but also before interfering with evaluative judgements involving the assessment of a number of different factors which have to be weighed against each other. The requirement for caution "applies with particular force in the case of a specialist adjudicative tribunal … which (depending on the matter in issue) usually has greater experience in the field in which it operates than the courts" (*Bawa-Garba* at [67]). Here the Tribunal was such a body in respect of matters of solicitors' conduct and the needs of that profession. The court "should only interfere with such an evaluative decision if (1) there was an error of principle in carrying out the evaluation or (2) for any other reason, the evaluation was wrong, that it is to say it was an evaluative decision which fell outside the bounds of what the adjudicative body could properly and reasonably decide" (*ibid)*.

59. In this case the Tribunal approached the decision as to costs in two stages. The first was the determination whether to make a costs order against the SRA and the second was the determination of the amount of the costs award. It is necessary to distinguish between those determinations and the force of the requirement for caution is different as between them.

60. The question of whether the Tribunal applied the correct test is a matter of law. The identification of the test was not a matter of evaluation and so there is no scope for deference: the Tribunal's identification of the test to be applied was either right or wrong.

61. Similarly, the question of whether the factors identified by the Tribunal were capable in law of being a good reason (or combining to form a good reason) for the purposes of the *Baxendale-Walker* approach is a matter of law with no scope for deference.

62. However, provided the factors were capable in law of being a good reason, the question of whether they were present in the current case and whether they amounted here to a good reason for making a costs order against the SRA were matters of evaluation by a specialist tribunal. It follows that the *Bawa-Garba* restrictions on interfering with such an evaluation apply. I have to have regard to the expertise of the Tribunal in the field of the regulation of solicitors. In addition, it is necessary to have particular regard to the fact that the Tribunal conducted the hearing. There was no live evidence at the hearing which turned on the Tribunal's assessment of the documents and, even more, on its conclusions on the submissions of law put before it. Moreover,

I have the transcript and have been referred to a number of passages in that. I have, nonetheless, to have regard to the expertise of the Tribunal and to the benefit gained by conducting the hearing. In the latter regard I have to keep in mind that those hearing submissions in real time are better able to gauge the "feel" of a hearing and to understand how the parties are putting their cases than are those reading a transcript after the event.

63. Mr Treverton-Jones made reference to the restraint which an appeal court is to exercise when determining an appeal against the exercise of discretion on costs. He referred to the decision in *South Lodge Flats Ltd v Malik* [2022] EWCA Civ 411 as an illustration of this. However, this restraint is not applicable when considering the Tribunal's decision as to whether there should be a costs order against the SRA. That was not a conventional costs decision made against the background of the general principle that costs follow the event. Instead, the effect of *Baxendale-Walker* was that a particular exercise of evaluation was necessary before such an order could be made and the appeal against that evaluation is to be approached in the way I have just described. However, the deference which is to be extended to the exercise of a discretion as to costs does come into play in relation to the decision as to the amount of the costs to be awarded. The decision as to the amount of costs was an exercise of judgement but one where there was a wide ambit for the exercise of discretion and which was made against the background of the preceding decision that an adverse costs order was warranted.

64. It follows that the first question to be addressed will be whether the Tribunal applied the correct test when considering whether to make a costs order adverse to the SRA. If the correct test was applied it will be necessary to consider whether the decision was properly open to the Tribunal applying that test. This will require consideration of whether the matters relied on by the Tribunal were capable in law of forming a good reason for an adverse costs order when applying the *Baxendale-Walker* test. That is essentially a matter of law and is closely related to the question of whether the correct test was applied. Next, it will be necessary to consider the Tribunal's decision that in the particular circumstances those matters amounted to a good reason and warranted a costs order. That was an exercise in evaluation to which the *Bawa-Garba* considerations (and particularly the second of them) will apply. In considering whether the Tribunal's decision was correct the judgment is to be read as a whole and realistically.

65. The matters advanced in grounds 1 – 3 relate to the preceding issues and can conveniently be dealt with together.

66. If the decision to make the SRA subject to a costs order was not open to the Tribunal then ground 4 (and indeed ground 5) falls away. However, if that decision was open to the Tribunal then ground 4 with its challenge to the amount of the costs award is to be considered having regard to the considerations I have noted above.

The Decision to award Costs: was the correct Test applied?

67. It is apparent that the submissions which were made to the Tribunal were on the footing that the normal course was for there to be no order for costs; that there needed to be a good reason for a costs order to be made against the SRA; and that that if there were such a good reason then the Tribunal had power to make an order. Thus at [23]

of the judgment the Tribunal summarised Mr Treverton-Jones as submitting that there could be a good reason for departing from the normal rule even if the case had not been a shambles from start to finish. Mr Tankel's submissions for the SRA were summarised at [24] – [31]. Mr Tankel reminded the Tribunal of *Baxendale-Walker* and the need for "great caution" in awarding costs against the SRA. It is clear that Mr Tankel laid stress on his contention that the proceedings had not been brought improperly and that the SRA had acted reasonably. He did not, however, contend that costs could only be awarded if the proceedings had been brought improperly and he is recorded, at [45], as having accepted that Sir Igor Judge's reference to a case which had been "a shambles from start to finish" was one example of where it would be appropriate to award costs rather than an exhaustive definition.

68. The Tribunal summarised its understanding of the applicable principles at [39] – [44]. That summary accords with my understanding of those principles as set out above. The Tribunal was expressly proceeding on the basis that the starting point was that the dismissal of the case against the Respondent was not sufficient to warrant a costs order against the SRA and that something more was needed before such an order could be made. I am satisfied that the Tribunal was purporting to apply the proper test which I have set out above and that it was alert to the need for caution before making a costs award. The Tribunal did not approach the matter on the footing that costs were only to be awarded against the SRA if the proceedings had been brought improperly but as I have already explained that was not the correct test and the scope for an award of costs was not so confined.

69. In those circumstances the Tribunal identified and purported to be applying the correct test. Whether it was in fact applied will depend on the questions to which I will turn next: first, whether the matters on which the Tribunal relied as being good reasons for ordering the SRA to pay the Respondent's costs were capable of being good reasons for the purpose of the *Baxendale-Walker* test and, second, whether the Tribunal was entitled to find that there was a good reason in this case. The answers to those questions will determine whether the decision to award costs against the SRA was properly open to the Tribunal.

Were the Matters relied on by the Tribunal capable of being good Reasons for the Purposes of *Baxendale-Walker*?

70. The Tribunal found that the combination of two matters amounted to a good reason for the making of the costs order. Those were the inordinate delay in prosecuting the case (see at [47] of the judgment) and the fact that the Allegation was without a proper legal basis with the consequence that conclusion had for the assessment as to whether the proceedings had been properly brought. Were those matters which were capable as a matter of law of being a good reason for an award of costs for the purposes of the *Baxendale-Walker* approach?

71. It is clear that procedural failings on the part of the SRA can be a good reason for making an award of costs. This follows from the acceptance in *Baxendale-Walker* that where a case proceeded as "a shambles from start to finish" this could be a good reason for making a costs order against the SRA. Delay is a procedural failing and so is capable in an appropriate case of being a good reason for making a cost order.

72. Mr Weston submitted that as a matter of principle delay is not relevant to orders about costs unless the delay has increased the amount of the costs and that, other than where that has happened, delay cannot be a relevant consideration for the purposes of the Tribunal's decision. I do not accept that analysis. The correct analysis is as follows. If a costs order is made the costs recoverable will be limited to those which have actually been incurred and will be subject also to a determination of whether the amount is reasonable and proportionate. I agree that when it has been decided to award costs then delay on the part of the paying party which has not increased the costs incurred by the receiving party will normally and absent special circumstances be irrelevant in the exercise of determining the amount of the costs to be paid. However, the exercise which I am considering and in which the Tribunal was engaged was a different one. That was the exercise of determining whether there was a good reason for departing from the starting position of no order for costs against the SRA. Procedural failings on the part of the SRA, including delay, are capable of being a good reason for that purpose regardless of whether or not they increased the amount of costs incurred by the other party. The fact that the failings either did or did not cause additional costs may well be relevant to the question of whether in the particular case the failings amount to a good reason for departing from the starting point but such failings are capable of being a good reason even if they did not cause additional costs.

73. Whether delay in the conduct of the proceedings amounts to a good reason for making a costs order in a particular case will be a matter of degree. Even the most expeditiously conducted disciplinary proceedings inevitably take time. It follows that a solicitor against whom an allegation of misconduct is made and which allegation is then taken to a tribunal hearing will necessarily have the matter hanging over his or her head for some time and will suffer the stress and the reputational and professional difficulties flowing from that. In addition, delay which is beyond that inherent in the proper conduct of proceedings but which is not attributable to the SRA cannot as a general rule be a good reason for making a costs order against the SRA. It follows that to be capable of being a good reason for these purposes the delay in a particular case will not only have to attributable to the actions of the SRA but also to go substantially beyond the delay inherent in the proper investigation and determination of allegations of misconduct.

74. It is clear that the fact that proceedings were not properly brought can be a good reason for the making of a costs order. I am satisfied that a finding that the proceedings were brought on a basis which was fundamentally misconceived as a matter of law can be a good reason for a costs order. This is so even if the proceedings are brought in good faith and even if the SRA took a different view as to the law from that ultimately adopted by the Tribunal. Mr Weston submitted that the fact that the SRA is mistaken in a matter of law as to the proper interpretation of the actions of a respondent and as to whether they amounted to misconduct cannot be capable of being a good reason for the making of a costs order. That was because on every occasion when the Tribunal dismisses a case which does not turn on a finding as to contested factual evidence but on the question of whether certain undisputed actions amount to misconduct the Tribunal will have taken a different view of the law (or at the very least on a matter of interpretation) from the SRA. To treat a mistaken view of the law on the part of the SRA as a good reason for making that body liable for costs would be to revive the approach of making costs follow the event contrary to the

approach laid down in *Baxendale-Walker*. There is some force in this argument but ultimately it is not compelling. Clearly the mere fact that the SRA's case as to the law or as to the interpretation of undisputed actions is rejected will not necessarily suffice to warrant a costs order. However, this will be a matter of degree with much turning on the nature and effect of the mistake. A mistake going to the root of the basis of proceedings such that they were fundamentally flawed is capable in an appropriate case of being a good reason for an award of costs. In such a case it is largely a matter of semantics as to whether the case is described as having been properly brought or not. Boiled down to its essentials Mr Weston's argument amounted to saying that a fundamental legal flaw in the Allegation and in the proceedings could not be a good reason for an award of costs provided that the SRA was acting in good faith and provided that it was genuinely mistaken as to the law. I disagree. The *Baxendale-Walker* protection is given to the SRA so that it shall not be discouraged by the risk of an adverse costs order from "advancing the public interest" by pursuing misconduct proceedings which ought to be taken to the Tribunal. That has considerable force when the proceedings are based on disputed issues of fact or where there is scope for different conclusions being reached depending on the way documents or actions are interpreted. The consideration does not apply in the same way where the proceedings are misconceived in law and such proceedings are not properly described as "advancing the public interest".

75. I am, therefore, satisfied that both the fact that misconduct proceedings have been brought on a fundamentally flawed basis and the fact that there have been failings in the conduct of the proceedings, including inordinate delay, are capable in an appropriate case of being good reasons for the making of a costs order against the SRA.

Was the Tribunal entitled to find that there were good Reasons for a Costs Order in the Circumstances here?

76. Was the Tribunal entitled to find both that there had been inordinate delay and that the proceedings were fundamentally flawed in law and to treat those matters as constituting a good reason for ordering the SRA to pay the costs?

Delay.

77. I deal, first, with delay. In that regard I take account of the specialism and experience of the Tribunal. The members of the Tribunal are to be regarded as having greater experience than the court of the time which it normally takes for matters to be brought to a hearing. Here the Tribunal was entitled to characterize the delay as inordinate and as going substantially beyond that inherent in the proper conduct of the proceedings. As I have explained above Mr Tankel had accepted that there had been a failure to progress the matter as quickly as should have been done and that the delay could not be attributed to the Respondent. This was not a case where there had been delay at one or two points in the course of proceedings which were otherwise being progressed expeditiously. Rather there were repeated delays and repeated occasions when the SRA took longer than it should have done to move the case forward. What is particularly significant is that these instances are to be seen against the background of an initial delay of two years between the commissioning of the investigation at the end of 2017 and the commencement of the investigation in November 2019. That was a significant period and that delay having occurred it was all the more important that the SRA ensured that the proceedings were conducted expeditiously thereafter.

Having characterized the delay as inordinate the Tribunal was entitled to proceed on the basis that this meant that the effect on the Respondent in terms of stress and the effect on her reputation was, therefore, greater than that which was inherent in the bringing of misconduct proceedings.

78. The Tribunal included "the harm to [the Respondent's] practice" as one of the matters which was caused by the proceedings and which was exacerbated by the delay. It included this in the matters which it said were "highly relevant to the issue of costs". That was an error. The Respondent had closed her practice in 2018 and the evidence was that she had taken the bulk of her clients with her to the practice for whom she worked thereafter. It follows that there was no material on which the Tribunal could conclude that there had been harm to the Respondent's practice attributable to the proceedings or to the delay. Did that error mean either that the Tribunal was adopting an approach which was wrong in principle or that the decision reached was, as a consequence of the error, outside the range of those properly open to it? The error did not vitiate the approach being taken as a matter of principle. As I have already explained the Tribunal was entitled to conclude that there had been inordinate delay and that this was potentially a good reason for making a costs order. Moreover, the purported harm to the Respondent's practice was not the only matter which was taken into account as a consequence of the inordinate delay. On a fair reading of the Tribunal's judgment it is apparent that this was seen as a material but not a determinative factor in the sense of being one which tipped the balance in favour of awarding costs when that would not otherwise have been the case. There was, nonetheless, an error and one in respect of what was said to be a "very relevant" consideration. The consequence is that it will be necessary to exercise a greater degree of scrutiny when considering whether the conclusion reached was within the range of those properly open to the Tribunal and whether the Tribunal was entitled to regard the delay and the flaws in the SRA's case as justifying a move from the *Baxendale-Walker* starting point.

The Flaws in the SRA's Case.

79. Was the Tribunal entitled to treat the legal flaws in the SRA's case as being a good reason for these purposes? It is to be remembered that there has been no appeal against the dismissal of the Allegation. I am, therefore, to proceed on the basis that the Tribunal was correct to dismiss the Allegation and to do so on the grounds which it did. When considering whether to make a costs order the Tribunal was necessarily making its determination in the light of the conclusion which it had just reached on liability.

80. The Allegation had been dismissed on the ground that it was not made out as a matter of law on the uncontested evidence. The key conclusion was that which was set out at [13.126] namely that as a matter of law the Respondent was not required to take any steps over and above those which she had done. It was open to the Tribunal to characterize that as meaning that there was no basis in law for the Allegation and there had been an essential mistake of law. It also apparent that the Tribunal did not regard this as a debateable matter but one which was clear cut and, again, it is to be noted that the SRA has chosen not to appeal against the decision on liability.

81. Mr Weston sought to minimise the weight to be given to the Tribunal's conclusion as to the flaws in the SRA's case. He referred to the fact that the Tribunal had said, at

[45], that "it was questionable, whether [the case] had been properly brought". Mr Weston emphasised use of the word "questionable" and submitted that its use meant that the Tribunal was expressly not finding that the proceedings had not been properly brought but only that there was scope for debate as to that point. In addition, Mr Weston said that the reference in [49] to "an essential mistake of law" on the part of the SRA did not advance matters because the mistake was not identified. Then, addressing the latter part of [49], Mr Weston pointed to the Tribunal's use of the word "undermined" and said that this showed the Tribunal expressly declining to find that the proceedings had not been properly brought but instead going no further than saying that the presumption in that regard had been weakened.

82. I do not accept that the force of the Tribunal's rejection of the SRA's case can be toned down in those ways. It is necessary to read the judgment realistically and as a whole. When that is done, and in particular when [45], [47], and [49] are read together, the Tribunal was saying at the least that the case against the Respondent was fundamentally flawed as a matter of law and that the case at its highest was on the cusp of having been properly brought. Thus, in the last sentence of [47] the Tribunal said in terms that the SRA "did not have a basis in law for its allegation". At [49] the statement that there had been an "essential mistake of law" on the part of the SRA was expressly a reference to the Tribunal's earlier finding of such a mistake. Mr Weston said that it was not possible on reading the judgment to identify the mistake to which this was referring. I disagree: the mistake can readily be seen as being that identified at [13.125] and [13.126] and in particular in the second part of the latter paragraph. Those paragraphs are the culmination of the Tribunal's explanation of its reasons for dismissing the Allegation. In them the Tribunal was saying that as a matter of law the Respondent was not required to provide more advice than she had done. I also reject Mr Weston's attempt to gloss the reference to the "undermining" of the presumption that the proceedings had been properly brought. Mr Weston's contention was that by its use of that word the Tribunal was saying that the presumption had been weakened but not that the proceedings had not been properly brought. It is to be remembered that any reference to a presumption being undermined is ultimately a metaphor. The meaning of the use of that term here by the Tribunal is clear: the Tribunal was saying that it was not open to the SRA to rely on a presumption that the proceedings had been properly brought.

83. Thus, the Tribunal was saying that the case against the Respondent had been fundamentally and irredeemably flawed as a matter of law and that this meant that, at the least, the case came close to one which was not properly brought.

84. There a number of considerations which the SRA says that the Tribunal failed to consider or to which it failed to attach adequate weight. These are the basis of ground 3. I will deal with them briefly in turn but before I do there is a point of general applicability. The Allegation was dismissed because the Tribunal had found that it was fundamentally flawed in law and that the Respondent was not required to act other than in the way in which she had acted. This is not a case which turned on a contest of evidence nor was it a case where new evidence had been produced which showed matters in a different light. What had changed in the course of the proceedings was that the Respondent's case had been better articulated than at the outset but there had been no change in the relevant legal principles nor in the factual context to which they were to be applied. It follows that the position was either that

the SRA's case had been fundamentally flawed from the outset or that the SRA had abandoned its original case and chosen to pursue one which was fundamentally flawed.

85. The significance of the Rule 13 certification and the other matters on which the SRA relies are to be seen against that background. When that is done they are matters relevant to whether the SRA was acting in good faith and to whether it genuinely believed that there was a proper case against the Respondent but the contrary was not alleged. To the extent that they relate to the SRA's good faith and belief these considerations do not alter the underlying merits of the Allegation. Accordingly, they do not alter the fact that the Tribunal was entitled to proceed on the footing that the proceedings had been brought on a fundamentally flawed basis.

86. Mr Weston said that these matters were relevant to the reasonableness of the approach taken by the SRA. He contended that they showed that the SRA had acted reasonably and that as such they amounted to a potent indication that the proceedings had been properly brought. That submission would have had considerable force if the case against the Respondent had turned on a factual dispute with the Tribunal's dismissal of the Allegation turning on its acceptance or rejection of particular disputed evidence. In such a case it may well be relevant that it was reasonable for the SRA to regard certain evidence as credible or as warranting the prosecution of misconduct proceedings. Here, however, the issue was the extent of the Respondent's duties as a matter of law in circumstances where the facts were not in dispute. The case being advanced by the SRA was either right or wrong as a matter of law. It follows that on a correct understanding of the law there was no scope for a different conclusion having been reached by the Tribunal. It is also of note that there was no suggestion that the Respondent's position was based on a novel point of law. Rather the Respondent's case, as accepted by the Tribunal, was that the SRA was basing the Allegation on the flawed basis of imposing obligations going beyond those derived from the Respondent's retainer. In those circumstances it was immaterial that the SRA was acting in good faith and that it genuinely believed that the Allegation was well-founded. To the extent that these considerations or Mr Weston's invocation of the reasonableness of the SRA's approach relate to whether the Allegation had substance then reliance on them is not open to the SRA. The Allegation was dismissed on the basis that it was wrong in law on the undisputed facts. The SRA has not appealed the Tribunal's conclusion on liability and so it cannot now seek to say that it was appropriate for it to regard the Allegation as well-merited as a matter of law.

87. Rule 12 of the Rules requires the SRA to make an application to commence misconduct proceedings. Rule 13 then provides for the application to be considered by a solicitor member of the Tribunal. That member is to consider whether the matters advanced by the SRA show a case to answer. It is only if that member (or a panel in cases of doubt or where the single member is minded not to certify) certifies that there is a case to answer that the matter proceeds.

88. Mr Weston laid considerable emphasis on the fact of the rule 13 certification as had Mr Tankel. It was contended that the fact of certification was a potent indication that the proceedings had been properly brought. The Tribunal dealt with this in short terms at [48]. It was correct to do so and the certification could carry little weight. For a matter to have reached the Tribunal there would necessarily have had to have been certification. It follows that if certification were to be regarded as indicating that the

proceedings had been properly brought and as being a potent factor against the making of a costs order against the SRA then the scope for such orders being made would be very limited indeed. That is not my understanding of the proper application of the *Baxendale-Walker* test. The rule 13 certification can carry very little weight when the Tribunal is assessing the merits and the strength of the SRA's case at the end of the proceedings after having reflected on all the material in the light of submissions and argument from both sides.

89. Similarly, there was little force in the point that the SRA had succeeded in misconduct proceedings against other solicitors in relation to the actions of those solicitors concerning the same developments as the Respondent. Those cases were relevant at most to the good faith of the SRA and not to the merits of the case against the Respondent which depended on the terms of her retainer and her actions. It is of note that the Tribunal distinguished the circumstances of those cases from that of the Respondent. It did so shortly at [55] but it had already summarised, at [13.104] – [13.107] the reasons which Mr Treverton-Jones had advanced for distinguishing the other cases from that of the Respondent and it is apparent that it was accepting those submissions. That approach was properly open to the Tribunal.

90. In ground 3(e) it is said that there were additional features in the case of the Respondent which required her to provide advice. However, that contention amounts to an attempt to go behind the Tribunal's decision on liability. The Tribunal had concluded that the Respondent's obligations were limited to those derived from her retainer and that she had fulfilled those obligations. The purported additional features had not altered that analysis and they could not be relevant to the costs decision. It is of note that this does not appear to have been a point which Mr Tankel had advanced in relation to costs. I accept that Mr Tankel was having to address costs immediately after the decision dismissing the Allegation had been pronounced and before any reasoned judgment was given. It follows that the fact that a particular point was not mentioned in his submissions is not conclusive as to its relevance. Nonetheless, the scope for criticising the Tribunal for a failure to take account of a factor is reduced where that factor was not put before it as being relevant. At the least Mr Tankel's failure to advance a point is an indication that the point was not regarded as relevant at the time of the hearing.

91. Mr Weston placed considerable emphasis on the fact that in her response of July 2021 the Respondent had admitted a professional mistake and had accepted that there had been a possible breach of duty. This again was not a point advanced by Mr Tankel but even if it had been it would not have had force once proper account is taken of the terms of the admission.

92. The admission was contained in the July 2021 response at [29] which said:

> "Ms Tsang is prepared to accept that she perhaps ought to have proffered advice in the reports on title to the buyers on the risk that the buyer's companies' charges could be demoted in favour of a lender *and* that she ought to have disclosed the fact that this had actually happened in respect of Pall Mall and Baltic House (had she known about it).
>
> This is a point that has been taken account of in reaching settlements with the claimants. Ms Tsang thought she had done enough by proffering advice on the limited nature of the charge, but she now accepts that she could have gone further. This, we accept, was a professional mistake and *possibly* a breach of duty actionable in negligence (though that

> is not admitted – we simply do not know). On this limited basis alone, Ms Tsang is prepared to accept that she failed to provide a competent service to her buyer clients and failed to achieve Outcome 1.5. The decision maker should note the limits on this admission. It is not an admission of the whole of allegation 2(d). For the avoidance of doubt, allegation 2(d) -as drafted – is denied, but the particular point made in this paragraph 29 is conceded as probably correct."

93. It will immediately be seen that the admission was in very limited terms. The admitted mistake was a failure to advise the Respondent's clients as to the risk of the demotion of their charges. The Allegation went much further. It was an assertion that the Respondent should have advised "about the high risks inherent in the Schemes". The admission of an error in a failure to advise on a particular narrow (albeit important) matter was not relevant in those circumstances. The position might have been different if having received the admission the SRA had confined the Allegation to the admitted error but that was not done. The admission of the narrow error does not provide a sound basis for the contention that the Tribunal should have regarded the proceedings advancing the Allegation in wider terms as justified.

94. As a matter of initial impression there might be thought to be considerable force in the contention that it was relevant that the Respondent had been found to have been negligent (and so in breach of the terms of her retainer) by HH Judge Hodge in a reserved judgment given after a contested trial concerned with one of the relevant developments. It is said now by the SRA that this should have been regarded as relevant when the Tribunal was considering whether the SRA was to be criticised for bringing the misconduct proceedings and whether those proceedings had been brought on a flawed basis. However, it is necessary to consider with care the findings made by Judge Hodge and also what was said about those findings in the misconduct proceedings. When that is done it becomes clear that this point does not advance the SRA's position on costs.

95. I have referred to Judge Hodge's findings at [12] and [13] above. Three points are of note. First, the finding of negligence on the part of the Respondent was much narrower than the subject matter of the Allegation. It was confined to the Respondent's omissions in relation to the securing of the deposits and was not a finding that there had been a duty to advise more generally of the risks of investing in fractional development schemes. Second, as I will explain further below, at the hearing before the Tribunal the relevant acts or omissions of the Respondent were expressly said not to be connected with those on which the Allegation was based. Third, that finding of negligence in those particular circumstances and in those limited respects is to be seen against Judge Hodge's positive assessment of the Respondent's general approach.

96. I turn to the reference which was made to Judge Hodge's decision in the proceedings before the Tribunal.

97. The SRA addressed Judge Hodge's decision at [39] – [42] of the Rule 12 statement. The finding against the Respondent was set out at [42]. The SRA did not contend that this finding related to the subject matter of the Allegation. Instead its position was that the negligence found by Judge Hodge was indicative of the Respondent's general approach saying:

> "...The Applicant will say that this is consistent with the Respondent's approach generally to advising as to the risks of these investments."

98. In his submissions on liability Mr Tankel had said that he was referring to Judge Hodge's decision because the Respondent had invoked the judge's favourable comments as a reason why she should not have to face disciplinary proceedings. Mr Tankel pointed out that Judge Hodge's decision contained elements critical of the Respondent as well as the positive assessment. He said (transcript p39G):

> "...although the respondent does rely upon that judgment, it is actually a mixed bag in terms of the findings that were made. I accept that there are comments in that judgment which support the respondent's case and those have been identified in various places in the respondent's representations. But there are also comments and observations and findings which undermine her case, and it is important when the Tribunal looks at that judgment to read the judgment as a whole including the section on contribution. So the first section is primary liability of 174 solicitors and they were found not liable and the second section is on whether or not if 174 had been found liable Ms. Tsang would have to make a contribution. So I say it is important to read the judgment as a whole and not simply adopt the respondent's submission that it is a completely clean bill of health..."

99. Mr Tankel expressly pointed out that Judge Hodge was concerned with different circumstances from those being considered by the Tribunal saying (transcript p40B):

> "..what this case was about was about releasing funds before that security was in place. So it is slightly different from the facts with which these disciplinary proceedings are concerned because these proceedings, our proceedings now concerned with the advice given at the start of the transaction and this negligence claim was about the release of fund some months down the line..."

100. Mr Tankel repeated that point and set out the SRA's case as to the decision's limited relevance when, having referred further to the facts with which Judge Hodge was concerned, he said (transcript p41C):

> "...Again, I emphasise this is not what today's disciplinary proceedings are concerned with. It is conduct that happened a few months down the line and it is different. If it is relevant at all, it is relevant in two ways: one, I say this is conduct which is consistent with the conduct which the SRA complains about in this case, i.e. just failure to kind of appreciate the commercial significance of what is going on and to give appropriate advice about it; but, secondly, if the respondent wants to rely upon this judgment as fully in their favour, well, it is not -- see all of these sections where the judge made some fairly critical findings about her."

101. Renewed reference was made to Judge Hodge's decision in the submissions on costs. Mr Treverton-Jones had referred to Judge Hodge's description of the Respondent as having been an "honest, careful, and competent solicitor". He then said that in the light of that description it had not been fair for the SRA to use its resources to bring the proceedings against the Respondent causing her to incur expense in defending herself. Mr Tankel responded to that point by saying (transcript p73B):

> "...It dealt with a different -- it was not dealing with the same circumstances. It dealt with something that happened a few months later and in any event the judgment is a mixed bag for Ms. Tsang, bearing in mind that His Honour Judge Hodge also found her 80% liable on the contribution claim, or would have found her 80% liable on the contribution claim for reasons, among others, of failing to give her clients appropriate advice. But that was not a good enough -- looking at that judgment and the whole of the judgment, it did

> not provide a reason for the proceedings to be withdrawn, not least because it dealt with different matters."

102. Given that the SRA's counsel was submitting that Judge Hodge's decision dealt with different circumstances from those on which the Allegation was based it is not surprising that the Tribunal did not regard it as a factor justifying the SRA in bringing the proceedings. The Tribunal's failure to see the decision as such a factor cannot support the appeal.

103. In those circumstances the Tribunal was entitled to take account of the fundamental legal deficiency in the Allegation when considering the making of a costs order.

104. In ground 2(e) the SRA asserts that the Tribunal erred in the judgment at [46] by regarding the absence of "compelling evidence" as relevant. It is said that the Tribunal was wrongly requiring the production of compelling evidence by the SRA and treating its absence as relevant. It is right that where there is a misconduct allegation based on disputed matters of fact the SRA is not to be criticised for failing to adduce compelling evidence provided that the case has been brought on the basis of evidence of sufficient potential credibility for it properly to be put before the Tribunal. However, this was not such a case. Rather it was one where the facts were not in dispute and the outcome turned on their interpretation and on the applicable law. The SRA's focus on the Tribunal's use of the word "compelling" and the construction of an appeal point on that basis involves an artificial and overly detailed reading of the judgment. Read fairly and in context [46] did not show the Tribunal penalising the SRA because the latter's evidence did not meet a particular high level of cogency or force. Instead what was being said there was that the evidence had not established that there were special circumstances such as would have called for the Respondent to give advice going beyond the scope of her retainer. That was contrasted with the fact that there was some evidence which indicated that the Respondent had given advice going outside the terms of her retainer. Read with hindsight the point being made by the Tribunal could have been expressed more clearly but there was no error of principle in the approach taken here.

The Conclusion Reached.

105. The decision is to be looked at in the round. There was an error as to whether the proceedings and/or the delay had caused harm to the Respondent's practice but, save for that, the Tribunal had regard to the matters which it should have considered and did not take account of any immaterial or irrelevant point. It found that the Allegation had been flawed in law; that, as a consequence, the proceedings had been advanced on a fundamentally flawed basis; that there had been inordinate delay in bringing those flawed proceedings to a hearing; and that the delay had increased the stress and damage to her reputation suffered by the Respondent. The Tribunal was entitled to make those findings and also entitled to conclude that they combined to amount to a good reason justifying a departure from the normal approach and warranting a costs order. The conclusion reached was not perverse and the error as to the harm to the Respondent's practice did not detract materially from the other elements. Putting the point more shortly the Tribunal was entitled to characterize this as a case where a flawed allegation had been pursued in proceedings where the SRA was responsible for inordinate delay and to characterize that combination as warranting a costs order against the SRA. The conclusion reached was well within the bounds of those which

the Tribunal could properly and reasonably reach. In those circumstances grounds 1 – 3 fail.

Quantum: Ground 4

106. Three points were made in support of the challenge to the Tribunal's conclusion on the amount of the costs to be awarded. First, it is said that the Tribunal failed to make a proper assessment of the amount of the costs. As developed by Mr Weston there were two aspects of this point. The first was that the Tribunal should have directed a detailed assessment of the costs. The second aspect was that having failed to direct assessment the Tribunal erred in awarding all the costs sought save only for a discount as to deduction of a refresher fee (a deduction which the Respondent says was in fact made in error) given the inadequacy of the cost information provided. The second point was that the Tribunal erred in failing to identify the time at which it became improper for the SRA to continue with the proceedings and then to limit the costs payable to those incurred after that date. The third point was that the Tribunal should have taken account of the absence of costs attributable to the delay and should either have confined the costs awarded to those or had regard to that sum when determining the amount of the costs to be awarded. I reject those contentions for the following reasons.

107. The starting point is the broad discretion which the Tribunal had in respect of determining the amount of costs. I am to approach the appeal mindful of that broad discretion and also mindful of the expertise and experience of the members of the Tribunal both in relation to costs matters generally and in relation to the costs of proceedings before the Tribunal.

108. The Respondent's costs schedule was set out in short terms. It was broken down into two parts. The first related to the sum of £15,500 which was said to be the fees paid to Complex Legal Ltd. That figure was said to be derived from an agreed fee but with the time spent having been recorded at 109 hours. The second part was the sum of £64,250 in respect of counsel's fees. This was broken down by reference to the items of work for which the fees totalling that amount had been charged and identified the fee for each item.

109. Ground 5 puts in issue the recoverability of the sum of £15,500 with the SRA contending that the Tribunal was misled in that regard. For the purpose of determining ground 4 I proceed on the basis that the sum of £15,500 was properly included in the costs schedule as being an amount payable by the Respondent. I take account of the SRA's argument that the fact that there is a question mark over the recoverability of that sum supports its case on ground 4. The contention is that the scope for challenging the recoverability of that sum supports the desirability of a detailed assessment. I take account of that point. It has, however, only limited force when it is remembered that no question as to the proper inclusion of the sum was raised before the Tribunal and that even on a detailed assessment the primary focus would be on whether the sum was a reasonable and proportionate sum for work properly done rather than on the obligations between the Respondent and Complex Legal Ltd.

110. The Tribunal looked at the figures in the round. It took account of the gravity of the matter and the volume of material to be considered. Having done that it concluded that the total amount was "neither unreasonable nor disproportionate". Provided that

there was material sufficient to enable it properly to form a view as to the reasonableness and proportionality of the figures that was an approach which the Tribunal was entitled to take. Having done that the Tribunal was, subject to the further points made by the SRA, entitled to conclude that the full amount was payable. The costs schedule provided by the Respondent was in short terms but was sufficient to enable the Tribunal to reach a proper conclusion on the reasonableness and proportionality of those figures being claimed. The work done by Complex Legal Ltd was not broken down by reference to particular items of work or hourly rate in the manner of a more formal costs schedule. It did, however, say that the work had been performed on the basis of an agreed fee and that 109 hours had been worked. The Tribunal was entitled to conclude that this provided sufficient information for it properly to form a view as to the reasonableness and proportionality of the sum claimed in that regard. In respect of counsel's fees the total sum was broken down by reference to the particular items of work or attendance and detailed the fees paid for each of those. Again the Tribunal was entitled to conclude this was sufficient to enable it to determine the reasonableness and proportionality of those sums.

111. The contention that the Tribunal should have identified a date after which the proceedings were to be characterized as having been improperly brought and to have confined the costs awarded to those incurred after that date has no substance. This was not a case where there was a change in the position during the course of the investigation. It was not, for example, a case where new evidence came to light which undermined the basis on which the Allegation was being brought. At most the change was that there was a more robust articulation of the Respondent's case and that the basis on which she said that the Allegation was flawed was set out more clearly. That, however, does not assist the SRA for these purposes. If, as the Tribunal found, the Allegation was fundamentally flawed in law on the basis of the undisputed material then the SRA cannot say that it should not be liable for the costs incurred in the period before that flaw was pointed out by the Respondent's lawyers. It is of note in that regard that the SRA proceeded to the hearing and sought a finding of misconduct notwithstanding the fact that the Respondent's legal team had identified what the Tribunal accepted to be the fatal flaw in the case. In those circumstances it was not necessary for the Tribunal to seek to identify a time from which bringing the proceedings had become improper and to limit the costs by reference to that date.

112. The contention that the Tribunal erred in failing to identify the costs attributable to delay on the part of the SRA is based on a misconception as to the relevance of that delay. The delay was relevant to the question of whether there was a good reason for awarding costs and moving from the starting point that there would be no order for costs against the SRA. The conclusion that there was a good reason having been reached the exercise for the Tribunal became the different one of determining what was a proper sum to be awarded to the Respondent in respect of her costs. That involved consideration of the reasonableness and proportionality of those costs and it was not necessary for the Tribunal to seek to identify what, if any, part of those had been the consequence of the SRA's delay.

113. In those circumstances ground 4 fails.

Conclusion.

114. Grounds 1 – 4 of the appeal are, accordingly, dismissed. I will consider the directions to be made in relation to ground 5 following the handing down of this judgment.