SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11535-2016

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

JOHN CONOR MACKENZIE Respondent

Before:

Mr A. Ghosh (in the chair)
Mr T. Smith
Mr M.C. Baughan

Date of Hearing: 6 December 2016

Appearances

Mr Geoffrey Williams QC of Farrar's Building, Temple, London EC4Y 7BD instructed by the Solicitors Regulation Authority of The Cube, 199 Wharfside Street, Birmingham B1 1RN for the Applicant.

Mr Scott Allen, Counsel of 4 New Square, Lincoln's Inn, London WC2A 3RJ instructed by DAC Beachcroft LLP, Sovereign House, Imperial Way, Newport NP10 8UH for the Respondent.

JUDGMENT

Allegations

1. The allegations against the Respondent made by the Solicitors Regulation Authority ("SRA" or "Applicant") as amended with the leave of the Tribunal were that he:

1.1 submitted a Notice of Acting to the Court dated 28 July 2011 on behalf of the Defendant (D4) in an industrial disease claim when he had no instructions to act and for whom his insurer client bore no responsibility or had any financial interest in, and thereafter conducted litigation on this matter throughout the period until April 2014. In doing so he:

1.1.1 breached one or all of Principles 1, 4, 5 and 6 of the SRA Principles 2011 (the "Principles");

1.1.2 [Withdrawn: allegation of failure to achieve Outcome 5.1 of the SRA Code of Conduct 2011 ("Outcome" refers in this judgment to the Outcomes set out in the SRA Code of Conduct 2011)]

1.2 When aware from (at the latest) January 2014 onwards that he was not instructed to act in relation to the Fourth Defendant (D4), he continued to act in the proceedings without informing his insurer client he was incorrectly on record. In doing so he:

1.2.1 breached one or all of Principles 2, 4, 5 and 6; and

1.2.2 failed to achieve Outcome 1.16

1.3 Notwithstanding his awareness that he had no instructions to act for the Fourth Defendant (D4) in April 2014, he agreed the terms of a Tomlin Order in relation to that Defendant and submitted it to and/or acquiesced in its ratification by the Court. In doing so he:

1.3.1 breached one or all of Principles [1 withdrawn], 2, 4, 5 and 6;

1.3.2 [Withdrawn: allegation of failure to achieve Outcome 5.1]

2. [Withdrawn: allegation of dishonesty]

Documents

3. The Tribunal reviewed all the documents including:

Applicant

- Rule 5 Statement dated 1 July 2016 with exhibit SM1
- Reply to the Answer dated 23 September 2016
- Note on behalf of the Applicant dated 29 November 2016 drafted by Mr Geoffrey Williams QC
- Applicant's schedule of costs dated 28 November 2016

Respondent

- Respondent's Answer to the Rule 5 Statement
- Respondent's note for the hearing on 6 December 2016 dated 5 December 2016 drafted by Mr Scott Allen with attached schedule of allegations
- Respondent's disclosure comprising Psychiatric report of Professor Benjamin Green dated 30 August 2016 and documents provided by Kennedys LLP (job offers and appraisal forms)
- Respondent's disclosure bundle comprising seven witness statements including that of the Respondent dated 11 November 2016
- Respondent's statement of means dated 9 November 2016
- Judgment in the case of Scott v SRA [2016] EWHC 1256 (Admin)

Preliminary Issues

4. For the Applicant, Mr Williams informed the Tribunal that all the documents exhibited to the Rule 5 Statement were agreed, as was the report of the consultant psychiatrist, Professor B. Green. The witness statement of the Respondent was not agreed and he intended to give evidence. Other witness statements served for the Respondent were agreed.

5. Pursuant to Rules 11(4)(c) and 11(6) of The Solicitors (Disciplinary Proceedings) Rules 2007, Mr Williams applied for leave to withdraw the allegations in paragraphs 1.1.2, 1.3.2, 2 and as to breach of Principle 1 in paragraph 1.3.1 of the Rule 5 Statement. Mr. Williams stated that in view of the report of Professor Green, the Applicant was unable to discharge the burden proof placed on it of substantiating these allegations beyond reasonable doubt. In particular it was unable to prove beyond reasonable doubt that the subjective limb of the test for dishonesty set out in the judgment of Lord Hutton in the decision of the House of Lords in Twinsectra Ltd v Yardley [2002] UKHL 2 and the subjective test for recklessness in the judgment of the House of Lords in R v G and other [2003] UKHL 50 had been satisfied. Mr Williams also stated that if the Tribunal were to refuse leave to withdraw these allegations, the Applicant would not submit any evidence in relation to them.

6. The Respondent admitted all aspects of allegation 1.1.1 that is breaches of Principles 1, 4, 5 and 6 of the SRA Principles 2011. In respect of allegations 1.2.1 and 1.3.1, the Respondent admitted unintentional breach of Principles 4 and 5 – failure to act in the best interests of each client and to provide a proper standard of service to your clients respectively. Mr Williams stated that no "deal" had been done with the Respondent in respect of these admissions. The Applicant made its application to withdraw the allegations because it thought it was right to do so; it had not accepted concessions in return for the withdrawals. The Respondent had made his admissions before the discussions had arisen.

7. In response to the Tribunal's enquiry as to why the Applicant was only now seeking to withdraw these allegations, when Professor Green's report was dated 30 August 2016, Mr Williams indicated that this was because he had been instructed only recently and had advised that the allegations should be withdrawn.

8. For the Respondent, Mr Allen stated that the Respondent supported the Applicant's application for leave to withdraw the allegations in question.

9. The Tribunal considered whether it would be more appropriate to find that the allegations in question had not been substantiated rather than to grant leave for these to be withdrawn. However, in view of the fact that the Respondent supported the Applicant's application for withdrawal, it granted the application.

Factual Background

10. The Respondent was born in 1972 and admitted as a solicitor in 2003. His name remained on the Roll and he held a current Practising Certificate.

11. At all material times the Respondent was employed as an associate solicitor at Berrymans Lace Mawer LLP ("BLM" or "the firm"). Since July 2014 he had been employed as a senior associate at Kennedys Law LLP ("Kennedys").

12. The Applicant's investigation arose following a report received from the Compliance Officer for Legal Practice at BLM, in which he outlined the findings of an internal investigation arising from the Respondent's conduct of a particular claim.

13. BLM had acted on the instructions of Zurich ("Z") in defending an industrial disease claim made by Mr A. His claim covered some 44 years and 18 different employers. The firm's client Z was the insurer for one of these employers ME Holdings (formerly C Bridge and Engineering Ltd).

14. T, solicitors acting for Mr A, issued proceedings in June 2011 naming 18 defendants of which ME Holdings was the first (D1) and C Pipework Services Ltd was the fourth (D4).

<u>Allegation 1.1</u>

15. Z sent instructions to BLM by e-mail containing the papers served against D1. The Respondent was assigned conduct of the case in respect of D1. BLM's record showed that on 27 July 2011, the Respondent incorrectly completed the firm's standard file opening form by indicating that he was acting for D4. This was then entered into the firm's case management system which automatically generated D4's name as the heading on subsequent outgoing correspondence instead of D1's.

16. On 28 July 2011, the Respondent wrote to T confirming that he was instructed by Zurich to represent D4 and to the court enclosing a Notice of Acting for D4. In August 2011, the Respondent filed defences for both D1 and D4 at court.

17. On 15 March 2013, the Respondent wrote to T referring to D4, stating that as the Defendant was no longer trading he did not propose to prepare a disclosure statement.

18. On 3 December 2013, Mr AB, a paralegal at BLM raised a query with the Respondent regarding for whom he was "on cover".

Allegation 1.2

19. T wrote to the Respondent on 7 and 8 January 2014 enquiring if a settlement could be reached in respect of D4. On 8 January 2014, AB confirmed to the Respondent that T had agreed a settlement which included D1.

20. On 27 January 2014, the Respondent reported the outcome to Z. The letter's heading referred to D4 although the content correctly referenced the outcome achieved for D1.

21. On 28 January and 3 February 2014, T wrote to the Respondent requesting confirmation of the position in respect of D4. Having received no reply, T followed up with an e-mail dated 17 February 2014 which also copied in AB who responded stating what "My colleague [the Respondent] confirmed to me prior to the Part 36 offers…"

22. On 12 March 2014, the Respondent submitted an application for BLM to come off the court record for D1 on the basis that his insurer client had no financial interest in D1. The Court replied by letter dated 27 March 2014 stating that no draft Order had been submitted with the application. On 31 March 2014, the Respondent sent a draft Order to the Court and on 23 April 2014 the Court confirmed the removal of BLM as acting for D1.

23. On 31 March 2014, the Respondent confirmed to T that BLM had come off the record acting for D1 as their insurer client had no financial interest in that Defendant. T enquired by letter of 3 April 2014 why the Respondent considered that there was no financial interest for D1 and also requested clarification concerning the position in respect of D4.

24. The Respondent replied on 8 April 2014 stating that his previous correspondence was in error and that D1 remained in the proceedings. He added:

> "Our insurer client has no financial interest on behalf of the Fourth Defendant however. Therefore we have been removed from the Court record for the Fourth Defendant."

25. On 15 April 2014, T wrote to the Respondent about the costs consequences.

Allegation 1.3

26. The Respondent wrote to his counterpart at T, Mr E on 24 April 2014 as regards D4 stating:

> "Our insurer client has no financial interest on behalf of the Fourth Defendant (i.e. they were not the insurer). Therefore we have been removed from the Court record for the Fourth Defendant as per the attached letter. Draft Orders were sent to the Court. I trust this clarifies matters."

27. Mr E replied the same day seeking an order for costs to be assessed. The exchanges continued between the Respondent and Mr E and following a telephone call referred to in their e-mails, for which there was no record or attendance note on the Respondent's file, the position of the parties remained at loggerheads.

28. Mr E set out his position more comprehensively in a further e-mail on 24 April 2014 following their telephone discussion, indicating an intention to join Z to the proceedings for costs purposes.

29. The Respondent softened his stance in an e-mail dated 25 April 2014 which was not contained on his file (but was discovered following an internal investigation by BLM), making an offer of £3,000 by way of contribution to the costs.

30. T responded on the same day rejecting the offer and counter-proposing a settlement of £6,500, inviting the Respondent to take instructions. The Respondent replied accepting this offer in an e-mail which was also not on his client file but which was identified by BLM's internal investigation.

31. The Respondent sent a signed consent order to T on 25 April 2014 and this was filed with the Court that same day.

32. The Respondent tendered his resignation to BLM on 25 April 2014.

33. The Respondent left BLM for a new role in July 2014 and was under the impression, at that time, that he had requested a cheque from Z to pay the costs order pursuant to the Tomlin Order.

Witnesses

34. There were no witnesses.

Findings of Fact and Law

35. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondent's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

(The submissions recorded below include those made orally at the hearing and those in the documents.)

General Submissions for the Respondent

36. For the Respondent, Mr Allen submitted that it was obvious from the catalogue of errors which the Respondent made, most of which occurred in a short period between March and April 2014, that something was seriously wrong with him during this time. The evidence was unanimously to the effect that both before this period and at all times after it whilst at his new employer, the Respondent had been a conscientious, effective and indeed exemplary solicitor. In his Note, Mr Allen detailed the Respondent's medical history from the mid 1990s and the factors which contributed

to it. He referred to the Respondent's working environment and the witness statements of two former colleagues about it. The Respondent started to seek alternative employment in late July 2013. Mr Allen also detailed the Respondent's personal circumstances at the material time as set out in his witness statement and that of his wife. Professor Green's evidence was that he had no doubt about the diagnosis. He set out that stressors could precipitate symptoms and concluded that "it is reasonable to think that, on the balance of probabilities" the Respondent was suffering from a symptom at the time of the errors in 2014 and the Professor indicated its effect.

37. **Allegation 1.1 - Submitted a Notice of Acting to the Court dated 28 July 2011 on behalf of the Defendant (D4) in an industrial disease claim when he had no instructions to act and for whom his insurer client bore no responsibility or had any financial interest in, and thereafter conducted litigation on this matter throughout the period until April 2014. In doing so he:**

1.1.1 Breached one or all of Principles 1, 4, 5 and 6 of the SRA Principles 2011;

37.1 For the Applicant, Mr Williams submitted that all aspects of allegation 1.1.1 that is breaches of Principles 1, 4, 5 and 6 were admitted. This matter started with what the Applicant accepted was a mistake. The Respondent was dealing with a multi-defendant civil claim in which his insurer client Z instructed him to act for D1 that is ME Holdings which was a successor in title to C Bridge & Engineering Ltd. The Respondent opened the file on 27 July 2011 signing the form and named the file C Pipework Services Ltd and thereby input the wrong Defendant into the firm's case management system. Mr Williams went through the history of what then occurred as set out in the factual background to this judgment. The Respondent's letter of 28 July 2011 to T named as its client C Pipework Services Ltd and stated that B was instructed to represent D4, enclosing a Notice of Acting which did the same. This action triggered allegation 1.1. It was common ground that the Respondent exposed Z to liability for D4 but Mr Williams asserted that the Respondent acted negligently. This was compounded by his filing a defence for D4. The version before the Tribunal had an unsigned statement of truth but it was understood that this was the Respondent's document. The statement of truth began:

> "The Fourth Defendant is in liquidation. The Fourth Defendant's insurers, having a financial interest in the proceedings, believe the fact (sic) stated in this Defence are true. I am duly authorised by the Fourth Defendant's insurers to sign the statement…"

The Respondent also filed a defence for D1.

37.2 Mr Williams submitted that the Respondent's lack of awareness of his position was about to change. The Tribunal would need to make a finding as to when the Respondent became aware of the true situation, what he knew and when. The issue of his awareness related to all three allegations. The case rumbled on and the firm was in the process of settling. On 3 December 2013, a colleague of the Respondent Mr AB e-mailed the Respondent. The email included a question to the Respondent:

> "Are you on cover for both the Frist (sic) Defendant – with an approximate interest of 4.72% as well as the Fourth Defendant 0.70%?

> Sorry if this going over old ground."

The Respondent replied:

> "I'm on for D1 but I've no instructions for D4"

Mr Williams submitted that the Rule 5 Statement charitably said that this reply could be taken in different ways; it could mean that the Respondent had no instructions. Mr Williams asked the Tribunal to construe the e-mail for what it said. He would contend that it went to the Respondent's awareness in December 2013 and that he was certainly aware of the position from January 2014. The e-mails were clear evidence that the Respondent knew that he was not instructed to represent D4. Mr Williams referred the Tribunal to the Respondent's reply to the Applicant's Explanation with Warning ("EWW") letter dated 23 October 2015. The Respondent's solicitors wrote to the Applicant on 27 November 2015 including:

> "In December 2013, [AB] at BLM took over the coordination of the BLM actions and he sought clarification in relation to [the Respondent] was acting for. As you set out in your letter, [the Respondent] stated:
>
> > "I'm on for D1 but I've no instructions for D4"
>
> …
>
> It appears therefore, that [the Respondent] at this stage realised that [Z] did not insure D4."

The Respondent's Answer to the Rule 5 Statement stated at paragraph 18.4:

> "It is accordingly clear that the Respondent's review of the file, in response to Mr [AB's] question, must have been incomplete and inadequate, as any complete or adequate review of the file would have revealed that the Respondent had filed a Notice of Acting and a Defence on behalf of D4. The Respondent regrets sincerely that this inadequate review of the file occurred on 3 December 2013."

37.3 Mr Williams submitted that in any event the position became much clearer in due course. He referred the Tribunal to the e-mail from AB dated 17 February 2014 to Mr E copied to the Respondent:

> "My colleague [the Respondent] confirmed to me prior to the Part 36 offers on 02 January and 08 January that he was only instructed on behalf of the First Defendant ([ME] and their predecessors in title – [C] Bridge Engineering Company) and not the fourth defendant [C] Pipework Services Ltd."

Mr Williams submitted that AB was confirming what the Respondent had told him and reminded the Tribunal that all the documents in this case were agreed between the parties. He submitted that this was clear evidence of the Respondent's awareness of the situation at the latest in early January 2014. The Respondent did not come back on the email to say that was not exactly what he had said. He accepted the effect of his

conduct was to breach the Principles 1, 4, 5 and 6 but he said that his conduct was unintentional. Mr Williams submitted but this was not an issue that Tribunal needed to decide as the Applicant did not say that the Respondent set out with the intent of breaching the rules because if he had done so that would have been dishonest but one could avoid behaving in such a way that breaches occurred. Mr Williams submitted that Principle 1 was breached because the Respondent was on the record for a company whom he did not represent. As to Principle 4, the Respondent did not do his best for Z. He breached Principle 5 because he exposed Z to a liability that came to fruition. The Respondent also admitted that his actions breached Principle 6 regarding public trust.

Submissions for the Respondent

37.4 As to the events on the file, Mr Allen submitted that the proceedings were commenced in 2011. Mr A contended that he had suffered vibration white finger syndrome caused by his employment by the 18 Defendants over a period between 1975 and 2008. A predecessor entity to D1 shared the same first part of its name "C" with D4 which was presumably what gave rise to the error in setting up the file. Regarding allegation 1.1, which was directed towards the Respondent's error there was now nothing between the parties. Mr Allen clarified that in addition to breaches of Principles 4 and 5 the Respondent admitted breach of Principle 1 because he had not been displaying symptoms of his illness when he went on the record by mistake. He had also therefore diminished the trust of the public (Principle 6) because the public was entitled to expect that he would do the work correctly.

Determination of the Tribunal in respect of allegation 1.1

37.5 The Tribunal had regard to the evidence including the witness statements and the oral evidence of the Respondent and the report of Professor Green as well as the submissions for the Applicant and for the Respondent. In respect of allegation 1.1, the Respondent had admitted breaching Principles 1, 4, 5 and 6. The Tribunal found proved to the required standard, that is beyond reasonable doubt, that the breaches of these Principles had been found proved on the evidence; indeed they were admitted.

38. **Allegation 1.2 - When aware from (at the latest) January 2014 onwards that he was not instructed to act in relation to the Fourth Defendant (D4), he continued to act in the proceedings without informing his insurer client he was incorrectly on record. In doing so he:**

1.2.1 Breached one or all of Principles 2, 4, 5 and 6; and

1.2.2 Failed to achieve Outcome 1.16.

Allegation 1.3 - Notwithstanding his awareness that he had no instructions to act for the Fourth Defendant (D4) in April 2014, he agreed the terms of a Tomlin Order in relation to that Defendant and submitted it to and/or acquiesced in its ratification by the Court. In doing so he:

1.3.1 Breached one or all of Principles 2, 4, 5 and 6;

(These allegations are recorded together as they arise out of a series of events.)

38.1 In respect of allegation 1.2, the Respondent denied breach of Principles 2 and 6 and Outcome 1.16. Mr Williams for the Applicant emphasised the word 'could' in Outcome 1.16 which required: "you inform current clients if you discover any act or omission which could give rise to a claim by them against you". He submitted that lack of integrity (Principle 2) was distinct from dishonesty and an individual did not have to be dishonest to lack integrity and did not have to set out on conduct deliberately in order to lack integrity. He submitted that the ratio decidendi in the judgment in Scott v SRA [2016] EWHC 1256 (Admin) was that an informed Tribunal should be capable of discerning lack of integrity on the basis of the substantiated facts, even though there was no precise judicial definition of integrity.

38.2 Mr Williams submitted that in agreeing to the Tomlin Order when he knew that he had no instructions to act for D4, the Respondent had knowingly misled the Court and T. He had failed to inform his client of the erroneous impression that he had given that D4 was insured by it. This amounted to a lack of integrity contrary to Principle 2 and undermined the trust the public placed in him in breach of Principle 6.

38.3 Mr Williams referred the Tribunal to T's letter of 7 January 2014 to the Respondent's firm which indicated that the only live party left in the action was D4 and in which T invited the firm's client's views to see whether the matter could be resolved without the need to litigate further. By a letter the following day, T invited Z's proposals for settlement without further delay. T wrote again on 28 January 2014 and 3 February 2014 chasing a response. Mr Williams submitted that it was in January/February 2014 when the Respondent realised that he was not instructed by D4. He was certainly well aware by March 2014 and Mr Williams submitted that he exposed Z at least potentially to liability. However, when requested by the Chair to cite the legal basis for his submissions as to Z's potential liability for costs, in view of the fact that Z was not a party to the court proceedings, it had not instructed either BLM or the Respondent to act in relation to D4 and it had not authorised, and indeed knew nothing of, the Respondent's actions which had resulted in these costs being incurred as D4 had not been insured by Z, Mr. Williams was unable to do so. On 12 March 2014, the Respondent wrote to the Court seeking to apply for BLM to come off the record. However he got it wrong and on the application notice form indicated that his firm applied to be removed from the court record as acting for D1. In the second paragraph of the section of the form asking what order he was seeking he completed:

> "[BLM] are not instructed to act, the insurer has no financial interest in the First Defendant."

Mr Williams submitted that the Respondent definitely put the situation together in his mind because that sentence would not make sense in respect of D1 but it did in respect of D4. On the next page of the form the Respondent stated:

> "We request an order that [BLM] be removed from the Court record as acting for the First Defendant.

> [BLM] are not instructed to act, the insurer has no financial interest in the First Defendant
>
> On investigation [Z] has no financial interest in the Defendant."

Mr Williams emphasised the reference to investigation; the Respondent was seeking to tell the court that he had investigated the position and Z had no interest in D4. An Order was duly made that the firm "be removed from the Court record as acting for the First Defendant". A few days later on 8 April 2014, the Respondent wrote to T informing it amongst other things:

> "Our last letter had a typographical error. The First Defendant remains in proceedings, and costs are outstanding.
>
> Our insurer client has no financial interest in behalf of the Fourth Defendant however. Therefore we have been removed from the Court record for the Fourth Defendant."

Mr Williams submitted that the last sentence quoted above was wrong because the Order made five days earlier plainly referred to D1 but it was correct that Z had no financial interest in respect of D4 and he submitted that the Respondent knew it. On 15 April 2014, T wrote to the firm acknowledging the Respondent's letter of 8 April and including:

> "The defence filed on behalf of the Fourth Defendant was signed by you on behalf of the Fourth Defendant and we have not seen any order to remove you from the Court records (sic) as acting on behalf of the Fourth Defendant and we would appreciate it if you could deal with this outstanding issue. If your Client (and we assume insurance Client) no longer has any financial interest then clearly the defence they have filed is a defence filed in error and they will have to now discontinue/withdraw their involvement with costs consequences following. Please confirm your Client's intentions. Who are the relevant insurers dealing with this matter now? Who is dealing on behalf of the Fourth Respondent…"

38.4 Mr Williams submitted that it was clear to the Respondent on 15 April 2014 that both parties knew that Z was not involved for D4 and that costs would be pursued. Costs would not be properly payable by Z but in such circumstances the solicitor must inform the client. Mr Williams submitted that this was a fundamental principle and it did not require any particular experience or sophistication to arrive at that conclusion. The Respondent was plainly aware of the true situation. The Respondent said that he thought it was Z's mistake. It was either a mistake by Z or the Respondent and it was incumbent on him to investigate the file which he told the Court he had done with a view to success in an application to come off the record. It must have been clear to him that there was potential for a claim against Z and the certainty of a claim against the firm if the costs of the Claimant's solicitors were paid. Mr Williams submitted that it was imperative for a solicitor to inform the Court of all the material facts in any case at all times and the client must be given all material information. The Respondent admitted that he failed to act in the best interests of the client and failed to provide proper service but Mr Williams submitted that what he had done went further

and amounted to failure to achieve Outcome 1.16 and diminished the trust of the public (Principle 6). The Respondent had admitted such a breach in respect of allegation 1.1. Mr Williams submitted that this was a more glaring example of that failure.

38.5 In respect of allegation 1.3, for the Applicant, Mr Williams submitted that the allegation related to how the Respondent settled this troublesome matter by means of the Tomlin Order knowing that he had no instructions to do so. Breaches of Principles 2 and 6 were denied but breaches of Principles 4 and 5 were admitted. In his solicitor's reply to the Applicant's EWW letter of 23 October 2015, it was stated:

> "It was his view was that he had been instructed to represent D4 wrongly by Z and not that he had filed a Notice of Acting and a Defence wrongly. In his mind, it was his client's mistake. As he was acting under delegated authority, he did not need to seek instructions from his client and applied to come off the Court record in the best interests of his client, albeit that he made the application for D1 instead of D4."

Mr Williams submitted that the delegated authority given to the Respondent by his client Z would extend to settling low-level claims without instructions and it could not operate in these circumstances; one could not contract out of one's duties in respect of a client. There was no evidence of purported authority from Z to do what the Respondent did. Mr Williams could not anticipate a delegated authority from Z to pay money they did not owe. It could not be suggested that it was their responsibility to pay bills which were the responsibility of the firm because of the Respondent's shortcomings. The Respondent must tell his client of the potential claim against him however uncomfortable. Mr Williams reminded the Tribunal that in respect of allegation 1.2 the Respondent had made partial admissions concentrating on his awareness and continuing to act without authority from Z.

38.6 Mr Williams submitted that the Respondent was under pressure to deal with the question of costs as shown by T's first e-mail to him of 24 April 2014:

> "There is still obviously the question of your client's involvement in the matter and we would be obliged if you could confirm that they will concede to a Judgement (sic) in an effort to save costs and time.
>
> There is also the question of the costs that have been incurred to date, which have been incurred, with respect, as a result of your client stating clearly in their Defence that they have a financial interest and have defended and put the Claimant to costs that would not have been necessarily incurred had they not done so, which will obviously have to be paid. No doubt you will agree and we suggest that an Order for costs to be assessed, if not agreed, in that regard."

The same day the Respondent sent an e-mail to Mr E asking him to telephone him to discuss the e-mail. Mr Williams submitted that whether it was right that the claimant's solicitors' costs should come from Z was not the point. Later on 24 April 2014, an e-mail was sent to the Respondent on behalf of Mr E stating:

> "We have considered our recent passage of e-mails and our telephone conversation and write further.
>
> We consider without doubt that the conduct of your Client has incurred costs in this matter unnecessarily and continues to incur costs again in our view unnecessarily.
>
> Although we have now received a copy of your letter received from the Court dated 27th March 2014 confirming that an order has been made in respect of your (unseen) application to be removed from record we have yet to see, despite requests, a copy of that application nor a copy of the order removing you from the record. Until such time that we receive such an order with respect, we must converse with you and deal with you whilst you remain on the record appropriately.
>
> As explained to you we are considering whether or not it is appropriate to make an application for costs order against your insurance Client. [To] do that they will have to be added as a party to the proceedings for the purposes of costs only proceedings and be given an opportunity to attend any hearing where a Court can consider matters further. Please provide us with the full title of your insurance client's for the purposes of seeking to add them to the proceedings for that purpose.
>
> Once again, we do express concern and frustration that despite the longevity of this matter and despite the statement of truth endorsed by your firm on behalf of your insurance Client confirming a financial interest, it is only a matter of days before trial that they confirm they now no longer have a financial interest."

There was no note of the telephone conversation referred to. The Respondent replied briefly the same day:

> "We were on record for them for [Z]. As they are not on record, there is no mechanism for them to pay your costs"

38.7 Mr Williams submitted that in spite of what he said the Respondent went on to settle the costs claim for Z with Z totally in the dark. On 25 April 2014, the Respondent e-mailed Mr E without prejudice:

> "We note your position. The Court having already removed us from the record, we do not believe there is any scope nor (sic) authority for the Court an order in the terms you suggest (sic). However, in the interests of compromise, we are prepared to offer to contribute towards your costs.
>
> We offer to contribute to the Claimant's costs as against the Fourth Defendant at £3,000. Please revert."

On 25 April 2014 the Respondent e-mailed "We can agree to an order at £6,500. A Tomlin order would appear appropriate." On the same day the Respondent e-mailed a signed consent order to Mr E and e-mailed the draft consent order to the Court

indicating that a signed copy would follow. Also on that day he wrote to the Court enclosing "the signed consent order for the remaining Defendant" when he knew that he was not instructed for that Defendant and never had been. The Order recited that D4's solicitors:

> "Do pay the Claimant's solicitors the sum of £6,500 within 21 days of the date of this order."

38.8 Mr Williams referred to the Respondent's Answer which stated:

> "…it was not in fact until March 2014 that the Respondent appreciated that he was on the Court record for a party (D4) on behalf of whom he had no instructions to act. The Respondent then attempted to remedy the situation by coming off the record for D4, but in error made an application in respect of D1. It is admitted that the Respondent did not inform his insurer clients that he had erroneously been on the Court record for D4."

Mr Williams submitted that by this Answer the Respondent accepted actual knowledge in March 2014 that he was on the record for a party for whom he had no instructions to act prior to settling costs and putting into effect the Court Order. There was evidence that the Respondent considered his position; he told the Court that he had investigated, and Mr Williams submitted that he took a conscious decision not to tell Z. The formal response letter from the Respondent's solicitors of 27 November 2015 included a reference to the Respondent writing on 24 April 2014 to the Claimant's solicitors stating that the claim against D1 had been settled and those costs were outstanding. It also stated that Z had no financial interest on behalf of D4. The response letter continued:

> "That letter stated that the application to come off the Court record had been approved. The Claimant's solicitors sought further clarification on this day stating that as [the Respondent] had been on the Court record since service of the Defence and they had progressed the matter on that basis, they asked him to agree to Judgment being entered against D4 and also raised the question of costs which had been incurred in dealing with the matter. In [the Respondent's] mind, he had come of the Court record for D4 (although we know it was actually D1) but his client was facing a claim for costs. He was still acting under the delegated authority scheme. He therefore considered the best strategy to enable [Z] to extricate themselves from these proceedings which was (sic) listed for trial immediately. He felt that the best option for his client would be to attempt to negotiate in respect of the Claimant's solicitors' costs and to reach a compromise. This would avoid criticism of his client.
>
> The Claimant's solicitors would not negotiate, however, and again acting in what he thought was his client's best interests, he resolved costs at £6,500 and organised for a Consent Order to be filed at Court reflecting this agreement."

Mr Williams emphasised the words "He therefore considered the best strategy to enable [Z] to extricate themselves" and "acting in what he thought was his client's best interests" but it was not for him to decide what was in Z's best interests; that was for the client to do in possession of all the facts. The Respondent's firm had a clear

costs liability because of the Respondent's negligence. The Respondent believed that he had asked Z to pay the costs as set out in the response letter:

> "[The Respondent] does not understand why a request was not made by e-mail to the [Z] offshore account in respect of the £6,500 but in his mind this had been requested and would be automatically generated and a cheque returned to [the firm] to enable payment to the Claimant's solicitors. It is clear from the file no request was made which is another error on [the Respondent's] part.
>
> In the handover note prepared when [the Respondent] left [the firm] to commence his employment with [K], he did not mention the Costs Order of £6,500 but he was of the view that this had been requested. When the cheque would have been received by [the firm], it would have been sent out…"

Mr Williams submitted that when the Respondent said that he had made a mistake in not obtaining the money, he had no business to ask for it. When the response letter was written he had seen the firm's letter dated 11 February 2015 reporting him to the Applicant which stated:

> "We have reported to our clients and we have confirmed that we will repay the sum of £6500…"

It appeared from the firm's February 2015 letter that another fee earner had requested payment from Z on 16 September 2014.

38.9 Mr Williams submitted that the fact Z made payment and was reimbursed was not the point; the Applicant's case was about the obligation to inform the client. The case started as a mistake and ballooned out of all proportion into breaches of the fundamental Principles which applied to all solicitors and went over and above what the Respondent had admitted. The client Z was let down very badly. The Respondent relied on a misconceived entitlement of delegated authority. Mr Williams submitted that if the delegated authority applied to defeat all the allegations they would all be denied.

38.10 The Tribunal asked for clarification as to the date of the Respondent's letter of resignation from the firm; his Answer stated that he obtained an alternative job offer on 16 April 2014. The Respondent gave notice on 25 April 2014 (the date of the letter to the Court enclosing the Tomlin Order) and worked his three-month notice period, leaving the firm on 25 July 2014.

Submissions for and evidence of the Respondent in respect of allegations 1.2 and 1.3

38.11 Regarding the admitted allegations of breach of Principles 4 and 5 in respect of both allegations 1.2 and 1.3, Mr Allen submitted that the Respondent did not deliberately breach the Principles and so there should be no finding that he was aware substantively before or after it happened that he was on the record for someone for whom he should not be; between 12 March and 25 April 2014 the Respondent's judgment was impaired.

38.12 With regard to the allegation of breach of Principle 6 relating to the trust of the public (allegations 1.2 and 1.3) and outcome 1.16 about informing his client of a potential claim against him (allegation 1.2) both of which were denied, Mr Allen submitted that this case had not affected the public in any respect, or its perception of either the Respondent or the solicitors' profession. He had admitted the breach of Principle 6 under allegation 1.1 because at the time he made the error he was not displaying the symptoms of his illness but Mr Allen submitted that there had been no breach of the Principle when he was ill. The Respondent did not believe that a right-thinking member of the public, with knowledge of the full facts of this case, would take the view that he had acted so as to diminish public trust in the profession rather that right-thinking members of the public would see that he was placed in an intolerable position by the weight of his work in this case, as well as by his personal and medical problems, and that he did not mean to do anything wrong. He believed that right-thinking members of the public were now sympathetic to and understanding of those who suffer from mental health conditions.

38.13 As for the alleged breach of Outcome 1.16, it was submitted that the fundamental assumption behind this Outcome was that the solicitor actually appreciated that an act or omission had occurred which could give rise to a claim by the client against him/her. The Respondent did not actually appreciate at the relevant time that this was the case hence the Outcome was not breached. The Respondent of course admitted that but for his mental health condition and the symptoms he was experiencing at the material time, he should have appreciated that this was the case, but he did not actually do so.

38.14 In respect of the allegation of lack of integrity breach of Principle 2 (allegations 1.2 and 1.3), the Respondent contended that it would not be right for the Tribunal to find that, at a time when he was suffering from mental health issues, his actions lacked integrity. The evidence demonstrated that the Respondent was placed under a huge burden of work at the material time, and that errors were nigh-on inevitable. That burden, and the stress it imposed, coupled with serious financial concerns at home, and chronic insomnia, caused the Respondent to display symptoms caused by his underlying mental illness. The mistakes he made in March and April 2014 were committed whilst mentally unwell. In respect of the allegation of lack of integrity, Mr Allen submitted that there were two real points against the Respondent; that he had not told Z about being wrongly on the record or about the cost claim against it.

38.15 In respect of not telling Z about wrongly being on the record, Mr Allen submitted that when the Respondent discovered in March 2014 that he was wrongly on the record he made an application to come off in respect of D4 which was the right thing to do. He did not need anyone's permission to do that. Any suggestion that the Respondent appreciated before 12 March 2014 that he was on the record for a party for whom he should not be, was inherently improbable and could and should be rejected. He would have done something on the very urgent basis with which he acted on 12 March if he had known. Mr Allen submitted that the 3 December 2014 e-mails did not relate to his being on the record for D4.

38.16 Mr Allen submitted that the Respondent should have reacted entirely differently; he should have got to the bottom of the file and worked out who was at fault and found out that it was he. He should have contacted Z about how to proceed. To do so would

have required a clear head and sufficient time and he had neither. It was not wholly rational for him to be convinced that his client was at fault but it was not wholly irrational either given the history of similar mistakes by insurers. There was no suggestion that the Respondent's belief was not honestly held. The Respondent formed a view that settling was something he had delegated authority to do. Again this was not wholly rational or irrational; he had delegated authority to agree both costs and damages. He now accepted that the delegated authority did not extend to settling in the circumstances of this case. Mr Allen did not assert that the delegated authority point was a complete answer to the allegations but it was an important part of the Respondent's mindset. It could not be right to ignore entirely the subjective element that is what the Respondent believed he was trying to achieve. The facts included his medical condition, his working conditions which he and others in the witness statements had described most vividly and his other personal circumstances which were all stressors which triggered his illness. The Respondent formed an honest belief about what he was doing. He had no ill motive or intention to mislead and he was not without adherence to proper standards of integrity. There were all sorts of logical flaws in his thinking but it was not right to say that he lacked integrity in those circumstances and with those beliefs. In respect of an allegation of lack of integrity by misleading the court through the Tomlin Order, Mr Allen was not sure that the Respondent had been cross-examined about his intentions towards the Court but he had no intention to mislead; he was just trying to bring the action to a close. There was nothing misleading about the order. It just asked for discontinuance against D4 on the basis that D4's solicitors pay the costs.

38.17 Mr Allen submitted that the lack of integrity allegations were maintained by the Applicant on the basis that no subjective finding about the Respondent's state of mind at the material time was necessary to support a finding of lack of integrity, and that these allegations could be made out on an objective appraisal of the facts. This approach was said to be based on the recent decision of Scott v SRA [2016] EWHC 1256 (Admin). The position in that case was that both parties accepted that "looked at objectively, the appellant's conduct was both dishonest and lacked integrity" (paragraph 36 of the judgment). The Tribunal had found that the subjective element necessary to make out a case in dishonesty was lacking (i.e. that the solicitor actually appreciated at the material time that he was acting dishonestly by the standards of reasonable people), but that the solicitor's conduct was nevertheless lacking in integrity, and he should be struck off the Roll. The solicitor sought to appeal that decision and his appeal was dismissed. The Court did not however find that considerations as to the solicitor's state of mind and what the solicitor was aware of at the material time were irrelevant. Indeed it would be highly surprising if that were the case – it is difficult to see how a finding of lack of integrity could be made against a solicitor in circumstances in which nothing about his state of mind was seriously culpable. It would be even more surprising if such a finding could be made against a solicitor who did not appreciate he was doing anything wrong by reason of a mental health condition which was operating upon him at the material time. Indeed it was clear that in reaching the decision in Scott, the Court (and Tribunal) paid careful regard to the solicitor's state of mind at the material time; it found that he did not care what happened to the money in the relevant client account, and that he had no regard at all to his obligation to protect client money and did not care at all about what he was instructed to authorise. He had no steady adherence to any kind of ethical code. There was 'not one iota of evidence that he had stood back and asked himself if it was

right to make the payments'. He failed to cooperate with the Applicant's investigation.

38.18 The Respondent of course accepted that it was possible for someone to be not guilty of dishonesty but guilty of lack of integrity – Scott simply reaffirmed this. He however denied resolutely that he was guilty of any lack of integrity. His actions which were now criticised were caused by his mental health at the material time being seriously impaired. The 'objective' factors which made Mr Scott's behaviour inappropriate were in fact related to his state of mind, and more specifically his not caring about whether what he was doing was right or wrong. That was not the position in this case. Mr Allen asked the Tribunal to have regard to the character evidence provided by the Respondent's wife and four other witnesses in addition to the evidence of the Respondent and Professor Green before deciding whether it was satisfied beyond reasonable doubt that the Respondent acted without integrity. These people had worked with him and one of them spoke for his current employers who were aware of all the facts of this case, and supported the Respondent without reservation.

38.19 As to the detail of what had occurred, in respect of the e-mail exchange on 3 December 2013 Mr Allen referred the Tribunal to the Respondent's evidence in his Answer and his witness statement. In his Answer, the Respondent stated that given the volume of files for which he was responsible he would not have known the answer to AB's query off the top of his head. He could not now recall what research into the file he conducted to provide the answer to AB that he had no instructions for D4 but could see that this was contrary to the understanding which he had formed in August 2011 which continued thereafter; namely that he was instructed by insurers who had an interest in the claim against D4. The Respondent stated that he was sure that he did not appreciate when giving his answer to AB that he had previously at all material times acted as if he was instructed on behalf of D4. He was sure that he simply answered on the basis of whatever research into the file he carried out in response to the query. Any time taken to undertake the research would undoubtedly have been limited given his workload and he did not appreciate that a mistake had previously been made. It was conceded in the Answer that his review of the file must have been incomplete and inadequate as a complete radical review would have revealed that he had filed Notice of Acting and a Defence on behalf of D4. The Respondent had no recollection of his thought process when he sent his response to AB. When coming back to the file in response to the Rule 5 Statement, the Respondent's interpretation of this e-mail was that it was intended to convey to AB that he was not instructed on behalf of D4. This was inconsistent with the material on the file as he would have appreciated if a proper review of the file had been carried out at the material time. In his witness statement at paragraphs 88 and 89 the Respondent stated that he had looked at the e-mail exchange which started with his e-mail of 28 November 2013. He said that he thought he had in his head that he was acting for D1 but not D4 and must have been confused. He thought most solicitors with a very busy practice would empathise to some extent with his position. Mr Allen submitted that the Respondent's position rang true for a number of reasons: if he checked the file then he would have seen that he was on the Court record for both D1 and D4; if he had appreciated that he was on the Court record for a party from whom he had no instructions then it was inconceivable that he would not have tried to do anything about it; and his ongoing confusion was evident from the letter dated

27 January to the insurer client reporting on the outcome of the case for D1 but referencing D4's name. Mr AB proceeded to settle the case on behalf of all the Defendants represented by the firm save for D4 in reliance on the Respondent's 3 December e-mail. Mr Allen submitted that there was no evidence that there was any communication between the Respondent and Mr AB about the issue save on 3 December 2013 after which the Respondent was plainly still confused about the position and that AB's mail was consistent with that e-mail exchange being the only communication on the subject. The Respondent did not believe that there was any other conversation or communication with AB about the matter.

38.20 Mr Allen further submitted that the Respondent's evidence in his statement was that the 17 February 2014 e-mail did not cause him to appreciate that anything had gone wrong and that he did not believe he became conscious of the contents of that e-mail until around 12 March 2014. In the context of the case and the workload which he had at the time it would not be at all surprising if he had not read this e-mail at all or not read it properly at the time, nor would it be surprising if he had read it but had not appreciated that there was any problem. The e-mail exchange could well have indicated a mistake by the Claimant's solicitors. The Respondent had been overloaded with work at BLM. He had had conduct of over 90 files and was supervising two junior staff, one newly qualified, each of whom had conduct of between 60 and 70 files. In addition he was instructed to supervise half of the caseload of a third junior fee earner. . Any suggestion that he would have had in his mind at any one time precisely which Defendants the firm was representing in each of these claims would be wholly unrealistic.

38.21 The Respondent believed that he became aware that the problem existed on around 12 March 2014 because it was on that date that he submitted a very urgent but mistaken application to the Court to come off the record. He could not recall the circumstances in which he came to appreciate that he was wrongly on the record for D4 but was sure that he would have taken very urgent steps to remedy the position as soon as he discovered it. Mr Allen submitted that there was no reason to doubt his evidence. The Court granted the application. There then followed a litany of further errors, and confusion on the part of the Respondent. His evidence in his witness statement about this period was that "It was like working in a cloud of fog. What would normally be clear to me was, in fact, very confusing." He wrote to T to say he had come off the record for D1. When T pointed out that their enquiries had been directed towards D4, the Respondent thought that his letter had contained a typographical error and replied (on 8 April 2014) to say so, and that he had come off the record for D4.

38.22 In respect of allegation 1.2, Mr Allen submitted that the Respondent did not do anything out of the ordinary in settling the case including the costs liability without referring first to his insurer client because it was within the scope of his delegated authority to do so. His evidence was that it was not unusual for insurers to make mistakes of this nature in complex multi-party litigation with historic defendants whose identities changed over time and indeed the insurers did not pick up his error. He now appreciated that if he had been thinking clearly he should have checked the position fully and carefully to find out if the insurer had made a mistake and that if he had discovered it was his mistake he should have informed the client and sought

instructions as to what course of action he should follow. He believed they were at fault and he was protecting their interests.

Evidence of the Respondent

38.23 The Respondent gave evidence. He described the actions he was taking to follow medical advice and to learn about what would trigger his illness. In his Answer he stated:

> "The Respondent accepts that his conduct in respect of the client files which form the subject matter of this application fell very significantly below the standard to be expected of him as a Solicitor of the Roll, in a number of respects."

The Respondent clarified that by this he meant that he had not been as diligent with the case as he ought to have been and he apologised for that. The Respondent agreed that he had made mistakes on two of his files in early 2014. He could not speak for all of his 90 files but he was not aware of any complaints about them. The Respondent agreed that while in his statement he was critical of the systems in place at the firm he accepted that he also said:

> "I must have made an error when entering the details of the matter on to the case management system…"

He did not blame the firm or its systems for the mistake but stated that the audit systems and other people at the firm did not appreciate what he had done.

38.24 The Respondent rejected the suggestion that he exposed Z to the risk that someone would pursue a claim for costs if the defence failed. He stated that if the case was settled negligently for Z then there would be a claim against the firm's professional indemnity insurers. If Z was joined into cost proceedings it would be able to seek contribution from the firm and could drop out.

38.25 The Respondent stated that he was confused throughout about for whom he was instructed, who was insured, and for whom he was on the record. One could tell from that application to come off the record in March 2014 that he was confusing the Defendants. As to his e-mail response to AB on 3 December 2013, the Respondent stated he was looking either at the file or the case management system and saw that he was on the record for D1 but did not realise that he was on the record for two Defendants. He would have clicked a button and it would have said that there was defence for D1 and that was what his answer to AB was based on. He could not remember what happened save that he could not put two hours in on a file. Every time he picked up a file he needed to revisit the facts of the case; he would have no recollection of it. AB had 75 files and he did not have supervision duties. The Respondent had 90 files all on the multi-track and was supervising two people. He stated that it was impossible in those circumstances to do anything meaningful in terms of work. When one sat down with the file it took one and a half to two hours to sort out what was going on. He felt that he had been put in the position that mistakes of this type were inevitable. He should have checked the situation out and he was sorry that he had not. If he had he would have made a mistake on a different file. The

Respondent emphasised that he was not seeking to exculpate himself but he was not in a situation to make good decisions.

38.26 In terms of the correspondence about settling the claim against D4, the Respondent had no particular recollection that as set out in T's letter of 7 January 2014 D4 was the only live party left in the litigation. The fact that he had written in those terms did not mean that he had taken on board the meaning of the letter. The Respondent rejected the suggestion that he was aware of the situation regarding D4 in January 2014. As to the e-mail from AB to Mr E and to him dated 17 February 2014, the Respondent stated that AB was saying what he thought was the case that he the Respondent was instructed for D1 and was not aware that he was on the record for two Defendants. The Respondent stated that he could not address AB saying that he had told AB prior to January 2014 that he was only instructed for D1; he had not come to the conclusion that he was acting for two Defendants. He had filed a defence for D4. The Respondent stated that he did not make the link.

38.27 In respect of his statement on the application form to come off the record in March 2014 that he had investigated, the Respondent supposed rather than recollected that what he was referring to was that he had gone to the schedule of insurers on the file and that whichever it was of D1 or D4 did not appear as insured by Z or its parent company. He did not know how long before he submitted the form he had looked at schedule and what prompted him to do it. The Respondent agreed that as Z did not insure D4 the proper answer in his letter of 8 April 2014 rather than that Z had no financial interest in D4 should have been that Z had no liability for costs. Mr Williams took the Respondent through aspects of the ongoing correspondence and the pressure which T had applied in respect of costs and his response that there was no mechanism for Z to pay them. The Respondent stated that he was still thinking that his application in respect of D4 had been successful. He agreed that Z's real defence was that it had absolutely nothing to do with D4 rather than that he had come off the record.

38.28 The Respondent stated that he did not have very good recall of his thought processes in respect of continuing to settle the costs claim, obtaining the Tomlin Order and on 25 April 2014 sending the signed consent order under a letter bearing the heading of D4 when it was his belief that he had already come off the record for that Defendant. He confirmed that at no stage did he tell the client anything about this activity; he thought that his delegated authority to settle a claim up to £25,000 would cover a scenario like this but it did not bear scrutiny. He was ill and he did not have a proper appreciation of the facts. He was not aware that he was ill as he had not been informed of any diagnosis and no one whom he knew informed him which would have enabled him to be aware that his behaviour was unusual. He never understood that the document opening the file started the cascading error. It was never clear to him how he came to be on the record for the two Defendants. He was not seeking to diminish his responsibility to the firm, the Tribunal and the Applicant but he could not give a logical explanation of the mistake that he had made when he was ill.

38.29 The Respondent stated that the implication that there was a link either inadvertent or deliberate in his not having flagged up the file as a problem file when he gave in his notice on 25 April 2014 and the fact he gave in his notice on that same day was a patent untruth. He had been in receipt of the job offer for two weeks. The fact it was made was a further contribution to his illness.

38.30 The Respondent was referred to his statement where he said:

> "The Claimant's solicitors were aggressive and threatened to join insurers into the proceedings and obtain an order for costs against them…
>
> My objective was to extricate insurers from the case because I thought that, by instructing me to go on record the D4, they had exposed themselves to an Order for costs…"

It was put to the Respondent that at the time he made the application he appreciated that Z was not the insurer and was not liable for costs. He stated that knowing what he now knew having looked at the file it made no sense but his starting point was that the client had instructed him in error. Perhaps if he had had two or three hours to sit down with the file he would have seen that he was on the record because he had completed a file opening form incorrectly. The Respondent rejected the suggestion that he had failed to show integrity in dealing with Z. He did not associate being ill with lack of integrity. His motive had been to act in the best interests of the client and get the best result he could. He had made a mistake and it was a professional negligence issue. What he was seeking would be a better outcome for Z and by not going to a contested hearing. The outcome for Z was not what it would have wanted but it was not for want of trying on his part. He understood that Z was reimbursed and had not suffered harm.

38.31 In re-examination, the Respondent was asked whether he recalled e-mail exchanges with AB aside from those on 20 December 2013, and 17 February 2014 which were referred to in his witness statement; he responded that he did not recall any of the e-mail exchanges. He recalled making the application to come off the record triggered by an awareness that there was a problem but he could not give any details of his investigation. It was difficult for him to separate what he was thinking from what he thought he was thinking. He believed that he thought it was a mistake by Z instructing him to go on the record for D4 and so Z had a potential cost liability in respect of which the best outcome would be for him to get them out of the action.

Questions from the Tribunal

38.32 The Respondent stated that since he had been at Kennedys there had been no manifestation of his illness. He was now doing rather different work, spending most of his time undertaking strategic and management issues with not too much file handling. He was continuing with treatment. As to his awareness of his condition, a couple of days before he went to see Professor Green he had visited his GP and enquired as to whether he might have what he thought to be his illness and was informed that he had been diagnosed with it 20 years previously. It had been in remission during that period. He became symptomatic shortly after he became aware of the Tribunal proceedings. He had been treated very effectively and was asymptomatic save in extraordinary circumstances. He did not know why this particular file had been a problem but possibly there were some unusual factors at play with the file.

38.33 The Respondent clarified that with his delegated authority he could take over a file and progress it. The delegated authority changed from time to time. One would write a letter to the client Z but the client might not read it and if one sent off such a letter Z would reply referring to the delegated authority. The process for obtaining costs was an automated one which operated by e-mailing.

38.34 The Respondent stated that it did not make sense that the Tomlin Order indicated that the firm rather than the client would pay the costs. He did not know why he had not asked the Court to assess the costs if he thought the client had made a mistake, save that assessment cost money but he could not say that he thought about it.

38.35 As to why certain of the e-mails exchanged on 24 and 25 April 2014 were not in the firm's system, the Respondent explained that he imagined that he had worked in haste. In a case such as this where there were 18 defendants, several insurers, medical experts and GPs numerous correspondents were involved across the action. One tried to save all the e-mails into the case management system but one could not keep up. The fee earner would print off an e-mail and put it out for filing by someone else but one might not always get round to doing that.

38.36 The Respondent stated that it was a commonplace in such cases for there to be mistakes as to the identity of the companies for whom Z acted. Part of the nature of his illness was that he had become very sure of himself. He became convinced that the client had made a mistake. He did not know where that conviction came from but he was convinced that he was taking the right course of action. He looked at the file and discovered it was a mistake but did not appreciate why it happened. Even when he left the firm he did not know it was his mistake. One was dealing in these cases with things that happened 20, 30 and 40 years ago and there were difficulties in ascertaining what the insurer covered.

Tribunal's Determination in respect of allegation 1.2

38.37 The Tribunal had regard to the evidence including the witness statements and the oral evidence of the Respondent and the report of Professor Green as well as the submissions for the Applicant and for the Respondent. In respect of allegation 1.2, the Respondent admitted breach of Principles 4 and 5 but denied breach of Principles 2 and 6. He also denied breach of Outcome 1.16.

38.38 The Respondent admitted breaches of Principles 4 and 5 because he had not scrutinised the file properly or at all. His actions were clearly not in the best interests of his client and he did not provide a proper standard of service. The Tribunal found these breaches proved to the required standard on the evidence; indeed they were admitted.

38.39 In respect of the allegation of breach of Principle 2, the Tribunal had to determine if it could, at what point the Respondent became aware that he was not instructed to act in relation to D4 in order to determine whether he continued to act in the proceedings without informing his insurer client that he was incorrectly on the record. The Tribunal considered the e-mails of 3 December 2013 when AB asked the Respondent whether he was on cover for both D1 and D4 and later that same day the Respondent replied that he was on cover for D1 but had no instructions for D4. The Tribunal

found the Respondent's reply to AB's e-mail to be somewhat ambiguous; having no instructions did not necessarily mean that the Respondent was aware that his insurer client Z was not liable in respect of D4 and that he the Respondent was not therefore acting for D4. There was then the e-mail of 17 February 2014 in which Mr AB stated that the Respondent had confirmed to him prior to the Part 36 offers on 2 January and 8 January that he was only instructed on behalf of D1 and not D4. The Tribunal accepted the Respondent's evidence that he could not recall what he had said to AB and the Tribunal could not be sure beyond reasonable doubt that the e-mail was proof that the Respondent was aware at that time that he did not act for D4. On 12 March 2014, the Respondent made an application to come off the record intending that it should relate to D4 but the Tribunal found mistakenly referring to D1. At this point the Respondent certainly realised that he should not be on the record for D4.

38.40 The Respondent denied lack of integrity because he said he did not know that going on the record for D4 was a mistake which was his fault. It was puzzling as to why apparently only one of the Respondent's 90 files had been affected by confusion but the Tribunal had regard to the unchallenged medical report of Professor Green. The Tribunal accepted the Respondent's evidence that he was utterly convinced that the mistake in going on the record for D4 arose out of instructions he had received from his client and the medical evidence was such that while noting that Professor Green's opinion was given on the balance of probabilities, the Tribunal felt that it raised a reasonable doubt. The Tribunal also noted that it was not disputed that the Respondent had been diagnosed some 20 years before with a particular medical condition but no one had alerted him to it or educated him about recognising and managing its symptoms. The Tribunal also had regard to the witness statements. The Tribunal could not find proved beyond reasonable doubt that the Respondent was aware that the error regarding D4 was due to his own mistake. The Tribunal accepted that as soon as the Respondent realised that an error had been made, albeit not he believed by him, he took steps to correct it. He messed up the process but the Tribunal found that this did not amount to continuing a claim where he knew that he should not do so. The Tribunal did not therefore find proved to the required standard that the Respondent was aware before March 2014 that he was not instructed to act for D4. The Tribunal also found that because of his mistaken but very strong belief that this was his client's fault compounded by his mistaken and illogical but genuine belief that he could act under his delegated authority and settle the matter it was not proved to the required standard that the Respondent in continuing to act in the proceedings without consulting the client, involved lack of integrity. The Tribunal therefore found breach of Principle 2 not proved in the evidence to the required standard.

38.41 Having regard to breach of Principle 6, the Tribunal considered that in view of the particular factors that affected the Respondent and because no member of the public had suffered loss the public trust in the Respondent and the provision of legal services would not be affected by what the Respondent had done. The Tribunal therefore found breach of Principle 6 not proved on the evidence to the required standard.

38.42 In respect of Outcome 1.16, the Tribunal, having found that it was not proved to the required standard that the Respondent was aware that the mistake in going on the record for D4 was his fault, it could similarly not be found proved that he was aware that he had any reason to tell the client of a possible claim against him in negligence. The Tribunal noted that there was nothing which gave the Respondent in his

particular mental state any reason to doubt his conviction that the client was at fault. In correspondence with the client D4 was automatically generated at the heading because of the error in setting up the original file but no one including the client ever came back to the Respondent to point out the error. The Tribunal found failure to achieve Outcome 1.16 was not proved on the evidence to the required standard.

Tribunal's Determination in respect of allegation 1.3

38.43 The Tribunal had regard to the evidence including the witness statements and the oral evidence of the Respondent and the report of Professor Green regarding the Respondent's psychological condition, which had not been challenged by the Applicant, as well as the submissions for the Applicant and for the Respondent. It also accepted the Respondent's evidence concerning his personal circumstances and substantial work load. It was alleged that the Respondent had breached Principles 2 and 6 both of which he denied and Principles 4 and 5 which he admitted. In respect of Principle 2 it was alleged in the Rule 5 Statement that the Respondent was aware in April 2014 that at no stage of the proceedings had he been instructed to act on behalf of D4; that he was aware of this when entering into the agreement under the Tomlin Order which represented to the Court that he acted for D4. It was also alleged that in allowing the Court to order this settlement in respect of a Defendant for whom he was not instructed the Respondent failed to act with integrity. Incidentally the Tribunal rejected Mr Williams' assertion that the Respondent had exposed the client Z to financial loss (although it agreed that he had not acted in the client's best interests) because Z would have had the right to be reimbursed by the firm/its professional indemnity insurer for the Respondent's admitted negligence. This point went to the seriousness of any proved misconduct rather than to issues of proof. The Tribunal accepted the Respondent's evidence that he had a mistaken belief that his delegated authority extended to correcting what he genuinely but mistakenly believed to be his client's mistake in his being on the record for D4. The Tribunal considered it to be crucial that the e-mails of 3 December 2013 and 17 February 2014 were ambiguous and did not prove beyond reasonable doubt that the Respondent's state of knowledge that he was not acting for Z in respect of D4 was acquired significantly before he made the application to remove himself from the record in March 2014. The Tribunal considered that his mistakes in making the application showed that he was in a confused state of mind which was supported by the medical evidence. The Tribunal did not find proved beyond reasonable doubt that at the material times the Respondent realised that he had made the mistake which led to him going on the record for D4 or that he did not genuinely believe that the mistake was that of his client. In all these circumstances the Tribunal did not consider that the Respondent acted in a way that lacked integrity when viewed objectively and that breach of Principle 2 was not proved to the required standard on the evidence in respect of allegation 1.3.

38.44 In respect of breach of Principle 6, the Tribunal noted that the order did not commit the insurer client Z to anything; the Tomlin Order did not involve settlement of costs by the client but by the firm. Furthermore the Tribunal had found that the Respondent was ill, was consequently making mistakes and proceeding on the basis of genuine but mistaken beliefs while under particular pressures. As a result the Tribunal did not consider that the trust of the public in him and the legal profession would be diminished by what he had done and that breach of Principle 6 was not proved on the evidence to the required standard.

38.45 As to breaches of Principles 4 and 5 which were admitted by the Respondent, the Tribunal agreed that as a fact he had failed to act in the best interests of his insurer client and had failed to provide a proper standard of service as the client had not insured D4 and the Respondent should not have been on the record and was only on the record because of his own mistake. The Tribunal therefore found breaches of Principles 4 and 5 proved on the evidence to the required standard; indeed they were admitted.

Previous Disciplinary Matters

39. None.

Mitigation

40. Mr Allen submitted regarding the allegations which the Respondent had admitted that he did not mean to breach any Principles or Outcomes, and was not motivated by any malevolent intent or thought of personal gain. In respect of allegation 1.1 he made a mistake in respect of the name of the party he was retained to represent. In respect of allegations 1.2 and 1.3 he made a series of errors the extent of which indicated clearly that he was just not functioning correctly at the material time. This was due to his mental state, brought on by his underlying condition and triggered by the pressures upon him. Neither the firm nor the Respondent knew that he was ill. Mr Allen submitted that while the initial mistake was made in 2011, otherwise the errors all occurred within a relatively short period of time between March and April 2014. There was no evidence of any other examples of the Respondent breaching any of his obligations as a solicitor; to the contrary he was very well thought of by those who worked with him previously and by his present employers. Also, the Respondent had genuine insight as to what went wrong in this case. These proceedings caused him to become aware of the extent of his mental health issues and how to manage them. He was committed to managing them going forward – he had adopted Professor Green's recommendations – and the testimony of his current employer was that he was succeeding. The Respondent had since moved himself to a new environment where he was doing extremely well, (they described his work as "excellent") and were aware of his condition and how it needed to be managed. He was supported and had been promoted. He was now a flourishing member of the professional community.

41. Mr Allen further submitted that the misconduct in question was not planned by the Respondent and did not result in any personal gain for him. The Respondent was in a sense in a position of trust in that he was operating under delegated authority from his insurer client, but he did not deliberately breach that trust. He also considered that this case was evidence of a failure of the firm's systems and supervision procedures. No harm was caused to the insurer client – the firm later reimbursed the insurer for its outlay. Mr Allen submitted that while the firm had to bear the £6,500 costs liability to the Claimant that did not constitute loss suffered by any third party and in the particular circumstances should not be a subject for complaint by the firm. It was worthy of note that Respondent having forgotten to request funds from the insurer client to meet the costs agreement, after he left the firm his successor requested the funds, so neither the successor nor his supervisor spotted that the Respondent had done anything inappropriate. The Respondent's actions did not impact upon the public

or the reputation of the legal profession. There were no aggravating factors to the misconduct. Further, the Respondent had an otherwise exemplary record as a solicitor.

42. The Tribunal's Guidance Note on Sanctions envisaged that personal mitigation which might be relevant and might serve to reduce the nature of the sanction included 'that the misconduct arose at a time when the respondent was affected by a physical or mental illness that affected his ability to conduct himself to the standards of the reasonable solicitor. Such mitigation should be supported by medical evidence from a suitably qualified practitioner.' The Respondent relied upon the report of Professor Green in this respect, as well as his own witness statement and those of his family members; he contended that his mental illness was relevant to mitigate any breaches which were found against him.

43. Mr Allen referred to the proportionality of sanction and the words of Lord Bingham in the case of Bolton v Law Society [1994] 1 WLR 512 about the purposes of sanction:

> "There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way…The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. … A profession's most valuable asset is its collective reputation and the confidence which that inspires."

Mr Allen submitted that neither a punitive element nor any deterrence was necessary here. This was not someone who had wilfully embarked on the wrongful course of action but rather there was an unfortunate set of circumstances; this was not a case where strike off or suspension would be appropriate. There was no danger of repetition of what the Respondent had done. He had explained his position regarding his mental health issues, how he managed them and his level of appreciation of the issues and the environmental stressors which occurred perhaps not uniquely at the firm but which existed there. Mr Allen emphasised that the type and level of work that the Respondent undertook at his new firm meant that there would seem to be no prospect of a recurrence of the combination of triggering factors. He now was able to recognise his symptoms and was surrounded by others who could do the same. There was no need to sanction him in a way that would prevent repetition. As to the maintenance of the reputation of the solicitors' profession as a purpose of sanction, Mr Allen submitted that this should be linked to the Tribunal's finding that the Respondent's conduct had not adversely affected public trust in him or in the profession and so there was no need to make a stark example of him. Mr Allen submitted that these proceedings had achieved their main purpose which was to ensure that the Respondent would never be at risk of doing anything like this again. The proceedings had caused him to appreciate and understand his condition and how to manage it. Later he might realise the benefit of the proceedings to him more than he did now. The Respondent had already suffered a great deal and should not suffer further.

44. The Respondent filed a statement of means. Mr Allen provided information about the financial position of the Respondent's wife and their childcare commitments which were not reflected in the Personal Financial Statement. Mr Allen submitted that the Respondent was not in a position of penury or devoid of means but he was not wealthy with vast reserves. His statement of means showed that there was very little available cash in his household – he remained the primary breadwinner in support of a young family which was just about managing. There was little left over after regular outgoings and he could not afford a substantial fine in conjunction with a costs order. The Tribunal should also be aware that the Respondent's defence was not covered by any professional indemnity insurance. He was therefore funding his own defence of this case, which had been costly.

Sanction

45. The Tribunal had regard to its Guidance Note on Sanctions and to the mitigation offered for the Respondent and the witness statements where they went to mitigation, including the statement in support of the Respondent from his present employer. As to the seriousness of the misconduct, the Tribunal considered that this was a sad case where the Respondent had been the author of his own misfortune but he had not acted from any adverse motive and had not planned what had occurred. He was however quite a senior solicitor and had direct control over the case. The harm which had been caused appeared to be minimal and he had admitted in respect of allegation 1.1 that his conduct when he was not displaying the symptoms of his illness would have undermined public trust. Overall his conduct occurred over a period March to July 2014 and related only to one piece of litigation. In the particular circumstances the Tribunal did not think that it could say that the Respondent could reasonably have known what the effects of his actions would be. He had not in any way sought to conceal what he had done. In terms of general mitigation, it was the firm rather than the Respondent who had made good the monies due back to the insurer clients and the Respondent had not notified the Applicant of what had occurred, rather the firm did so. The Tribunal bore in mind that this was only one case occurring in an otherwise unblemished career. The Respondent had displayed a very high level of insight into what had occurred after having had the benefit of the report from Professor Green. The Tribunal considered that it was regrettable that certain of the allegations had only been withdrawn at the commencement of this hearing. The Tribunal had found itself in a somewhat unusual situation with unchallenged medical evidence but ongoing allegations of lack of integrity. This case involved a cascade of mistakes and a number of breaches of the Principles. The original mistake itself was minor but what happened afterwards was problematic. The Tribunal's Guidance Note on Sanctions gave examples of particular matters of personal mitigation which might serve to reduce the nature of the sanction and/or its severity and these included that the misconduct arose at a time when the Respondent was affected by physical or mental illness that affected his ability to conduct himself to the standards of the reasonable solicitor. Such mitigation should be and in this case was supported by medical evidence from a suitably qualified practitioner. The Respondent was quite an experienced solicitor. In respect of the admissions which had been found proved he had made prompt admissions and cooperated with the regulator. The Tribunal did not overlook that allegation 1.1 which the Respondent admitted was not affected by his illness. Overall the Tribunal considered this matter was too serious for no order or a reprimand to be imposed. The risk of harm had not been negligible and some harm

had occurred. The Respondent had admitted eight breaches of Principles and these had been found proved. Breach of Principles was a serious matter even where there was significant personal mitigation but there was no real risk to the public of recurrence or to the future reputation of the profession. The Tribunal considered that a fine of £8,000 would be appropriate. It arrived at this decision having regard to the Respondent's financial position, his continuing employment and the amount of costs agreed between the parties (see below).

Costs

46. For the Applicant, Mr Williams had submitted a schedule of costs totalling £21,354. The parties informed the Tribunal that they had agreed costs in the amount of £12,000.

Statement of Full Order

47. The Tribunal Orders that the Respondent, JOHN CONOR MACKENZIE, solicitor, do pay a fine of £8,000.00 such penalty to be forfeit to her Majesty the Queen, and it further Orders that he do pay the agreed costs of and incidental to this application and enquiry fixed in the sum of £12,000.00.

Dated this 23rd day of January 2017
On behalf of the Tribunal

A. Ghosh
Chairman