The Applicant appealed to the High Court (Administrative Court) against the Tribunal's decision to dismiss a number of the allegations against the Respondents. The appeal was heard by Davis LJ, Foskett J and Holgate J in July 2018 and Judgment given on 19 October 2018. The appeal was dismissed.

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 — Case No. 11502-2016

BETWEEN:

SOLICITORS REGULATION AUTHORITY — Applicant

and

MARTIN JEREMY DAY — First Respondent
SAPNA MALIK — Second Respondent
ANNA JENNIFER CROWTHER — Third Respondent
LEIGH DAY — Fourth Respondent

Before:

Mr S. Tinkler (in the chair)
Mr R. Hegarty
Mrs L. Barnett

Date of Hearing: 13 November 2017

Appearances

Timothy Dutton CBE QC of Fountain Court Chambers, Fountain Court, Temple, London EC4Y 9DH, **Andrew Tabachnik QC** of 39 Essex Chambers, 81 Chancery Lane, London WC2A 1DD, **Heather Emmerson** of 11KBW, 11 King's Bench Walk, Temple, London EC4Y 7EQ and **Nick Daly** of Fountain Court Chambers instructed by Paolo Sidoli of Russell-Cooke Solicitors, for the Applicant.

Patricia Robertson QC, Paul Gott QC, Tetyana Nesterchuk and Joseph Farmer of Fountain Court Chambers, Fountain Court, Temple, London EC4Y 9DH, instructed by Fergal Cathie of Clyde & Co LLP, for the Respondents.

JUDGMENT

Background

1. The substantive hearing in this matter was heard on 24 April – 9 June 2017. The Tribunal announced its findings on 9 June 2017, and its detailed reasons were contained in a judgment dated 22 September 2017. Paragraph 150.8 of that judgment contained an error in that it referred to allegation 1.15, instead of allegation 1.16. At the hearing on 13 November 2017, the Tribunal ordered that the judgment be amended in that regard.

2. At the hearing on 9 June 2017, the Tribunal directed that submissions on costs should take place at a later date, once the parties had received the Tribunal's detailed written reasons for its findings. The matter was listed for parties to address the Tribunal in relation to costs on 13 November 2017, subsequent to their having filed their written submissions as to costs. The dissenting Judgment was that of Mr Tinkler.

Respondents' Submissions

3. It was accepted that an order for costs against the Applicant should not ordinarily be made on the basis that costs follow the event. The Applicant was entitled to a degree of protection against adverse costs orders so as to ensure that it could properly discharge its function as an independent regulator. The Tribunal was referred to paragraph 43 of the Divisional Court decision in Baxendale-Walker v The Law Society [2006] EWHC (Admin) where LJ Moses stated that given that a regulator brings proceedings in the exercise of its public obligations, 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 has 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."

4. In Bradford v Booth [2000] 164 JP 485 DC, Lord Bingham CJ espoused three principles, namely: (1) There was a "discretion upon a magistrates' court to make such order as to costs as it thinks just and reasonable"; (2) "What the court will think just and reasonable will depend on all the relevant facts and circumstances of the case before the court"; and (3) "Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in the exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both (i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and (ii) the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged." This was authority for the proposition that a costs order could be made against a public authority that had acted unreasonably. That was much broader than abuse of process or dishonesty, as was contended for by the Applicant.

5. Bradford v Booth and Baxendale-Walker were both considered and applied in Perinpanathan v Westminster Magistrates Court [2010] EWCA Civ 40. Perinpanathan specifically endorsed the reasoning in Bradford and its applicability to disciplinary proceedings. Stanley Burton LJ found that whilst the starting point and default position was that no order should be made against a losing public body in relation to costs, costs could still be awarded to the successful private party "if the conduct of the public authority in question justifies it." Lord Neuberger found that where a Tribunal was considering ordering costs against a disciplinary body, it should approach the question by reference to the 3 principles detailed in Booth. He further found that "in a case where regulatory or disciplinary bodies … carrying out regulatory functions, have acted reasonably … it seems appropriate that there should not be a presumption that they should pay the other party's costs."

6. The Applicant's position, that a costs order should only be made against the SRA if the proceedings were improperly brought, or were a shambles from start to finish, did not accord with the case law and set the bar much higher than was required to protect the proper discharge of the SRA's functions.

7. Ms Robertson argued that Perinpanathan made it clear that it was relevant to consider whether the authority had acted unreasonably or in some way open to criticism, and that the Tribunal must scrutinise each stage and determine whether the SRA had adhered to the standards of behaviour that could be expected of it. The Tribunal was referred to section 28(3) of the Legal Services Act 2007, which required the SRA to have regard to "the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principle appearing to it to represent the best regulatory practice."

8. In considering the propriety of bringing proceedings, the question was more than simply whether the allegations brought were arguable. Rule 10 of the SRA Disciplinary Procedure Rules 2011 required the SRA to be satisfied that there was enough evidence to provide a realistic prospect that the regulated person would be found to have committed misconduct, taking into account any response and the standard of proof operated at the Tribunal. It also required the SRA to be satisfied that proceedings were required in the public interest and were proportionate.

9. In considering the reasonableness of the SRA's conduct, the Tribunal should determine:

   (i) Whether the SRA had taken a disproportionate approach that had resulted in unnecessarily protracted and expensive proceedings; and

   (ii) Whether there were valid criticisms of the manner in which the SRA pursued the allegations which added to the overall costs.

10. As regards the allegations:

- At the pre-action stage, the allegations against Leigh Day caused additional work and contributed, to an important degree, to the pre-action costs.

- The case against Leigh Day was improperly brought in circumstances where the Applicant ought to have appreciated that the allegations against it were not properly matters that it should have been required to answer. In matters where there were allegations of systems failures, the Tribunal unanimously concluded that there was insufficient evidence to show failings amounting to misconduct.

- The case against Leigh Day was lacking in transparency, disproportionate, incoherent, inconsistent and unfair.

- The referral of the Third Respondent as regards allegation 1.8 was contrary to the SRA's published policy on referrals to the Tribunal. The SRA ignored the evidence of two QC's in relation to the disclosability of the handwritten translation. The referral of the Third Respondent in relation to allegations 1.2 – 1.4 was unnecessary where the partners responsible for her supervision were facing the same allegations. The prosecution of the Third Respondent was disproportionate, oppressive and inappropriate.

- The prosecution of the Second Respondent in respect of allegation 1.1 was disproportionate and the calling of Colonel Coote to give evidence was unnecessary given the Respondents had indicated that he was not required.

- The Applicant's case as regards allegations 1.2 – 1.4 was wholly unrealistic, and inconsistent with the stance it had taken in the proceedings against Mr Shiner. The pursuit of those allegations involved a great deal of time and costs.

- The case in relation to allegation 1.5 shifted during the course of the hearing, such that minor mentions in the pleadings became prominent during the hearing, and the Respondents were alleged to know, (rather than know there to be a risk as was pleaded) that their clients were putting forward dishonest claims. There was an inconsistency in prosecuting the Respondents in relation to this allegation when there was no similar allegation made against Mr Shiner.

- The pleaded claim as regards the Second Respondent and the MoD offers was improper, particularly given the written evidence of Mr Ramsden. The maintenance of an allegation of a lack of integrity against the Second Respondent in that regard was patently misconceived.

- There was a failure, as regards allegation 1.6, to provide any evidence that Leigh Day's systems fell short of the prevailing standards.

- As regards allegation 1.7, the Applicant had sought to obtain a finding of professional misconduct against the Respondents on a different basis to that obtained in relation to Mr Shiner. Prosecution on an inconsistent basis undermined public trust in regulation.

- The pursuit of allegations 1.9 – 1.11 demonstrated the Applicant's unreasonable and oppressive pursuit of allegations. The lack of transparency in relation to these allegations was evident both in the Applicant's failure to answer the question as to why the interpretation of the Rules had not been raised before the Rule 5

Statement was issued, and its failure to inform the Shiner Tribunal of the issue of the interpretation of the Rule as raised in these proceedings.

- As to allegations 1.12 – 1.14, it was unfair to suggest that the arrangements were a deliberate circumvention of the substance of the Rules when Mr Harris had not considered the arrangements to be in breach of the Rules.

- The pursuit of allegation 1.15 was further evidence of the pursuit by the Applicant of matters that were technical breaches and insufficiently serious to attract the opprobrium of a finding of professional misconduct.

- The Applicant, on realising the deficiencies of its case in relation to allegation 1.16, sought to radically change its position, when it ought properly to have withdrawn that allegation and consequently allegations 1.17 and 1.18.

- Allegation 1.19 had never been put to the Respondents in interview and there was minimal evidence to bring it. Further, the SRA had sought to support its case with evidence from Mr Harris which was misleading.

- Allegation 1.20 was misconceived and had no evidential basis.

11. Ms Robertson submitted that the cumulative effect was such that the Applicant could be criticised and found to have prosecuted the case unreasonably such that a costs award in favour of the Respondents was appropriate. As regards quantum, the order sought was for 60% (or such other percentage that the Tribunal deemed appropriate) of the Respondents' costs. The request for a proportion of the costs acknowledged that it could, in principle, have been reasonable to bring more narrowly drafted allegations and also took account of the dissenting opinion expressed in the judgment.

Applicant's Submissions

12. There was no merit in the Respondents' application for costs as they had failed to establish that the proceedings were improperly brought or that any of the individual allegations were improperly pursued, or that the case had been conducted shambolically or with some other form of reprehensible conduct such that the threshold for a costs award against the Applicant had been passed.

13. The Tribunal was referred to the Court of Appeal judgment in Baxendale-Walker which stated that a costs order should not ordinarily be made against the Law Society unless the complaint was not properly brought or, for example, proceeded as a shambles from start to finish. "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…"

14. The Tribunal was also referred to the Divisional Court decision in Baxendale-Walker as detailed in paragraph 3 above. It was also found that the award of costs to the appellant on the grounds that he had been successful in the defence of one allegation "was not a sufficient ground to order the Law Society to pay any of his costs. There

was no finding that the allegation was misconceived, without foundation or born of malice or some other improper motive. In those circumstances the order was without foundation."

15. Mr Dutton submitted that the test for reasonableness in public law was one of manifest unreasonableness. This interpretation was supported by the fact that if a challenge had been made to the referral of the case to the Tribunal on the basis that it was misconceived, the Respondents would have to have demonstrated that the allegations were flawed by errors of law, or that there was manifest unreasonableness or perversity in the pursuit of the case by the prosecution. The Respondents could, and should, have taken steps in the event that they believed the case, or any part of it, was not properly brought:

- The referral of the matter to the Tribunal could have been challenged by way of a judicial review;
- The decision of the Tribunal to certify a prima facie case could have been challenged by way of a judicial review;
- A submission could have been made that the continuation of the proceedings would amount to an abuse of process as the proceedings had been improperly brought or continued;
- A submission of no case to answer could have been made at the end of the prosecution case;
- Applications could have been made to strike out allegations or parts of allegations on the basis they were misconceived or prejudice was being caused to the Respondents.

16. The Respondents chose not to take any of those steps, and instead called evidence in defence of the allegations.

17. The uncontroversial facts demonstrated that the case against the Respondents was properly brought:

- There had been allegations of multiple murder which the ASI found to be "wholly without foundation and entirely the product of deliberate lies, reckless speculation and ingrained hostility";
- At the press conference in February 2008, the First Respondent (in the presence of the Second Respondent) said that he believed his clients' statements were likely to be true;
- From 2004 onwards the Respondents had the OMS Detainee List on their files. It travelled with them to Istanbul and Damascus, and was contained in the files given to the First Respondent prior to the press conference;
- Despite the significance of the list it was not provided by the Respondents to their colleagues at PIL or to the High Court, and was only provided to the ASI in 2013;

- Leigh Day were informed by no later than April 2008 that KAS was a senior member of the Mahdi Army, that he had made death threats and that he had been blackmailing or intimidating other clients;

- A handwritten translation of the OMS Detainee List (an evidential document which was relevant and disclosable in the ASI) was destroyed after the Respondents were on notice that the ASI required a search to be made;

- The ASI was provided with inaccurate evidence by the Respondents as to the provenance of the OMS Detainee List;

- Leigh Day paid £1.6 million to MY who had introduced the Al-Sweady claimants;

- In addition to the £1.6 million, a fee of £25,000 was paid to MY relating to the Baha Mousa case, and a payment of £50,000 was made following receipt of £25,000 from PIL;

- Leigh Day made payments, including to KAS, which were described in their own emails as bribes.

18. Given those uncontroversial facts the Applicant was duty-bound to undertake an investigation, and it could not possibly be said that it had acted perversely in bringing the proceedings; it was clearly in the public interest for it to do so. Any costs order against the Applicant would accordingly be unjustified.

19. As to the allegations, in addition to there being no application to strike out any, or any part of any allegation, and there being no submission of no case to answer at the end of the prosecution case in relation to any allegation:

- There could be no suggestion that any of the allegations which Mr Hegarty would have found proved were improperly brought, shambolic or otherwise reprehensible, unreasonable or disproportionate;

- The allegations against Leigh Day were all properly brought – Allegations 1.6 and 1.7 related to the Firm's systems. Allegations 1.2 – 1.4 related to the disclosure of documents held by the Firm. Allegation 1.5 was against the Firm in respect of its continued pursuit of the claims. Allegations 1.10, 1.11, 1.13, 1.14 and 1.18 all involved the Firm itself engaging in the conduct;

- The allegations against the Third Respondent were properly brought. Mr Hegarty found allegation 1.8 proved including a breach of Principles 5 and 6. The suggestion that her referral was contrary to the SRA's referral policy was without merit. The Third Respondent was a proper party to allegations 1.2 – 1.4;

- It was proper to bring allegation 1.1 against the Second Respondent given the background of her involvement with the press conference. The criticism of the calling of Colonel Coote was surprising. He was an important and willing witness as to the impact of the press conference;

- The Respondents were in possession of the OMS Detainee List, which they failed to share or disclose. They were pursuing a joint endeavour with PIL and there was an understanding that documents would be shared. The fact that the OMS Detainee List was not disclosed until late in the ASI proceedings gave rise to public and regulatory concern. The question of the duties was one that ought properly to be considered by the Tribunal. The SRA's consideration that the Respondents had obligations under the Code of Conduct was not unreasonable such that the bringing of allegations 1.2 – 1.4 was improper;

- There were two strands to the Applicant's case as regards allegation 1.5. Firstly that the Respondents failed to investigate, and continued to act when there was a significant risk that their clients were putting forward dishonest evidence. Then there came a point when it was clear to the Respondents that their clients were putting forward false and dishonest evidence which required investigation, and which the Respondents did not adequately address. The bringing of the allegation in relation to the first strand was clearly proper. Secondly, the Respondents received information about KAS which might have given rise to a conflict between him and other clients and thus required investigation. The fact that there was an unresolved potential risk of a conflict, which the Respondents did not investigate, meant that the second strand of allegation 1.5 was properly pursued;

- Allegation 1.6 was not improper simply because no expert evidence was called as to the nature of the system – there was either a systems failure, a human failure or both;

- Allegation 1.7 was not inconsistent with the allegation pursued against Mr Shiner. It was made clear in those proceedings that nothing said at that hearing related to the conduct of these Respondents. Where there had been an agreement to share documents, and Leigh Day had failed to do so, the bringing of allegation 1.7 was proper and appropriate. Whilst Mr Shiner should have asked for disclosure, his failure to do so did not negate the Respondents' obligation to share documents;

- Mr Hegarty found allegations 1.9 – 1.11 proved as regards the breach of the Rules. As to seriousness, given the sums of money involved, both in terms of what was paid to MY, and the profits made by the Firm, the allegations of breach of the Principles, such that there was more than a technical breach of the Rules, was properly brought;

- Allegations 1.12 - 1.14 were properly brought. Both Mr Hegarty and the Shiner Tribunal found these matters proved. It was for the SRA to decide on the allegations to be brought; the fact that these matters were not raised by Mr Harris was irrelevant;

- Mr Hegarty's findings of both Rule and core duty breaches as regards allegation 1.15 made any suggestion that this allegation was improperly brought or pursued unsustainable;

- As regards allegation 1.16 this was admitted in part by Mr Shiner, and found proved in part by Mr Hegarty. Accordingly the allegation was properly brought and pursued. Allegations 1.17 and 1.18 followed from allegation 1.16. The

bringing of allegations 1.17 and 1.18 were not over prosecution; there was express provision in the Code of Conduct for reporting misconduct;

- Allegation 1.19 relied on the contemporaneous emails of the Respondents, and was found proved by Mr Hegarty, including as to dishonesty. Accordingly, it could not be suggested that the allegation was improperly brought or pursued;

- The First Respondent accepted in evidence that it was understandable that questions were asked in relation to the Firm's disbursement system. Given that admission, it was entirely appropriate to bring allegation 1.20 and there should be no costs consequences for the Applicant.

20. Accordingly, given the reasons stated above, the Respondents' application for costs was without merit and should be dismissed. The appropriate order in all the circumstances was no order for costs.

21. In the event that the Applicant's primary submission was rejected, it was submitted in the alternative that if any costs order were appropriate, the Tribunal should only order the Applicant to pay such identified proportion of the Respondents' costs as demonstrably flowed from conduct which was deemed improper. Further, there was no basis for the Tribunal to make an interim costs order.

The Tribunal's Unanimous Findings

22. The Tribunal was directed to several legal authorities as to how it should exercise the discretion vested in it in relation to costs pursuant to section 47(2) of the Solicitors Act 1974 (as amended) and Rule 18 of the Solicitors (Disciplinary Proceedings) Rules 2007. The Tribunal took particular note of the decision of the Court of Appeal in Perinpanathan, which took into account the decision of the Court of Appeal in Baxendale-Walker.

23. The Tribunal noted that the Applicant was not in the position of a normal party to litigation, and that it had a statutory duty to regulate the profession. Consequently in proceedings at first instance before this Tribunal the principle was that ordinarily, even if the Applicant was unsuccessful, costs should not be awarded against it. This was clearly set out in paragraph 39 of the Court of Appeal decision in Baxendale-Walker and was not disputed by the parties before this Tribunal. What was, however, disputed was the interpretation of unreasonableness, with the Applicant contending that in public law proceedings "unreasonableness" was to be interpreted as "manifestly unreasonable" or "perverse" and the Respondents contending that unreasonable had no special meaning, and in considering the reasonableness or otherwise of the Applicant's conduct, the Tribunal should consider whether there were valid criticisms to be made of the Applicant's conduct.

24. The Tribunal had particular regard to the passages of the judgment in Perinpanathan of Lord Neuberger at paragraph 77, and of Stanley Burnton LJ at paragraph 40. The Tribunal, in essence, should start from the position that costs do not follow the event, and then should examine the conduct of the Applicant to consider if its conduct had been unreasonable or otherwise justified a costs order against it. Even if the conduct had been reasonable there might also be other circumstances in which the Tribunal

should exercise its discretion to awards costs, and Lord Neuberger had identified financial hardship to the Respondent as being one such circumstance.

25. The Tribunal noted that the Applicant had asserted that the word "unreasonable" in Perinpanathan had a meaning that differed from the ordinary meaning of the word. The Tribunal considered that if the Court of Appeal had intended the word to have a different meaning then it would have said so, or would have used a phrase such as "wholly unreasonable" rather than the simple word.

26. The Tribunal noted the submissions made by the parties as regards financial hardship, with the Applicant submitting that this was only to be considered if there was a finding that the SRA had behaved unreasonably, and the Respondents submitting that even where the behaviour of the SRA was reasonable, the Tribunal should still consider any financial hardship caused. The Tribunal considered that Perinpanathan was clear authority that if there was financial hardship, which meant something more than just the cost of successfully defending the case, then even if the SRA had acted reasonably, a costs order could still be made. The Tribunal determined, however, that there was no such evidence of exceptional financial hardship having been suffered by any of the Respondents.

27. The Tribunal determined that in assessing the reasonableness or otherwise of the Applicant's conduct, it should consider whether the Applicant, based on the information it possessed at the relevant time, had acted unreasonably. The reasonableness or otherwise of the Applicant's conduct was a matter for the Tribunal to decide.

28. The Tribunal found that there was little evidence that the Applicant's investigation prior to the issue of the Rule 5 Statement had been unreasonable. The SRA were entitled to, and should, investigate matters of concern. The information requested in the EWW letters had been required by the Applicant so as to enable a proper and thorough investigation. Given the nature of the allegations made, the judicial review and the ASI, it was in the public interest and in the interest of maintaining public trust in the profession, for the Applicant to investigate the conduct of the Respondents. The Applicant had raised questions of professional misconduct of Leigh Day relating to a period when it was not actually a body subject to the relevant rules. This had been repeatedly challenged by the Respondents, and the SRA had taken considerable time to alter its position and amend the allegations, but in the overall context of the investigation this had been relatively immaterial. There had been other criticisms of the conduct of the Applicant. In particular, the Applicant had issued a second batch of EWW letters which covered related matters to the first batch, had given what was said to be insufficient time for a response and then referred the matters to the Tribunal without waiting for that response. It had also included matters in the EWW which it had not put to the Respondents in interview relating to the bribery allegations (even though it knew of them at the time of the interview) and included certain items in the Rule 5 statement which it had not put to the Respondents. The Tribunal found that those matters had not increased the costs burden and so did not create a basis for a costs order against the Applicant. Accordingly, the Tribunal determined that the Respondents were not entitled to a costs award in their favour in relation to their costs arising prior to the referral to the Tribunal.

The Tribunal's Majority Findings

29. Unreasonable, when considering making an award of costs against the Applicant, meant more than that valid criticisms could be made of the Applicant. The Tribunal had regard to the case of SRA v Chapman and Abramson (Case No 11164-2013). In that case the Tribunal had criticised the conduct of the Applicant, but did not find that it was appropriate to make a costs award against it. Given the facts and particular circumstances of this case, it was clearly in the public interest, and in the interests of the reputation of the profession for the allegations to be pursued. In considering the reasonableness or otherwise of the Applicant's conduct, the Tribunal heeded and applied the warning given by Lord Neuberger in Perinpanathan as regards invoking the "wisdom of hindsight". It was clearly in the public interest that proceedings should have been brought, and whilst criticisms could be and had been made of the Applicant, (as detailed in the unanimous findings), those criticisms were not such as to render the Applicant's decision to prosecute the allegations unreasonable. There would always be aspects in any contested matter that were open to criticism, however that did not mean that the parties had been unreasonable in putting and pursuing allegations, or in the defence of allegations.

30. In considering the reasonableness or otherwise of the Applicant's conduct, the Tribunal noted that the Respondents at no stage in the proceedings sought to challenge, whether by way of a judicial review or a submission of no case to answer, the bringing of any or all of the allegations. The Tribunal did not consider this to be a determinative factor in its decision. However, it did find that the Respondents' assertion, once findings and reasons were known, that a submission of no case to answer was not made at the close of the prosecution case simply due to the time such an application would take, did not of itself support the contention that the Applicant had conducted the matter unreasonably such that a costs award should be made against it.

31. Notwithstanding its findings in relation to the allegations, and the criticisms referred to above, the Tribunal did not consider that the Applicant had taken a disproportionate approach in the prosecution of the allegations, nor was the manner in which the allegations were pursued unreasonable. By way of illustration, the Tribunal had unanimously dismissed allegations 1.2 – 1.4. The Tribunal considered that in order to determine those allegations, it was necessary to hear the witness evidence, and to consider the scope and extent of the duties contended for by the Applicant. It was as a result of hearing all of the evidence in that regard that the Tribunal came to its decision. Accordingly, the Tribunal determined that the bringing and pursuit of those allegations was reasonable. The Tribunal found that plainly, where dissention had been expressed, those allegations were properly brought and reasonably pursued.

32. As regards the allegations individually and cumulatively, the Tribunal determined that no allegations were unreasonably pursued or prosecuted. Accordingly, the Respondents' application for costs was dismissed, and the appropriate and proportionate order was one of no order as to costs. Given the Tribunal's findings, it did not consider Mr Dutton's alternative submissions.

The Tribunal's Dissenting Findings

33. The Applicant was the regulator of the solicitor's profession and had an important function to discharge. It was vital that it was able to bring proceedings against solicitors without normally being subject to the "chilling effect" of a costs order against it just because it had failed to prove an allegation. The costs protection it received did not, however, give it carte blanche to proceed in any way it wished. It was important that the regulator acted reasonably and proportionately.

34. The Applicant was in a protected position as regards costs compared to a normal litigant, and had to be mindful of that privileged position. If it unreasonably pursued matters it should no longer be protected in costs. It was important in upholding trust in the regulator that it acted reasonably, and was seen to be accountable where it did not do so.

35. The Applicant seemed to assert that even if a relatively material part of an allegation was unreasonably pursued then the Applicant would be protected from a costs order against it. This did not seem right, particularly in a case where the allegations contained multiple alleged rule breaches, against multiple Respondents. There would inevitably be a de minimis threshold, whereby an allegation that had only some small element of unreasonableness would not cause the loss of the costs protection given to the Applicant. Once that threshold had been crossed, the fact that it was reasonable to maintain an allegation against one Respondent for one part of the allegation should not mean that the Applicant was immune from a costs award for unreasonably pursuing another part of the allegation against that Respondent, or unreasonably pursuing that allegation against a different Respondent.

36. The Tribunal had made numerous criticisms of the allegations brought by the Applicant in its unanimous and majority findings. Specific references to these criticisms are set out in relation to each allegation below. In general terms, though, these criticisms included (a) there being no evidence at all to support certain allegations (or parts of allegations) (b) certain allegations being based on interpretations of rules or legal principles that had not existed at the time of the actions by the Respondents (and in some cases that did not exist at all) (c) certain allegations being unclear or being different at the hearing from the pleaded allegation and (d) certain allegations being pursued against Respondents who were not involved in any meaningful sense in the matters alleged. Those allegations that had been the subject of meaningful criticism had been pursued unreasonably, both individually and collectively, resulting in over-prosecution and significant wasted costs.

37. The Applicant argued that because the Tribunal reached its decision based on evidence presented at the hearing then this meant that the relevant allegation must have been reasonably brought. This did not necessarily follow. The crucial question was whether the actions of the Applicant were reasonable based on what the Applicant itself knew at the relevant time. It was important to look at that question in the light of knowledge at that time, and not with the benefit of hindsight. By the time of issue of the Rule 5 Statement the Applicant had conducted interviews with all the Respondents, and received extensive replies and documentation in relation to all matters. Indeed, those responses had already resulted in the Respondents incurring over £2 million in legal costs. If, based on what the Applicant knew, the bringing or

maintenance of an allegation by the Applicant was unreasonable, then the fact that the evidence had not yet been put before the Tribunal was irrelevant.

38. The Applicant made the point that a number of these allegations were serious and it was in the public interest to investigate them. That was undoubtedly true. Once they had been investigated though, the Applicant had to decide which allegations of professional misconduct could reasonably be brought and maintained, taking into account the results of its investigations.

39. This reflected the point made by Mr Dutton in paragraphs 17 and 18 above. The matters he identified were worthy of investigation. The crucial point, though, was that once the investigation had been concluded the Applicant had a duty properly to consider the results. If, in the light of the responses and evidence it had received, it proceeded with allegations unreasonably or disproportionately then it could no longer expect to be protected for the costs caused.

40. The Applicant pointed out to the Tribunal that:

- The Tribunal had certified that the Rule 5 Statement had disclosed a prima facie case to answer;

- The Respondents had not applied for judicial review of that or any other decision by the Tribunal; and

- The Respondents had not at any stage applied to strike out any part of the allegations.

41. The Applicant suggested that these factors led to an inevitable conclusion that the Applicant had been reasonable in maintaining the allegations. Addressing these points in turn, this was not correct because:

- When the Tribunal certified the Rule 5 statement as showing a case to answer, the only document the Tribunal had was the Rule 5 Statement itself. That statement did not contain any defence from the Respondents, nor any evidence from either party. It did not include all the information known to the Applicant, merely a selection of that information. If the Applicant had, based on its own knowledge at the time (including knowledge it had already received from the Respondents), acted unreasonably in bringing an allegation, then the Applicant could not rely on the fact of certification to defeat a claim that it had acted unreasonably.

- The duty was on the Applicant to act reasonably. If it acted unreasonably then it was doing so at its own risk. It could not in good conscience assert that it was the job of the Respondent to stop the Applicant acting unreasonably. If the Respondent did not make applications for judicial review then that did not remove the Applicant's possible liability in costs for its own unreasonableness. It was also doubtful whether any such application would have reduced the overall costs.

- The same arguments applied to this point as in relation to point 2 above. In this particular case, where every point had been hard fought, and where the hearing had been listed for 7 weeks, the Tribunal would also have found it difficult to

have accommodated after the start of the hearing any application for certain allegations to have been struck out. That may well, in any event, have resulted in the same costs being incurred in relation to the striking out application as in actually reviewing the allegations in full.

42. Some of the allegations against the Respondents had been found not to have been proved by a majority decision, with Mr Hegarty dissenting. In deciding whether the allegations had been reasonably pursued by the Applicant, particular weight in this costs hearing was given to the fact that Mr Hegarty had found the allegations proved, and this is specifically addressed in relation to the individual allegations below.

Specific Allegations

Allegation 1.1

43. The allegation against the First Respondent had been the subject of very careful consideration by the Tribunal. The witness evidence from him as to his state of knowledge and belief at the time had been important. At the hearing, it was clear that this allegation that was one that required thorough review before a conclusion could be reached. Mr Hegarty had concluded that the evidence showed that the First Respondent had breached his professional obligations. Whilst the majority of the Tribunal found this not to have been the case, the Applicant was reasonable in bringing to the Tribunal that allegation against the First Respondent.

44. On the other hand, The Tribunal unanimously found that the Applicant had "failed to provide any meaningful evidence to show that the second Respondent had acted improperly". Her involvement had been found to be "peripheral". The Respondents should not have been put to the cost of defending allegations for which the Applicant failed to provide any meaningful evidence. The Applicant had been unreasonable in bringing and maintaining this allegation against the Second Respondent in those circumstances.

45. The Tribunal had unanimously found that "there was nothing to show that the Respondents lacked integrity". For this reason, and for the reasons set out above, the bringing of this allegation against the Second Respondent was unreasonable and misconceived. The bringing of this allegation against the First Respondent was close to the threshold of being unreasonable but on balance it was probably not unreasonable, as the First Respondent had given evidence on the subject which had reinforced the Tribunal's conclusion.

Allegations 1.2/1.3/1.4

46. It was common ground in relation to these allegations that the Respondents would have provided the OMS Detainee List if they knew they had it and knew of its significance. The question was therefore one of whether they had a professional duty, in essence, to go looking for it by conducting a disclosure exercise, and were in breach of their professional obligations by not doing so.

47. Leigh Day were never the solicitors of record in the JR or the Legal Aid application. That was PIL and they clearly had the relevant duty to carry out the disclosure exercise. Indeed, that was the thrust of the SRA's case against PIL in their disciplinary proceedings. The Applicant did not, on the other hand, produce a single witness or piece of evidence that indicated there was any duty of disclosure on Leigh Day in relation to the JR or the legal aid application. Indeed, the evidence from the Applicant's own witness, Mr Baker of the LAA, was that no such duty existed.

48. It seemed that the Applicant had formed a view at an early stage that the Respondents had breached a professional duty in relation to the Legal Aid application and JR, without giving much thought as to what that duty was and in what way it was breached. It seemed that at no subsequent point had the Applicant properly stepped back to consider the position as to whether any duty to conduct a disclosure exercise actually existed; the Applicant had just ploughed on regardless.

49. The Tribunal had unanimously concluded that "The Applicant had produced no evidence, nor any legal authority, to support its assertion that a solicitor who was not a party to particular legal proceedings had a duty to conduct a disclosure exercise. Nor had it produced any evidence from the MOD, PS or anyone else involved with the JR proceedings to show that those people thought such a duty might exist".

50. It is not reasonable to proceed with allegations for which there is no evidence. The bringing of these allegations insofar as they relate to the Legal Aid application and JR was therefore misconceived and unreasonable.

51. The Applicant had maintained throughout these proceedings that the Chairman of the ASI had in his opening address created a specific obligation on Leigh Day to start a thorough disclosure exercise. This was despite explicit evidence from the documents, the rules of the ASI and from the conduct of PIL and the MOD that this was not the intention, or the consequence, of the address. Indeed Mr Sanders of the MOD, who was called by the SRA, flatly contradicted the SRA's case on this. The Tribunal unanimously concluded that "The Applicant produced almost no evidence to back up this assertion". This part of these allegations was misconceived and unreasonable.

52. There was, however, certainly some involvement of Leigh Day in the ASI, and so some investigation of Leigh Day's general obligations to the ASI was justified. In particular, analysis was required of the precise arrangements between PIL and Leigh Day in relation to the ASI to see if they had created a professional duty of co-operation such that Leigh Day were in effect PIL's agent. If that were the case Leigh Day might have been bound by notices given to PIL by the ASI, or Leigh Day's agreements with their clients might have created some obligation to conduct a disclosure exercise. Ultimately these arrangements did not create any relevant duty, but it was not unreasonable to allege that they might.

53. The allegation also covered arrangements with PIL prior to the ASI. Although they were a matter of contract between PIL and Leigh Day, it was probably not unreasonable to invite the Tribunal to consider them.

54. Part of the allegation, as argued at the hearing, was that Leigh Day's failure to spot the significance of the OMS Detainee List was itself professional misconduct causing the failure to disclose. Although this was not particularly clearly pleaded, it was not unreasonable to invite the Tribunal to consider this.

Allegation 1.5

55. This allegation had two main parts and a third more minor part. All parts were unanimously rejected by the Tribunal. The first part was that there was a conflict created by the position of KAS which should have caused the Respondents to stop acting. This was not clearly pleaded, and took on a greater prominence than expected during the hearing. A slightly more rigorous analysis by the Applicant would have shown the alleged conflict to be a storm in a teacup. The Tribunal's unanimous conclusion was that the Applicant had "fallen significantly short" in relation to this allegation, which had in itself been framed in a way that was "somewhat confusing". However, the Tribunal had placed weight on the evidence it had heard from the First and Second Respondents to help put the "conflict" in context. On balance this was therefore not an unreasonable part of the allegation to pursue.

56. The second part of the allegation related to the Applicant's assertion that the Respondents had a duty to cease acting for the Detainees and KAS. This was initially pleaded on the basis that the duty arose because the Respondents should have suspected their clients were not telling the truth. The Applicant then realised that this was insufficient to be misconduct because breach of professional duty in those circumstances required the Respondents to be "clear" that their clients were putting forward false evidence. Instead of withdrawing the allegation, the Applicant then asserted that the Respondents had actual knowledge that their clients were putting forward false information. There was little if no actual evidence to support the assertion of actual knowledge. Furthermore, the legal claims by the Detainees on which the Respondents were acting were still potentially valid even after the ASI, because that enquiry had found evidence of mistreatment which may well have justified a civil claim. The Tribunal unanimously found that the lack of clarity in the pleading and case was such that "had the broader allegations been closer to being proved, the Tribunal would have had to consider whether the Respondents had received fair notice of them and a fair opportunity to defend themselves." The Tribunal found that in any event it could see "no evidence for the Applicant's assertion (if indeed the Applicant was still making it) that the claims of the Detainees for torture and mistreatment were ... so without merit that the Respondents were professionally obliged to stop acting on them". It also found "no basis for the Applicant's assertion that the Respondents were in breach of professional obligations by continuing to act for KAS until January 2015". The Tribunal's views on this part of the allegation were very clear and it was unreasonable for the Applicant to have included this in the Rule 5 Statement.

57. Finally, the Applicant had continued to make allegations in relation to the offers by the MOD which, on the MOD's own evidence, it had made intentionally. This allegation had been dismissed by the Tribunal in its entirety. This part of the allegation should never have been part of the Rule 5 Statement.

Allegations 1.6/1.7

58. These allegations related to the internal systems of Leigh Day. Those systems had contained a key document. The ultimate significance of that document was not appreciated or discovered for some time. That raised questions about the systems of Leigh Day as operated by the Respondents. Whilst the Applicant had not provided the evidence to the Tribunal that it would have expected to have received as to how the systems should have operated, on balance these allegations were reasonable to pursue.

Allegation 1.8

59. The Tribunal unanimously rejected the Applicant's assertion that all negligence that was more than de minimis was professional misconduct. That assertion had not been supported by any legal authority to which the Tribunal was directed. Furthermore, the Tribunal had by majority concluded that the Applicant had failed to bring real evidence as to the alleged negligence of the Third Respondent. Mr Hegarty had, however, found that the Third Respondent had been so negligent that she had committed professional misconduct. On balance, and bearing in mind in particular the fact of Mr Hegarty's conclusion, the Applicant had not been unreasonable in bringing this allegation against the Third Respondent.

Allegations 1.9-1.11

60. The Tribunal, by majority, found that Rule 9.01(4) did not have the meaning alleged by the Applicant. Furthermore the Tribunal found that prior to the issue of the Rule 5 Statement the Applicant had never interpreted the rule to have the meaning it now asserted. Notwithstanding this, the Applicant had instituted proceedings for professional misconduct against these Respondents. The Applicant had put forward its current proposed interpretation to the Tribunal in the Shiner Tribunal, but had not informed that Tribunal of the interpretation proposed by these Respondents (despite being on notice of it). Notwithstanding that omission the Applicant had in this case sought to rely on the Shiner Tribunal's decision as supporting the Applicant's case. This course of action was not impressive, and did not sit well with the duty of a regulator to be transparent and proportionate.

61. The Applicant had also declined to tell the Tribunal when it first interpreted the rule in the way it now asserted. This did not seem open or transparent. The case of Iqbal had established that ordinarily a solicitor should give an account of his actions, and it would be odd if a regulator should not be expected be behave in the same way.

62. Mr Hegarty had concluded in his dissenting judgment that the rule did have the meaning alleged by the Applicant. He also concluded, however, that it was only a technical breach and not one which would have been misconduct.

63. The Tribunal had by majority already concluded that this allegation had been "disproportionately brought".

64. Given that finding by the majority, it followed that this allegation was one that it was unreasonable to have been included in the Rule 5 Statement.

Allegations 1.12-1.14

65. These allegations were found not proved by the majority of the Tribunal. Mr Hegarty dissented. This allegation was the subject of a different decision in Shiner, although the Shiner Tribunal had not the benefit of the evidence from the Respondents given in this Tribunal. Notwithstanding the strength of the majority decision against the Applicant, which found the allegation to be unproved, and the fact that the Applicant's own FI Officer had not considered the arrangements to be in breach of the rules, the Applicant had, in the light of Mr Hegarty's decision, probably not been unreasonable in bringing these allegations.

Allegation 1.15

66. The Tribunal had by majority found that there had been a breach of the rules, but that it was a technical breach and not deserving of a finding of professional misconduct. Mr Hegarty had found that it was also a breach but was deserving of a finding of misconduct. Although, the Tribunal had unanimously rejected the finding of a lack of integrity, it had not criticised the fact that it had been invited to consider that allegation. The Applicant was in these circumstances not unreasonable in bringing this allegation.

Allegation 1.16

67. Part of this allegation related to breaches that followed from the breaches in allegations 1.9 to 1.11 inclusive. For the reasons set out above it was unreasonable to pursue that part of this allegation.

68. Part of this allegation related to breaches that followed from the breaches in allegations 1.12 to 1.14 inclusive. For the reasons set out above it was not unreasonable to pursue that part of this allegation.

69. The final part of the allegation related to £25,000 that was said to relate to publicly funded cases. This part of the allegation was misconceived. It seemed to ignore contemporaneous emails. The payment had required some investigation. The Applicant had, in essence, got the wrong of the stick on its analysis of the situation, but this was partly caused by the confused nature of the Respondent's records. It was, on balance, not unreasonable to have brought this allegation to the Tribunal to ascertain its views, notwithstanding the conclusion of the tribunal that it had "no difficulty in concluding that the payment was exactly what the Respondents had consistently said it was from their first interview to their witness evidence".

Allegation 1.17

70. This allegation related entirely to the payment of £25,000 allegedly from public funds referred to in allegation 1.16 and described in paragraph 69 above. Allegation 1.16 required a regulatory breach, but this allegation 1.17 required the further element of concealment and thus knowledge of the breach. There was no evidence whatsoever of either of those. The allegation was unsupported by any evidence, and hence unreasonable.

Allegation 1.18

71. This allegation was that Leigh Day should have reported PIL for regulatory breach. The purpose of the reporting requirement is to ensure that solicitors who become aware of breaches report them promptly to the SRA, either directly or through their firm. This requires the solicitor or firm to be aware of the breach. There was no evidence that any Respondent knew, or believed, that PIL was in regulatory breach. Leigh Day, as a separate entity, could clearly not have reported a breach of which no Respondent was aware. Even if the First or Second Respondents had been aware of the breach, the Applicant had not explained how Leigh Day itself could have reported a breach of which it as a firm was unaware. The pursuit of this allegation was disproportionate and unreasonable.

Allegation 1.19

72. This allegation had been the subject of very careful consideration in relation to the Second Respondent in particular. Mr Hegarty had found the evidence here was such that he would have found the allegation proved. This was a serious allegation that needed investigation. Whilst the majority of the Tribunal considered that the evidence was insufficient to prove the allegations, it was reasonable to have brought this allegation against the Second Respondent to the Tribunal for it to review the evidence.

73. The Tribunal by majority found that the evidence against the First Respondent consisted almost entirely of one email he had received. Whilst this evidence was slight, this was a serious allegation and therefore in need of proper consideration. The witness evidence of the First and Second Respondents was important in finalising the Tribunal's conclusion on this allegation. As such it was on balance probably not unreasonable to put the allegation against the First Respondent to the Tribunal.

74. Part of the Applicant's pleaded case throughout had been that both the First and Second Respondents knew of (rather than suspected) improper payments, yet there was no evidence to support this element of the case. It might have been reasonable to assert that the Respondents suspected payments to be bribes, but it was not reasonable in the absence of any evidence to make a serious allegation that they knew them to be such. Although this did not add much to the complexity or length of the hearing, it is very serious to allege that a solicitor knew something to be a bribe, and such allegations should not be made as lightly as seemed to be the case.

Allegation 1.20

75. Generally speaking, this allegation would not have merited the Tribunal's attention if it had been the only allegation against the Respondents. It is something that the Applicant would have dealt with itself, if at all. However, as the Applicant was bringing other allegations, it may have been appropriate for the Applicant to have included this allegation so it could be addressed at the same time.

76. The Applicant had maintained until the end of the proceedings that there was professional misconduct in the Respondents having used $29,865.50 of their own office money to make payments to AJ and MY on account of expenses to be incurred. There was no authority in the rules of professional misconduct to support this

assertion. The Tribunal unanimously found "there was no basis for any alleged breach of the rules". It was unreasonable to have brought this part of the allegation in any event.

77. It was reasonable to have initially investigated the $9,488.68 of Leigh Day funds that remained unaccounted for. However the sum clearly did not put Leigh Day in financial difficulty, there was no evidence it would have been charged to clients, and no evidence of misconduct. It was disproportionate for the Applicant to have proceeded with this allegation after that investigation.

Consequences of Findings

78. In assessing the Applicant's liability for costs the Respondents suggested various possible motives for the Applicant to maintain allegations unreasonably. The Tribunal did not hear direct evidence on these, and it is not necessary to speculate on them in deciding whether or not the Applicant was unreasonable in bringing the allegations.

79. This had been a very complex case with multiple allegations across multiple Respondents each based on facts that were heavily intertwined. There were also some allegations where only part of the allegation had been pursued unreasonably. Unpicking the costs of the various aspects that were unreasonable could, in itself, consume vast amounts of time and expense.

80. The allegations which it had been unreasonable to bring in whole or in part were: Allegations 1.1 (the Second Respondent, and lack of integrity against the First and Second Respondents), 1.2/1.3/1.4 (part), 1.5 (part), 1.9, 1.10, 1.11, 1.17, 1.18, 1.19 (knowledge of bribes) 1.20.

81. The Respondents had provided a table setting out the proportion of the hearing taken up by each allegation, calculated in various different ways. The figures had some degree of variation but gave a broadly accurate indication of the amount of time spent on each allegation. The calculation that seemed the most appropriate was the percentage of time spent by the Applicant in its oral opening on the allegations. The table provided by the Respondents included 35 hours of general time, so ignoring that the relevant percentages are set out in the table below. In addition, an estimate of the proportion of the time spent on elements of allegations that were partially unreasonable is included.

Allegation	**Proportion of allegation unreasonably brought**	**Proportion of overall case (%)**	**Proportion of overall case unreasonably brought (%)**
1.1	20	18	3.6
1.2/1.3/1.4	50	26	13

1.5	75	21	15.75
1.6/1.7	0	8	0
1.8	0	5	0
1.9/1.10/1.11	100	6	6
1.12/1.13/1.14	0	3	0
1.15	0	1	0
1.16	0	2	0
1.17/1.18	100	1	1
1.19	10	8	0.8
1.20	100	1	1
Total		100	40.85

82. This is not an exact calculation and, giving the Applicant the benefit of rounding, the appropriate order would have been that 40% of the costs from the date of issue of the Rule 5 Statement to the conclusion of the costs hearing be payable by the Applicant, to be assessed if not agreed.

Unanimous Findings

83. The Applicant and the Respondent had made submissions on the costs of the costs hearing. The majority decision was that no costs order should be made in relation to the matter generally. The case had included numerous case management hearings in which both sides had been successful on some points and unsuccessful on other points. This costs hearing would normally have been heard at the same time as the main hearing so the costs would have been included in the decision at the time. On that basis, and bearing in mind that the Applicant had failed to prove any allegation it had brought, the appropriate decision was that there be no order for costs in relation to the costs hearing.

84. The Applicant had indicated that if there was no order for costs on the main hearing, it may wish to make further written submissions on the costs of the costs hearing. Accordingly, the Applicant has liberty to make submissions in writing to the Tribunal and the Respondents on or before midday on the Tuesday 19 December 2017 after the date of this costs order. If no such submission is made then the Tribunal will then issue an order confirming there shall be no order as to costs for the costs hearing. If a submission is made than the Respondents have liberty to make submissions in response in writing to the Tribunal and the Respondents on or before midday on Thursday 21 December 2017 after the date of this costs order. The Tribunal will then issue its order as to costs of the costs hearing.

Statement of Full Order

85. Following the Hearing on 13 November 2017, the Tribunal ORDERS that there be NO ORDER for costs.

Dated this 15th day of December 2017
On behalf of the Tribunal

S. Tinkler
Chairman