Neutral Citation Number: [2019] EWHC 2737 (Admin)

Case No: CO/2246/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/10/2019

Before:

LORD JUSTICE FLAUX
-and-
MRS JUSTICE MAY

- -

Between:

SOLICITORS REGULATION AUTHORITY	**Appellant**
- and -	
KWAME AGYEKUM SIAW	**Respondent**

- -
- -

Mr Edward Levey (instructed by **Solicitors Regulation Authority**) for the **Appellant**
Ms Althea Brown (instructed by **Birnberg Pierce Solicitors**) for the **Respondent**

Hearing date: Tuesday 8 October 2019

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Approved Judgment

Lord Justice Flaux:

Introduction

1. In this appeal under section 49 of the Solicitors Act 1974, the Solicitors Regulation Authority ("SRA") appeals against the finding by the Solicitors Disciplinary Tribunal ("SDT") in its judgment dated 17 May 2019 that the conduct of the respondent, Mr Siaw, was not dishonest. The SRA also contends that, in any event, the sanction imposed by the SDT of a £10,000 fine was excessively lenient and clearly inappropriate.

The factual background and the judgment of the SDT

2. The background facts, as essentially set out in the judgment, are as follows. The respondent is now aged 60 and was admitted to the Roll as a solicitor in 2002. At the material times he practised at The Mountain Partnership Solicitors in London SE14. He began working for the firm in June 2004, was promoted to associate in July 2005 and to partner in July 2006. He specialised in immigration law.

3. He received 60% of the fees he generated however the work came to him at the firm. In May 2014, Mr Okenla, senior partner had become unhappy because, following file reviews, he concluded that the Respondent was not working in the way Mr Okenla wished and particularly that he was not always passing payments through the firm's systems. He said in evidence that he had found at least 10 files conducted by the respondent unofficially. He confiscated the files. In one file there was £1,700 in cash, in another £200. He found £2,000 to £3,000 in total. Mr Okenla met with the respondent on 16 May 2014 to discuss his concerns and decided they should part company. He directed that the Respondent should take on no new matters and should not undertake any pro bono work without the consent of Mr Okenla (a limitation which applied to all staff). He issued a Memorandum to that effect on 19 May 2014. At the meeting he had given the respondent until December 2014 to close down his files which were over 100 in number, but the respondent did not carry out an orderly closure of files and so did not leave the firm until October 2015.

4. The respondent met Mr K, who was a Ghanaian national, in early 2015 and gave him some free advice about his immigration status. The respondent developed a social relationship with Mr K and his fiancée (to whom I will refer as Mrs K) who was a Romanian national. He was invited to their wedding which was due to take place on 1 September 2015. However, in July 2015 Mr K was detained by the immigration authorities. Whilst he was in detention, the respondent visited him with Mrs K. The matter had become urgent because Mr K was due to be removed from the UK at 23.30 on 28 July 2015. On 16 July 2015, the respondent asked the immigration authorities to forward a Letter of Authority for Mr K to sign appointing Mountain Solicitors to act on his behalf on his immigration matter. Mr K completed that Letter of Authority and it was faxed back to Mountain Solicitors.

5. The respondent then wrote letters to the Home Office on 17 and 22 July 2015 and to the Chief Immigration Officer on 22 July 2015, all on Mountain Partnership headed paper and referring to Mr K as the firm's client. A Judicial Review Claim Form was issued by the respondent on 27 July 2015 which named Mountain Partnership as Mr K's solicitors on the front page and which contained a Statement of Truth at the end

signed by the respondent as a solicitor at Mountain Partnership, Mr K's solicitors. This was sent by the respondent to the Home Office under cover of another letter dated 27 July 2015 on Mountain Partnership headed paper again referring to Mr K as "our client". In the event Mr K was released from detention on bail on about 5 August 2015.

6. It appears that up to this point there had been no discussion between the respondent and Mr and Mrs K about the fees which they would be charged for the work done, the respondent's focus being on getting Mr K released from detention. However, on 6 August 2015 a meeting took place between the respondent and Mr and Mrs K at which matters were put on a more business-like footing. The evidence of both Mr and Mrs K, which the SDT accepted in preference to that of the respondent, was that at that meeting they raised the question of fees which he had not been prepared to discuss previously. He said the fees would be £1,500 and asked for £500 on account. He gave them the details of his personal bank account and on 20 August 2015, £500 was paid by them into that account.

7. The respondent's evidence was that the £500 was paid for disbursements. The SDT accepted that the respondent had disbursed £65 on the completed EEA Form and £140 issuing the Judicial Review Claim Form but found that the respondent was unable to explain to what disbursements the balance of £295 related. At the outset of the SDT hearing the chairman had drawn attention to the Upper Tribunal (Immigration and Asylum Chamber) (UTIAC) Fees Table under which the fee for an oral hearing to reconsider a refusal on paper of permission to apply for Judicial Review was £350. Later that day the respondent gave evidence, not foreshadowed in either of his witness statements, that at some point in August 2015, but prior to 4 August 2015, when Mr K was still in detention, the respondent had attended Field House (where UTIAC sits) in person with an application for such an oral permission hearing, following a refusal on paper of the application for permission to apply for Judicial Review and that he had paid £350 in cash as the fee for that application.

8. However, the SRA conducted enquiries overnight and obtained an email from UTIAC in the morning of 3 April 2019 which stated that the solicitors for Mr K had not lodged an application for an oral permission hearing, instead the case was withdrawn and subsequently closed on 2 September 2015. The respondent was recalled for further cross-examination. He withdrew his evidence of the previous day that he had paid £350 cash for an application for an oral permission hearing and gave what the SDT found were conflicting accounts. As it found at [30.33] of its judgment, the respondent could not refute the evidence from UTIAC. The SDT did not accept his evidence that he had made an application for an oral permission hearing for which he had paid £350 cash.

9. In his evidence before the SDT (as in prior correspondence with the SRA to which we refer below) the respondent maintained that he had acted on a pro bono basis throughout and had never asked for fees, asserting that the £500 had all related to disbursements. After he was forced to withdraw his evidence about making an application for an oral permission hearing for which he had paid £350 cash he sought to say that the balance of £295 had related to taxi fares. The SDT did not accept his evidence or his account of the 6 August 2015 meeting. It found at [30.34] that he was unable to tell the SDT what the £500 was for over and above the £205 initial disbursements and that he had said he would not charge clients for taxi fares.

10. The respondent retained the £500 in his personal bank account and did not account for the sum to the firm. Mr K subsequently made a complaint to the Legal Ombudsman about the conduct of his immigration case by the Mountain Partnership. During the course of the investigation by the Legal Ombudsman, it emerged that the firm had no record of having acted for Mr K. In those circumstances, the Legal Ombudsman referred the matter to the SRA.

11. On 8 May 2017, the SRA wrote to the respondent asking a series of questions, including:

> "4. Did you receive costs from Mr [K] into your personal bank account? If so, why?
>
> 5. Have you received any money from any other clients into your personal bank account?"

12. The respondent replied on 22 May 2017, stating he was acting on Mr K's matter "…out of my heart on a pro bono basis". In answer to the specific questions, he stated:

> "4. I acted for [Client K] on a pro bono basis and used my own money to pay his fees. I did not receive cost in my personal bank account.
>
> 5. I have never received my money from client into my personal bank account."

13. In the Rule 5 Statement in the SRA proceedings commenced in September 2018, the SRA made these allegations (amended at the hearing before the SDT) against the respondent:

> "1.1 - On 20 August 2018 the Respondent having provided his personal bank account details to Client K (or Client K's wife), received £500 into his personal bank account in relation to Client K's immigration matter and subsequently failed to account for that money (or part of that money) to the firm thereby breaching all or alternatively any of Principles 2 and 6 of the SRA Principles 2011 and Rule 14.1 of the SRA Accounts Rules 2011.
>
> 1.2 In an email dated 22 May 2017 the Respondent informed the SRA that he had not received payment (of costs) into his personal bank account in relation to Client K's matter when this was untrue and/or misleading contrary to all or alternatively any of Principles 2, 6 and 7 of the SRA Principles 2011."

14. The SRA Principles 2011 provide:

> "Principle 2: You must act with integrity.
>
> Principle 6: You must behave in a way that maintains the trust the public places in you and in the provision of legal services.

> Principle 7: You must comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner."

15. Rule 14.1 of the SRA accounts Rules 2011 provides:

> "Use of a client account
>
> Client money must, without delay, be paid into a client account, and must be held in a client account, except when the rules provide to the contrary."

16. In relation to both allegations, it was alleged by the SRA that the respondent had acted both with a lack of integrity and dishonestly.

17. In relation to allegation 1.1, the SDT determined first whether Mr K was a client of the firm Mountain Partnership. At [30.31] of its judgment it found that he was, for the following reasons:

> "While the Respondent gave different accounts, there was no doubt that he and the firm were officially on the record and acting for Mr K. However that of itself did not mean that the basis of funding was not pro bono or private. The Tribunal determined that Mr K had become a client of the firm based on the following facts: he had signed an authority letter which the Respondent had prepared; the Judicial Review application named the firm and the Respondent as solicitor on the record; the Respondent signed a statement of truth; the Respondent wrote four letters relating to Mr K's case describing him as a client. The fact that the [Legal Ombudsman] found the firm was acting and awarded £340 against the firm to Mr K as compensation supported a finding that Mr K was a client. Mr K was a client of the firm in the true meaning that any solicitor, court, tribunal or client would regard Mr K as being."

18. The SDT found that this conclusion was not affected by the absence of a letter of retainer or the absence of a file; further that the prohibition by Mr Okenla on pro bono work and taking on new work was not relevant, but a partnership matter between him and the respondent.

19. At [30.32] and following the SDT went on to consider the nature of the payment of £500 into the respondent's personal bank account. It recorded the evidence which we have already summarised above, concluding at [30.34]:

> "The Tribunal found that the Respondent discussed an amount of £1,500 with Mr K and Ms I and they paid £500. The Respondent said this was repayment of disbursements. The Tribunal now knew that the disbursements consisted of £205 and a few taxis for which he said he would not ask clients. Therefore the Tribunal found that part at least of the £500 was not reimbursing the Respondent for disbursements. So even if

> part of the money was a refund of disbursements and the monies were received into the Respondent's personal bank account which was undisputed, as Mr K was a client of the firm then the Respondent should have paid the money into the firm's client account and then reimbursed himself. The Tribunal found that it did not matter if the disbursements had already been paid. If the Tribunal was wrong about that then at least the amount over and above £205 should have been paid into client account. The Tribunal therefore found breach of Rule 14.1 proved."

20. In relation to Principles 2 and 6, the SDT found at [30.35]:

> "…the Tribunal found that the Respondent might have been generous in acting initially for Mr K but he retained the £500 in his personal bank account and only now offered to refund it to whomsoever the Tribunal suggested. He had 15 years' experience of practice at that time. The Tribunal did not accept the Respondent's account of the 6 August 2015 meeting. The Respondent did not challenge the Ks' evidence about the costs figure of £1,500. The Tribunal found Mr and Mrs K's evidence to be more reliable than the Respondent's. If the Respondent was acting pro bono he would have limited his request for funds to the disbursements totalling £205. In the light of his questionable conduct the Tribunal found the Respondent failed to adhere to the higher standards which society expected from professional persons and thereby failed to act with integrity and also failed to act in a way that maintained public trust in him and the legal profession and therefore also breached Principle 6. The Tribunal therefore found allegation 1.1 proved on the evidence to the required standard."

21. The SDT then went on to consider the issue of dishonesty in relation to Allegation 1.1. It referred at the beginning of [30.36] to the allegation by the SRA in the Rule 5 Statement:

> "The Respondent was aware that he was not to take on new clients and in circumventing this decision by the firm and requesting a payment to be made directly, to ensure that he benefitted personally rather than follow his firm's accounting process, these were conscious acts by the Respondent in possession of the full facts."

22. The SDT stated that it had followed the *Ivey* test, a reference to the test laid down in the judgment of Lord Hughes JSC in the Supreme Court in *Ivey v Genting Casinos* [2017] UKSC 67; [2018] AC 391 at [74]:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice

> determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

23. The SDT then considered the respondent's knowledge and belief of the facts:

> "He knew that he had received £500 into his personal bank account having provided Mr K with his personal bank account details. Mrs K produced a redacted bank statement recording the payment. The Respondent produced no evidence but did not dispute the payment was made. The Tribunal did not doubt that the Respondent took on Mr K because of their previous warm acquaintance. From 16 to 27 July 2015 the Respondent was genuinely trying to get Mr K out of detention. There was no discussion of fees; obtaining Mr K's release was the full focus of the Respondent's activities. Mr K became a client of the firm; that was the context. On 6 August 2015 events took a different turn; the immediate emergency over, the Respondent had spent some of his own money on disbursements and when the dust settled he and the Ks discussed costs. Things changed to more of a business footing. The Tribunal found that the Respondent knew that either all or part of the money he received was costs and that he should pay it into the firm. If on his case he was not charging for the work – see his answer to question 4 [in the SRA's request of 8 May 2017] but only sought reimbursement of disbursements he should not have accepted personally a sum in excess of what he had expended."

24. The SDT then made this finding about the respondent's belief which led it to conclude that he was not dishonest applying the objective *Ivey* test:

> "However he had a deep if misguided belief that he was acting privately to help a friend and that at least part of the money was his own. He had not opened a file and not created a ledger for the work. The Tribunal found this belief and his various explanations to be muddled but genuinely held. He did not realise that what he did might potentially engage other obligations by saying Mr K was a client or what pro bono work meant; the firm acting and not charging. The Tribunal could not be sure that the Respondent acted as he did as part of a deliberate course of action to deprive the firm of what it was entitled to and in those circumstances did not consider that by the standards of ordinary decent people he was dishonest. The Tribunal did not find proved on the evidence to the required standard that he acted with dishonesty."

25. In relation to Allegation 1.2., the SDT cited the correspondence between the SRA and the respondent in May 2017, to which I have referred and the relevant evidence, to which we have also referred. It then made its Determination at [31.10]:

> "The Tribunal had regard to the evidence including the oral evidence and the submissions for the Applicant and by the Respondent. It had to determine whether the Respondent's answers to questions 4 and 5 in his email to the Applicant were evasive or simply answering what he believed he had been asked. There was also a question as to why the Respondent chose not to volunteer information to the Applicant in the email and until the first day of the hearing when he had written letters, could have informed the firm and had made two witness statements. He said in evidence that he had more than one bank account and had to ask Mr P of the Applicant how much had been paid in. The Tribunal did not find this part of his evidence convincing not least because he had provided the bank details to Mr K himself. On the basis of the facts already found by the Tribunal, that at least in part the £500 consisted of costs and that it was not disputed that money was paid into his personal bank account, what the Respondent said was untrue and misleading. The Tribunal considered that the Respondent's response to the Applicant's email fell well below the standards which society expected of a solicitor. As such the Respondent failed to act with integrity and breached Principle 2. He failed to maintain public trust breaching Principle 6 and he failed to deal with the Applicant in an open way breaching Principle 7. The Tribunal therefore found allegation 1.2 proved on the evidence to the required standard."

26. The SDT then went on to consider the issue of dishonesty in relation to Allegation 1.2, finding at [31.11]:

> "As to the Respondent's state of knowledge and belief as to the facts, setting aside procedural compliance, the answers which the Respondent gave were correct in part if he had used his own money to pay for disbursements but he had now also received an amount for costs. However the Respondent had been found not to regard that money as costs due to the firm. Also the answer might have been correct initially in the context of the relationship between the Respondent and the Ks. In the light of the Respondent's muddled state of belief in respect of the payment the Tribunal did not consider that it had been proved that he was trying to hoodwink the Applicant or that the email of 22 May 2017 was a concerted effort to mislead. In all the circumstances the Tribunal did not consider that it could be sure that by the standards of ordinary decent people the Respondent had been dishonest."

27. The SDT then set out the respondent's personal mitigation such as the fact that he had over 16 years' experience and had always conducted himself in a professional

manner. The allegations arose out of one situation, his relationship with Mr K, a misguided attempt to help a friend which he regretted. He acknowledged he had not acted with integrity. He had not intended any harm and did not believe Mr and Mrs K had suffered any harm. He hoped he would be reprimanded and given the opportunity to carry on in practice. He had an elderly relative whom he took turns looking after with other members of his family. He worked at R Spio & Co three days a week, only on immigration law, earning about £12,000 a year.

28. In determining the appropriate sanction, the SDT had regard to the Guidance Note on Sanctions 6th edition. In relation to culpability and harm, the SDT said at [35]:

> "As to culpability, the Respondent stated that his motivation was to help a friend which the Tribunal accepted. What he did was not planned in the sense of being calculated. The conduct occurred over a period of a few weeks. The Respondent had direct control over the circumstances and responsibility for them; he chose not to pay the money received into the firm and to answer the Applicant's questions as he did. He was quite experienced, a partner in the firm and its COLP when the misconduct occurred. He misled the regulator but the Tribunal had not found this to be calculated. As to the harm that resulted from the misconduct, the client had been assisted; he had complaints about the standard of service but these had been dealt with by the [Legal Ombudsman] and that was not the subject of any allegation. The loss to the client in monetary terms setting side any [Legal Ombudsman] compensation was limited to around £350."

29. The SDT continued:

> "The Tribunal considered that the reputation of the profession had suffered because of the Respondent's approach to his obligations; his lack of understanding of what he should have done. He had been found to have failed to act with integrity in two respects. It was a serious matter to accept payment of costs into a personal bank account and to fail to deal openly with the Applicant. The resulting harm to the reputation of the profession was foreseeable. As to aggravating circumstances, Mr and Mrs K were vulnerable at the material time but the Respondent did try to help them. As to mitigating factors, the Respondent had not made good any loss suffered and only offered to do so during the hearing. The conduct was of fairly short duration in an otherwise unblemished career. The Respondent seemed genuinely contrite. As to sanction, the conduct involved lack of integrity. Proper accounting for client money was a cornerstone of the profession and even where the amount involved was relatively modest, the duty remained. Full co-operation with the Applicant was also important. The matter was too serious for either no order or a reprimand but the protection of the public and of the reputation of the profession did not require suspension or strike off. The Tribunal

> determined that a financial penalty would be appropriate. The Tribunal assessed the conduct as falling into Level 3 of the Indicative Fine Bands, conduct assessed as more serious and coming above the bottom of that band. The Tribunal assessed the fine at £10,000."

The grounds of appeal

30. There were four grounds of appeal advanced by the SRA:

(1) The SDT had found that the respondent received money in respect of legal fees which he knew he should pay to the firm [30.36] and it was common ground that he did not account to the firm in respect of those monies [30.4]. Accordingly, the Tribunal made an error of law in finding that the Respondent had not acted dishonestly in relation to Allegation 1.1 and/or 1.2.

(2) Further or alternatively, the Tribunal made an error of law by applying the wrong test in relation to the issue of whether the Respondent had acted dishonestly:

(2.1) In relation Allegation 1.1, the SDT determined the issue of dishonesty by reference to whether the respondent acted as he did "*as part of a deliberate course of action to deprive the firm of what it was entitled to"* [30.36];

(2.2) In relation to Allegation 1.2, the SDT determined the issue of dishonesty by reference to whether the respondent was trying to "*hoodwink the [SRA]"* or whether the email he sent was a "*concerted effort to mislead"* [31.11];

In neither case did the issue of dishonesty depend on the Tribunal making those findings.

(3) Insofar as may be necessary, it is contended that the SDT was wrong to find that the respondent had a "deep if misguided belief that he was acting privately to help a friend and that at least a part of the money was his own" [30.36]. That finding was (a) contrary to the weight of evidence and/or (b) not one that a reasonable tribunal could have reached.

(4) In any event, in light of the findings that the respondent had acted without integrity in respect of Allegation 1.1 and Allegation 1.2, the sanction imposed by the SDT was clearly inappropriate in all the circumstances.

The applicable legal principles

31. The applicable legal principles as to the approach to be adopted by this Court to an appeal against the decision of a specialist disciplinary tribunal such as the SDT, both as regards reversal of a finding of honesty or dishonesty and as regards interference with the sanction imposed, were essentially not in issue between the parties. Those principles can be summarised relatively briefly, essentially by way of repetition of the summary of the principles in my judgment in the Divisional Court in *Solicitors Regulation Authority v Good* [2019] EWHC 817 (Admin) at [28]-[32].

32. The appeal is by way of review not rehearing: CPR 52.21(1), so that the Court will only allow an appeal where the decision is shown to be "wrong": CPR 52.21(3)(a). This can connote an error of law, an error of fact or an error in the exercise of discretion. That an appellate court should exercise particular caution and restraint in interfering with the findings of fact of a lower court or tribunal, particularly where that court or tribunal has reached those findings after seeing and evaluating the witnesses, has been emphasised time and again in the authorities, most recently in the case of the SDT by the Divisional Court (Davis LJ and Foskett and Holgate JJ) in *Solicitors Regulation Authority v Day* [2018] EWHC 2726 (Admin), where many of the authorities are usefully cited at [64] to [68] of the judgment, culminating in citation of what was said by Lord Reed in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600 as to the correct approach, at [62] and [67] of his judgment:

> "The adverb "plainly" [qualifying "wrong"] does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached….
>
> It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

33. As the Divisional Court went on to say at [69], the appropriate restraint on the part of an appellate court is still called for where the conclusion of the lower court or tribunal is not just as to the primary facts, but as to the evaluation of those facts. The appellate court should only interfere if there was an error of principle in carrying out the evaluation or for any other reason the evaluation was "wrong", in other words, was an evaluative decision which fell outside the bounds of what the court or tribunal could properly and reasonably have decided. The particular caution and restraint to be exercised before interfering with an evaluative judgment by a specialist tribunal, where that tribunal has made an assessment having seen and heard the witnesses, was emphasised in the context of the SDT by the Divisional Court in *Day* at [71] and in the context of the Medical Practitioners Tribunal ("MPT") by the Court of Appeal in the recent cases of *General Medical Council v Bawa-Garba* [2018] EWCA Civ 1879; [2019] 1 All ER 500 at [67] of the judgment of the Court (Lord Burnett CJ, Sir Terence Etherton MR and Rafferty LJ) and *General Medical Council v Raychaudhuri* [2018] EWCA Civ 2027; [2019] 1 WLR 324 at [57] per Sales LJ (as he then was) and at [74] per Bean LJ.

34. Similar restraint should be exercised by an appellate court before interfering with the sanction imposed by a specialist disciplinary tribunal for professional misconduct. That involves a multi-factorial exercise of discretion and evaluative judgment by the relevant tribunal, which is particularly well-placed to assess what sanction is required in the interest of the profession and to protect the public. It is well-established that the court will only interfere if the sanction passed was "in error of law or clearly inappropriate": see the authorities cited and summarised by Carr J at [69] and [70] of her judgment in *Shaw v Solicitors Regulation Authority* [2017] EWHC 2076 (Admin); [2017] 4 WLR 143; and see also my judgment in the Divisional Court in *Solicitors Regulation Authority v James* [2018] EWHC 3058 (Admin); [2018] 4 WLR 163 at [53]-[55].

35. Applying those principles to the present appeal, this Court should only interfere with the decision of the SDT that the respondent was not dishonest and as to the appropriate sanction if satisfied that in reaching the particular decision the SDT committed an error of principle or its evaluation was wrong in the sense of falling outside the bounds of what the SDT could properly and reasonably decide.

The parties' submissions

36. On behalf of the SRA, Mr Edward Levey focused on [30.36] of the judgment. In the first part of the paragraph (quoted at [23] above), the SDT had found that, although there had been no discussion of fees before the 6 August 2015 meeting, there was such a discussion at that meeting and the respondent had said the fee would be £1,500, asking for £500 on account. The SDT then made the crucial finding that the respondent "knew that either all or part of the money he received was costs and that he should pay it into the firm." The remainder of [30.36], beginning with the word "However" (i.e. the passage quoted at [24] above) was inconsistent with the findings the SDT had already made in [30.35] and the first part of [30.36]. On the basis of those findings, the respondent cannot have held a "deep if misguided belief that he was acting privately to help a friend and that at least part of the money was his own". The conclusion of the SDT as to that belief was in fact inconsistent with the finding of a lack of integrity in [30.35].

37. Mr Levey submitted in relation to the first ground of appeal that the crucial finding that the respondent "knew that either all or part of the money he received was costs and that he should pay it into the firm" was not consistent with the SDT then finding that he had not been dishonest. This was not honest conduct by the standards of ordinary decent people. Likewise, the finding in [31.10] that what the respondent had said in his email of 22 May 2017 in answer to the SRA's questions 4 and 5 "was untrue and misleading" was only consistent with his having acted dishonestly. The finding in [31.11] as to his "muddled state of belief", like the finding of his "deep if misguided belief" in [30.36], was inconsistent with the finding that what he said to the regulator was untrue and misleading. On the basis of the findings the SDT had already made, the findings that the respondent was not dishonest in respect of Allegations 1.1 and 1.2 were not sustainable.

38. In relation to the second ground of appeal, Mr Levey submitted that the SDT had erred in applying the *Ivey* test by seeking to bring into it consideration of the respondent's motive. Thus, in relation to Allegation 1.1 at [30.36], the SDT had said that it: "could not be sure that the Respondent acted as he did as part of a deliberate

course of action to deprive the firm of what it was entitled to and in those circumstances did not consider that by the standards of ordinary decent people he was dishonest". In relation to Allegation 1.2., the SDT had found at [31.11] that it did not consider that the respondent "was trying to hoodwink the [SRA] or that the email of 22 May 2017 was a concerted effort to mislead" and in those circumstances it did not consider it could be sure that by the standards of ordinary decent people, the respondent had been dishonest. Mr Levey submitted that in each case the SDT had sought to bring into the *Ivey* test consideration of the respondent's motive or intention, which was not relevant. Whatever his motive or intention had been, his conduct had been dishonest.

39. Mr Levey submitted in relation to the third ground of appeal that if need be the Court should go so far as to set aside the findings about the "deep if misguided belief" or "muddled belief" for five related reasons:

(1) It was impossible to see how the respondent could have thought he was acting privately when he was writing letters on behalf of the firm on its letterhead and signing the Statement of Truth on the Judicial Review Claim Form. His explanation that he was still acting privately and pro bono but needed to use the firm letterhead to convince the Home Office he was serious was simply not credible.

(2) The findings were totally inconsistent with other findings made by the SDT, specifically: (i) as to what happened at the 6 August 2015 meeting, that he had said the fee for the work was £1,500 and that he wanted £500 on account and (ii) that the respondent knew he was supposed to pay that money to the firm because it was the firm's money.

(3) In determining that he had this "deep if misguided belief" the SDT had made no proper attempt to assess the respondent's credibility in the light of the other evidence, specifically: (i) his maintenance throughout that he was acting pro bono and had never asked for money whereas the SDT found that he had asked for £500 on account, from which it followed that everything he had said about this was untrue and (ii) his evidence on day 1 of the hearing about having gone to Field House to apply for an oral permission hearing and paid the tribunal fee of £350 in cash, evidence which he had had to withdraw on day 2 when it was found that what he had said was untrue.

(4) The SDT had failed to appreciate the significance of Mr Okenla's evidence which was significant for two reasons: (i) the existence of the 10 off the books cases he found demonstrated that the respondent had "form" and should have led the SDT to query whether he could have had this deep if misguided belief given that he had been acting improperly and (ii) it went to the respondent's credibility as it demonstrated he was doing the very thing Mr Okenla had told him not to do.

(5) It was impossible to see how the findings of the SDT in [30.35] and [31.10] as the lack of integrity of the respondent could stand in the light of the findings that he was not dishonest. As the decision of the Court of Appeal in *Solicitors Regulation Authority v Wingate* [2018] EWCA Civ 366; [2018] 1 WLR 3969 emphasises, integrity is not about competence but moral standing.

40. In relation to all the first three grounds of appeal, Mr Levey recognised that, applying the legal principles to which I have referred, the Court should only interfere when the SDT had gone plainly wrong, but he submitted that it had done so in at least two of the respects identified by Lord Reed in *Foxworth*: it had made findings as to the respondent's deep if misguided belief and muddled belief which had no basis in the evidence or those findings demonstrated a failure to consider relevant evidence. In relation to the second ground there was an error of law in relation to the application of the *Ivey* test, in that the respondent's motive was not relevant.

41. If the appeal succeeded on any of the first three grounds, the Court should make a finding of dishonesty, in which case the appropriate sanction was striking off the Roll. There were no "exceptional circumstances" warranting a different sanction. None of the points made by Ms Althea Brown on behalf of the respondent came anywhere near establishing such exceptional circumstances. In particular: (i) the submission that the respondent was seeking to help a friend was not open to him on the SDT's findings about the position at and after the meeting on 6 August 2015; (ii) that he was seeking to wind down his practice and leave the firm only made it worse because the context in which he was leaving was that Mr Okenla was not happy about his 10 off the books cases; (iii) that there was no harm to the client was incorrect as the money not being in the client account was potentially harmful; and (iv) it was said that the firm had only lost the benefit of some £100 given the respondent's profit share so that the amount involved was very small. Mr Levey disputed the mathematics but submitted that the case was more serious than this submission suggested. Since the respondent was a man who was prepared to lie to the regulator, striking off was the only appropriate sanction.

42. The fourth ground only arose if the Court concluded that the SDT had not been wrong to find that the respondent was not dishonest, so that the issue was the appropriate sanction for lack of integrity in the two respects found by the SDT. Mr Levey submitted that the sanction imposed by the SDT of a fine of £10,000 fell outside the bounds of what the SDT could properly and reasonably decide, justifying the Court in interfering with its decision. He drew attention to that part of the famous passage from the judgment of Sir Thomas Bingham MR in *Bolton v Law Society* [1994] 1 WLR 512 at 518-9 which at 518D-E dealt the sanction for lack of integrity:

> "If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking off order will not necessarily follow in such a case, but it may well. The decision whether to strike off or to suspend will often involve a fine and difficult exercise of judgment, to be made by the Tribunal as an informed and expert body on all the facts of the case. Only in a very unusual and venial case of this kind would the Tribunal be likely to regard as appropriate any order less severe than one of suspension."

43. Mr Levey also drew attention to the statement slightly later in this passage that the most fundamental purpose of the sanction imposed is: "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." As the judgment continues at 518H:

> "To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires."

44. Mr Levey referred the Court to [25]-[26] of the judgment of Moses LJ sitting in the Divisional Court with Burnett J (as he then was) in *Solicitors Regulation Authority v Emeana* [2013] EWHC 2130 (Admin), which emphasised that even in cases of lack of integrity where dishonesty was not proved, striking off may well be the appropriate sanction in order to protect the reputation of the profession. He submitted that, given that the SDT had found a lack of integrity in two respects involving handling of client money and misleading of the regulator, the sanction of a fine was far too light and striking off or at the very least a period of suspension was the appropriate sanction.

45. On behalf of the respondent, Ms Althea Brown emphasised the great care and attention with which the SDT had approached the evidence and the fact that it had produced a rational and well-reasoned judgment. Its starting point had been that it accepted that the respondent had been in an exceptional situation, in that he believed he was helping a young couple who were planning to get married. It had looked at the matter in real life terms and had not hesitated to criticise the respondent when appropriate.

46. She submitted that the criticisms levelled by the SRA against the respondent in the third ground of appeal were not entirely fair. The evidence of Mr Okenla did not establish that the respondent had "form" for paying client monies into his personal bank account. Whilst he had acted irregularly, in that the files contained cash not put in the client account he had not paid monies into his own account. By the time of the SDT hearing, he had left the firm and did not have access to the files, so that he did not have an opportunity to defend himself by reference to contemporaneous documents. If Mr Okenla had been genuinely concerned that the respondent was of such a character that there were risks in respect of client monies, he would have acted more urgently. The SDT had been correct to approach this part of the evidence in the way it did, particularly in the last sentence of [30.29]. The absence of a challenge by the respondent to these allegations was not probative or determinative of his culpability in relation to those previous transactions.

47. In relation to the issue of the disbursements to which the £500 related, at the time when the respondent gave evidence about making the application to UTIAC for an oral permission hearing and paying £350 cash, he had said that he would have obtained a receipt which would have been on the file but he was hampered by not having access to the file. He was giving evidence about this nearly four years later.

The SDT had seen him struggling to try and explain what had occurred and was entitled to form the judgment that he had not been dishonest.

48. Whilst Mr Levey had suggested that the SDT had in effect struggled not to make a finding of dishonesty against the respondent so that he would not be struck off, another explanation which Ms Brown submitted was more plausible was that, whilst the SDT accepted there had been deep flaws in the way in which the respondent had conducted himself, it had been satisfied that the failings it found were not such as to attract the ultimate censure of a finding of dishonesty. Whilst the respondent may have done the work very badly he had done it with the intention of assisting Mr and Mrs K. There was a sense in which he believed that he was entitled to the £500.

49. In answer to questions from the Court as to how, in the light of the unqualified findings the SDT made that the respondent: "knew that either all or part of the money he received was costs and that he should pay it into the firm" and that his answers to the SRA questions were "untrue and misleading", all of which pointed to dishonesty, the SDT could have found he was not dishonest, Ms Brown submitted that there may have been a lack of explanation of the SDT's reasoning. Even if the Court found that troubling, in the context of what was otherwise a very careful decision, the Court should not be discouraged from concluding that the decision should be allowed to stand. She emphasised the powerful authorities culminating in *Day* to which we have referred above, urging caution on the part of the Court before it interfered with findings of fact and evaluations by specialist tribunals.

50. Even if the Court considered that it should set aside the SDT's findings that the respondent was not dishonest and substitute findings that he was dishonest, Ms Brown submitted that it was not appropriate to impose the sanction of striking off because of exceptional circumstances. I have already noted the matters on which Ms Brown relied as amounting to exceptional circumstances at [41] above, when summarising Mr Levey's submissions. She submitted that it would be disproportionate to strike the respondent off given the modest amount involved and that he had acted with the best intentions but handled the matter badly. She urged the Court to remit the matter to the same SDT to determine the appropriate sanction which would not inevitably be striking off.

51. If the Court did not interfere with the finding of the SDT that the respondent was not dishonest, she submitted that it should not interfere with the sanction imposed given the need to accord special respect to the judgment of a profession decision-making body such as the SDT, citing Laws LJ in *Fatnani & Raschid v General Medical Council* [2007] EWCA Civ 46 at [19]. If the Court thought the SDT had erred in the sanction imposed, the matter should still be remitted to the same SDT for reconsideration.

Analysis and conclusions

52. I am acutely aware of the need for considerable circumspection on the part of an appellate Court in overturning a finding by a specialist tribunal of honesty and substituting a finding of dishonesty. This has been emphasised by all the authorities referred to above and, in particular by the recent decision of the Court of Appeal in *Raychaudhuri*, where the decision of the judge in the Administrative Court reversing the decision of the MPT and finding dishonesty, was itself reversed by the Court of

Appeal. The same points have also been made recently by the Divisional Court in *Day.*

53. However, the law is clear that where the appellate Court identifies errors of law or of principle in the approach of the tribunal to its finding of honesty or that finding is outside the bounds of what the tribunal could properly and reasonably decide, the Court can and should interfere.

54. In the present case, I am clearly of the view that there are errors both of law and of principle in the SDT's approach to the issue of honesty or dishonesty, essentially as identified by Mr Levey. My reasons for reaching that conclusion are as follows. First, I agree with Mr Levey in relation to Allegation 1.1 that the clear finding made by the SDT at [30.36] that the respondent: "knew that either all or part of the money he received was costs and that he should pay it into the firm" is only consistent with a conclusion that his retention of the money was dishonest. The SDT's finding as to his "deep but misguided belief" and indeed the whole of the second half of [30.36] beginning with "However" (as quoted at [24] above) is inconsistent both with the finding that he "knew that either all or part of the money he received was costs and that he should pay it into the firm" and with the findings made as to Mr K being a client of the firm and as to what happened at the meeting on 6 August 2015.

55. At [30.31] the SDT found that Mr K was a client of the firm, rejecting the respondent's case that he had been acting privately for Mr K. Then at [30.34] the SDT found, accepting the evidence of Mr and Mrs K and rejecting that of the respondent, that at the meeting on 6 August 2015 he told them the fee for the work on the immigration matter was £1,500 and he wanted £500 on account. In the light of those findings, whatever the position might have been before the meeting, after the meeting when, as the SDT found, the respondent "knew that either all or part of the money he received was costs and that he should pay it into the firm", the respondent simply cannot have held the deep but misguided belief that he was acting privately to help a friend or that some of the money was his own. The later findings as to the lack of dishonesty are simply inconsistent with those earlier findings.

56. Second, I agree with Mr Levey in relation to Allegation 1.2 that the finding at [31.10] that the answers given by the respondent to the SRA's questions 4 and 5 were "untrue and misleading" is an unqualified finding that he had lied to and misled the regulator. There is no question of there being some lack of explanation of the reasoning of the SDT, as Ms Brown suggested, so that what the SDT was really trying to say was that the respondent had inadvertently or carelessly misled the regulator. If that analysis were correct, it would be inconsistent with the SDT's finding that there was a lack of integrity on the part of the respondent. As Rupert Jackson LJ pointed out in his judgment in *Wingate* at [97] and [100], integrity involves adherence to the higher standards of professional behaviour required of the relevant profession as the SDT's findings of lack of integrity in [30.35] and [31.10] expressly recognise. To have acted inadvertently or even negligently would not amount to a lack of integrity. As Rupert Jackson LJ recognised at [105]-[106] of *Wingate*, manifest incompetence is not the same thing as lack of integrity.

57. Third, following on from that last point, the findings made as to the misguided belief and the muddled belief at [30.36] and [31.11] are totally inconsistent with the earlier findings of lack of integrity in relation to both Allegations. It is difficult to see how, if

the respondent had really had the mistaken belief found by the SDT that he was acting privately for a friend and that some of the money was his own, the SDT could have found lack of integrity proved against him to the requisite standard.

58. Fourth, given that the SDT seems in each case to have reached its conclusion that the respondent was not dishonest because it considered that he had not engaged in a concerted course of action to deprive the firm of its money or a concerted effort to mislead or hoodwink the regulator, the SDT has determined the issue of dishonesty at least in part by having regard to the respondent's motive for doing what he did. That sets the bar too high or places an impermissible and irrelevant gloss on the *Ivey* test, which may be why the SDT reached the conclusion it did. Given its finding as to the knowledge of the respondent that all or part of the money was costs due to the firm which should be paid into the client account, if the SDT had simply applied the objective *Ivey* test and asked itself whether his conduct of receiving the money in his personal account and retaining it there with that knowledge was conduct which ordinary decent people would regard as dishonest, in my judgment that would only allow for an affirmative answer.

59. Likewise the unqualified finding that the answers which the respondent gave to the questions from the SRA were "untrue and misleading" is only consistent with the respondent having been dishonest by the standards of ordinary, decent people. In going on to find at [31.11] that he was not dishonest because it had not been proved that he was trying to hoodwink the SRA or that his answers to the question were a concerted effort to mislead, the SDT placed the same irrelevant and impermissible gloss on the *Ivey* test by reference to the respondent's motive.

60. Fifth, I consider that the findings in [30.36] and [31.11] as to the deep but misguided belief or muddled belief of the respondent should be set aside essentially for the reasons given by Mr Levey. They are findings which have no basis in the evidence, in the sense that they are totally inconsistent with the evidence. Any suggestion that the respondent believed that he was acting privately to help a friend is belied by the contemporaneous documents: (i) the letter of authority he got Mr K to sign authorising the firm The Mountain Partnership to act on his behalf; (ii) the letters he then wrote on the firm's letterhead to the Home Office and the Chief Immigration Officer. The suggestion that this was done so that the recipients would take him seriously is simply not credible and in any event would involve the respondent in misleading the Home Office and the Chief Immigration Officer by describing Mr K as a client of the firm; (iii) the issue of the Judicial Review Claim Form identifying the Mountain Partnership as Mr K's solicitors with a statement of truth signed by the respondent as a solicitor at the Mountain Partnership. If he had been acting privately that statement of truth would have been a complete lie.

61. There were a number of pieces of evidence which cast considerable doubt on the respondent's credibility, but which the SDT did not properly evaluate. The 10 off the books files discovered by Mr Okenla, some of which contained cash, may not have demonstrated that the respondent had "form" for paying into his own bank account monies which he knew were the firm's monies, so to that extent Ms Brown is right, but they do show he had "form" for acting irregularly, creating or working on files which did not go through the firm's books. Further, in acting as he did in relation to Mr K, he acted contrary to the express instruction of his senior partner not to take on any new work.

62. I have read carefully the passages in the respondent's evidence, to which Ms Brown drew our attention, where he said on day 1 that he had gone to Field House to lodge an application for an oral permission hearing and paid the tribunal fee of £350 in cash and then on day 2 had to withdraw that evidence because overnight it had been established with UTIAC that no such application had been made. This evidence did him no credit. Contrary to Ms Brown's submissions, in my judgment what the passages demonstrate is not a witness who was struggling to remember events four years previously, but a witness who had been caught out telling an untruth, having alighted on the £350 fee as a convenient justification for his assertion that the whole £500 was disbursements, and who was desperately trying on day 2 to come up with an explanation for the untruth on day 1, but could not do so.

63. Whatever the position before the 6 August 2015 meeting (and the weight of the evidence to which I have just referred belies any suggestion that the respondent believed he was acting privately pro bono to help a friend), the SDT's findings that, at the meeting, he said the fee would be £1,500 and asked for £500 on account and that he knew that either all or part of the money he received was costs and that he should pay it into the firm, are wholly inconsistent with his having had the alleged misguided or muddled belief after the meeting on 6 August 2015. In my judgment the findings about that belief are unsustainable and should be set aside.

64. Accordingly, I would set aside those findings and the conclusions flowing from them, in the last sentence of each of [30.36] and [31.11], that it had not been proved to the required standard that the respondent was dishonest. I would substitute for them a finding that the respondent was dishonest in both respects alleged in the Rule 5 Statement as amended and that such dishonesty was made out beyond reasonable doubt.

65. So far as the sanction for such dishonesty is concerned, the only appropriate sanction is striking off the Roll, unless "exceptional circumstances" are demonstrated. In considering whether there are "exceptional circumstances" in any given case, the principal focus is on the nature and extent of the dishonesty and the degree of culpability: see *Solicitors Regulation Authority v James* at [48]. In my judgment, this is a matter to be assessed and determined by this Court. In the light of my conclusion that the SDT erred in law and in principle in its assessment as to the respondent's honesty, it would not be appropriate to remit the matter to the SDT to determine the appropriate sanction, as Ms Brown suggested.

66. Given the conclusion I have reached in relation to the dishonesty of the respondent, this case involves dishonesty in two respects: in retaining money in his personal bank account which he knew was money which should be paid into the firm's client account and in lying to the regulator. Whilst, as Ms Brown submitted, the amount involved may have been "moderate", any dishonesty involving handling of client money is serious and in this case was aggravated by the fact that the respondent was prepared to lie to and mislead the SRA in his answers to their questions in their investigation of his conduct. The continued resort to the submission that he was only trying to help a friend is, as Mr Levey correctly submitted, not open to the respondent in view of the SDT's findings as to the position at and after the meeting of 6 August 2015.

67. In my judgment, none of the matters relied upon by Ms Brown amounts to exceptional circumstances. This was serious dishonesty for which the only appropriate sanction is striking off, given the fundamental purpose of the sanction, to maintain the reputation of the solicitors' profession. That sanction is not, as Ms Brown suggested, disproportionate.

68. In these circumstances, given that the appeal on Grounds 1 to 3 will succeed, it is not strictly necessary to deal with Ground 4, but since it was fully argued, I will deal with it, albeit more briefly than the other Grounds. In my judgment, even if the respondent was not dishonest, but only guilty of the lack of integrity found by the SDT, the sanction of a £10,000 fine was excessively lenient and clearly inappropriate, so that the Court should intervene and quash that sanction, substituting the sanction of striking off the Roll.

69. I have reached that conclusion for a number of reasons. First, the assessment by the SDT that the respondent's conduct was only sufficiently serious to attract the sanction of a fine downplays significantly the seriousness of the lack of integrity. Allegation 1.1 concerned proper accounting for client money and, as the SDT recognised at [35]: "Proper accounting for client money was a cornerstone of the profession". Failure to account properly for client money, however modest the amount involved, erodes confidence in the profession. The SDT states at [35] that: "The conduct was of fairly short duration in an otherwise unblemished career". That seems to me to overlook two matters. First, Allegation 1.2 involves the lack of integrity in giving untruthful and misleading answers to the SRA in May 2017, nearly two years after the conduct in Allegation 1.1. This is not only, as I have said, a matter which aggravates the lack of integrity covered by Allegation 1.1, but points to conduct amounting to a lack of integrity over a longer period. Second, it overlooks the 10 off the books files which had led Mr Okenla to ask the respondent to leave the firm and to give him express instructions not to take on any new work, which he then disregarded in taking on Mr K as a client. Whilst he was not charged by the SRA in relation to the 10 files and I have well in mind Ms Brown's point that, accordingly, the respondent did not have a full opportunity to provide an explanation for that conduct, that conduct does demonstrate that the lack of integrity that this case entailed was not an isolated incident and that his career was perhaps not so unblemished as the SDT appears to have thought.

70. Second, whilst it is correct that *Emeana* is not authority for the proposition that whenever the SDT makes a finding of lack of integrity the appropriate sanction is striking off, it is authority for the proposition that where the lack of integrity is particularly serious, as it is in the present case, the reputation of the profession is seriously undermined by the imposition of fines and that reputation will only be properly protected in such a case by the sanction of striking off: see per Moses LJ at [28] and [35]. As he said in the latter paragraph:

> "I acknowledge that the sanctions I propose in relation to all three of these respondents are the most severe which can be imposed. But I cannot see how the integrity of the profession can be upheld by the imposition of lesser sanctions. I do not believe that the public would find it acceptable that those who have behaved in this way should be allowed to act as solicitors."

71. Accordingly the sanction imposed by the SDT here of a fine was wrong in principle and excessively lenient and the sanction should have been striking off the Roll. In those circumstances, if it were necessary to decide Ground 4, I would allow the appeal on that Ground as well.

Conclusion

72. For the reasons given in this judgment I would allow the appeal of the SRA on Grounds 1 to 3 and substitute for the findings in [30.36] and [31.11] of the judgment of the SDT a finding that the respondent was dishonest and that the allegations of dishonesty made against him in the Rule 5 Statement as amended were proved beyond reasonable doubt. I would therefore quash the sanction of a £10,000 fine and substitute for it the sanction that the respondent be struck off the Roll of Solicitors. In the circumstances, it is not necessary to decide Ground 4, but were it necessary I would allow the appeal on that ground and quash the sanction of the fine and substitute for it the sanction that the respondent be struck off the Roll of Solicitors.

Mrs Justice May

73. I agree.