Neutral Citation Number: [2017] EWHC 835 (Admin)

Case No: CO/3223/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/04/2017

Before :

MR JUSTICE MOSTYN

- -

Between :

John Michael Malins	**Applicant**
- and -	
Solicitors Regulation Authority	**Respondent**

- -
- -

Fenella Morris QC (instructed by **RadcliffesLeBrasseur**) for the **Applicant**
Geoffrey Williams, QC (instructed by **SRA**) for the **Respondent**

Hearing date: 4 April 2017

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Approved Judgment

Mr Justice Mostyn:

1. The appellant was admitted as a solicitor in 2001. He came to specialise in construction law. He enjoyed an unblemished career. Prior to 1 May 2013 he was a partner in Bond Pearce LLP. On that date Bond Pearce merged with Dickinson Dees and became Bond Dickinson LLP. Following the merger, the appellant became a partner in the new firm. On 21 April 2016, the Solicitors Disciplinary Tribunal ("SDT") found the appellant guilty of dishonesty and of acting without integrity and struck him off the roll. This is my judgment on the appellant's appeal against that decision. It is agreed that this judgment will be confined only to the appeal against conviction. If it fails, then his appeal against sentence will be considered later.

2. In early 2012 the appellant started acting for a new client, Stephen Shirley, concerning a dispute about building works at Mr Shirley's family home in Kent. Mr Shirley wished to make a claim against a company called STMC which had supervised those works. STMC instructed Hill Dickinson. From early 2012 the appellant corresponded with Hill Dickinson to see if the dispute could be resolved without the need for litigation. However, it was clear that if the matter did become litigious that Mr Shirley would need third-party funding and after the event ("ATE") insurance cover against adverse costs liability. There is no dispute that the appellant told Hill Dickinson in November 2012 that ATE insurance would be taken out if the case was not settled.

3. On 1 May 2012, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 received Royal Assent. Section 46 provided that a costs order made in favour of a party to proceedings who has taken out an ATE policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy. By the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5 and Saving Provision) Order 2013 (S.I. 2013 No. 77), made on 18 January 2013, this section was to come into force on 1 April 2013. Thus, the cost of such premiums in respect of ATE policies taken out after 1 April 2013 would no longer be recoverable in a costs order. But, if the policy had been taken out before 1 April 2013 then by virtue of section 46(3) the premium cost of an ATE policy would remain recoverable. However, under the terms of the (pre-1 April 2013) CPR PD 44 para 19.3(a) and (b) and (pre-1 April 2013) CPR 44.3B(1)(c) the premium cost would only be recoverable provided that a notice in Form N251 had been served on the other party and had been filed with the court. If the notice had not been filed with the court before 1 April 2013 then on an application for relief from sanctions there would be scope for the court to treat a late filing as having been made in time. However, if the notice was not served on the other side then that would be a fatal omission. In such a circumstance the premium cost could not be recovered in a costs order.

4. On 13 March 2013 Mr Shirley received an offer for ATE insurance cover for a costs liability up to £421,682.94 for which a premium of £181,682.04 was payable. On 19 March 2013 Mr Shirley accepted the offer in writing, and later (although I do not know when) paid the premium.

5. The appellant's case was that he was positive that he had sent a copy of the form N251 to his opponent on 19 March 2013. It is not his case that he believed that the form was filed by him at court. His case is that he believed that his assistant Mr

Tucker had done so. As explained above that latter omission would not necessarily have been fatal; in contrast, had the appellant failed to send a copy of the form to his opponent before 1 April 2013 then the premium cost could not have been recovered from the other side in a costs order.

6. 1 April 2013 came and went. In May 2013 a claim form was issued. As the case progressed the appellant periodically mentioned to his opponent the existence of the ATE cover for tactical reasons. The case developed normally with pleadings, disclosure and witness statements. A mediation was fixed for January 2014. At the mediation Mr Cooper of Hill Dickinson mentioned for the first time that notice of ATE cover had never been received by him. The appellant was not unduly concerned by this, he says, because he was sure that he had sent it. A Part 36 offer was made by the defendant which was accepted by Mr Shirley on 14 March 2014. That carried with it an entitlement to costs. As explained above, if Form N251 had not been sent to Hill Dickinson before 1 April 2013 then the premium cost would not be recoverable. The appellant was told by his assistant Mr Tucker that he had forgotten to file the Form N251 at court.

7. Following these revelations, the appellant hunted high and low to see if he could find the Form N251 and the covering letter that he was sure he had sent to Hill Dickinson on 19 March 2013. He could not find them. He says that following the merger some files referable to the case, both in hard and soft copy, had gone missing. He asked Mr Cooper's superior at Hill Dickinson, Mrs Grant, whether she would check her files to see if the form and the covering letter were there. There were a number of conversations between the appellant and Mrs Grant about the missing form. Mrs Grant agreed to check her files. However, it became clear to the appellant that Mrs Grant was too busy to attend to this assiduously.

8. On 2 May 2014, the appellant commenced the course of conduct which led to him being struck off.

9. At 11:40 on that day the appellant downloaded onto his workstation a blank, but fillable, Laserform template of Form N251. He did not work on it at that time – it was only open for a matter of seconds. At 11:52 he opened an old Bond Pearce letter (I remind myself that the firm merged with Dickinson Dees and became Bond Dickinson on 1 May 2013). He modified this old Bond Pearce letter over a 14 minute period ending at 11:57. During that period he printed it three times. What he was doing was to create a letter dated 19 March 2013 addressed to Hill Dickinson which stated the following:

> "Dear Sirs,
> **Stephen Shirley v STMC**
> Please find enclosed a notice of funding confirming the details of the ATE insurance that has been taken out in respect of our client's claim.
> A copy of the notice will be filed at court in due course, as necessary.
> Yours faithfully
> Bond Pearce LLP "

10. At 16:25 the appellant returned to the document and finalised it over the course of a minute. He then printed it.

11. He then turned at 16:26 to the downloaded Form N251. He worked on this for just under five minutes. The boxes that were filled in merely gave details of the policy which was issued on 13 March 2013. That was then printed.

12. The appellant then signed the printed copy of the letter and signed and dated the printed copy of the form N251. The signed documents were then scanned and converted into PDF format. That must have taken a few minutes.

13. The appellant then at 16:40, that is to say 14 minutes after the documents were printed (and, one assumes, perhaps seven or eight minutes after they had been scanned) sent an email, attaching the two PDFs, to Sarah Grant in these terms:

> "Without prejudice
> Sarah,
> Further to our conversation earlier this week, I attach a copy of our correspondence last year with notice of funding.
> The other point which we should have made clear in our last letter is that our client is also entitled to interest on their costs, but this has been waived for the purposes of their settlement offer.
> I know you are away until 8 May, but can we speak by the end of next week to confirm whether your client accepts our client's offer in relation to costs.
> Regards
> John"

14. Hill Dickinson maintained the position that the Form N251 had not been filed and so the premium cost was not recoverable. They made a Calderbank offer in respect of costs which did not include the premium cost.

15. On 21 July 2014, the appellant wrote a letter, which he accepts that he signed, which made a counter-offer. In that letter it was stated:

> "In respect of the ATE premium our client maintains they are entitled to the full payment of the ATE premium in the sum of £181,682.94. The form N251 was sent to your firm as we have evidenced. Further, the funding arrangements for the case were discussed with your firm throughout the progress of the litigation. Therefore, we maintain that you and your client should have been well aware of the ATE insurance in place for this case"

16. By this stage the matter had been passed to the costs team. On 14 August 2014 a letter was sent to Hill Dickinson. It was drafted by the costs team, but under the appellant's reference and email address. It stated:

> "There is still the outstanding issue of the ATE premium paid by our client in relation to this claim and which forms part of

> our client's costs of the claim. We understand that your argument to justify not paying the full ATE premium is that you consider that you were not properly notified of our client's funding arrangements. We maintain that this is fundamentally incorrect for the reasons set out below.
>
> - Primarily, you were notified by way of Form N251 of the existence of ATE insurance in compliance with court rules. The form was sent you on 19 March 2013. A copy of the letter and notice is (sic) funding is attached. We cannot see that this is anything other than proper notification to you and your client of the existence of the ATE policy, notwithstanding any arguments that you may raise about receipt of that notification. …"

17. Although Hill Dickinson had made an offer to pay 50% of the premium cost this was not accepted. I do not know how the issue was ultimately resolved. I assume that nothing was in fact paid in relation to the premium cost, but that this was reimbursed to Mr Shirley under the firm's professional indemnity insurance.

18. In June 2014, the appellant had notified the firm that there existed a circumstance which might give rise to a claim under the firm's professional indemnity policy as a result of the failure to file the Form N251 at court. This led to the firm reporting the matter to the SRA on 24 October 2014. On 4 November 2014 the appellant made a self-report to the SRA. In it he stated:

> "… on 2 May 2014 I created a backdated Form N251 in relation to the litigation proceedings against STMC Building Control Ltd and also a letter and sent the letter and the form to Hill Dickinson stating that the form had been sent to them in March 2013. I created a covering letter dated 19 March 2013 which said I had issued the form N251.
>
> I considered that Hill Dickinson were well aware of the funding arrangements in the case, including the ATE premium. I had discussed the funding arrangements with Hill Dickinson at various points throughout the case and they did not argue that the Form N251 had not been served until the mediation in January 2014. This is obviously no excuse for my conduct
>
> I accept that I made subsequent false representations in relation to the letter and Form N251 to Hill Dickinson and to the client. This was totally unacceptable and the creation of those documents was a total aberration on my part of which I am ashamed. I created the documents myself and no one else at the firm was involved in creating the documents.
>
> It is clear to me now that I was not thinking clearly in any way for a variety of reasons, but I think that I foolishly believed that I could improve my client's position and disguise our oversight by sending these letters in the hope that the defendant would

> not argue any further about payment of the ATE premium which I believe they were well aware of from my discussions with them. I cannot believe now that I made such a foolhardy decision.
>
> I did something initially very stupid, driven to an extent by other pressures on me at that time, and found it difficult to turn back. I knew I would need to address this issue at some stage and it was a relief to me when the firm identified the issue and raised it with me, so that the issue can be resolved with the client and with the defendant's solicitors.
>
> I have cooperated fully with the investigation by the firm and am assisting with the resolution of the matter.
>
> I am willing to apologise in person to the client, to the defendant's solicitor and anyone else who has been affected by this incident as I fully appreciate that this is not the conduct or behaviour to be expected of a solicitor.
>
> I have never come close to even considering doing anything like this before and have always been clear and honest with my clients. I believe that my honesty is one of the things that my clients really appreciate about me and my approach to their work and the advice that I give. I have not had a complaint from a client in 15 years as a solicitor, including five years as a partner.
>
> There were a range of personal circumstances and circumstances at work which placed me under very significant stress in the first 6 – 9 months of this year. I am not seeking to use these issues as an excuse for my conduct but I would be happy to discuss them with the relevant SRA relationship manager as they may put this situation in some context and also represent a set of circumstances which I have never come across in my professional career. I have learned from this very serious mistake. One of the key lessons for me is that I must ask for help when I become aware that there is a risk that personal pressures and work pressures might affect my judgment at work. I can make a very clear assurance that I will never make such a serious mistake again."

19. The matter was referred by the SRA to a disciplinary tribunal.

20. The charges are set out in a document known as a rule 5(2) statement. This states:

> "The respondent:
>
> 1.1 Created a Form N251 (notice of funding) on 2 May 2014 which he backdated to 19 March 2013, in breach of Principles 2 and/or 6 of the SRA Principles 2011.

> 1.2 Created a covering letter for a notice of funding on 2 May 2014 with a date of 19 March 2013, in breach of Principles 2 and/or 6 of the SRA Principles 2011
>
> 1.3 Relied on and/or acquiesced in others as his firm relying on the backdated documents mentioned above from 2 May 2014 until on or around October 2014, as evidence in support of his position when seeking to favourably negotiate a settlement with his opponent in litigation, in breach of Principles 1 and/or 2 and/or 6 of the SRA Principles 2011
>
> 1.4 Dishonesty is alleged in relation to allegations 1.3 set out above. Whilst dishonesty is alleged with respect to this allegation, proof of dishonesty is not an essential ingredient for proof of any of the allegations."

21. Principle 1 of the SRA Principles 2011 states "you must uphold the rule of law and the proper administration of justice". Principle 2 states "you must act with integrity". Principle 6 states "you must behave in a way that maintains the trust that the public places in you and in the provision of legal services".

22. I am told that in contrast with the Bar Code of Conduct the SRA Principles do not contain an explicit requirement that a solicitor must behave with honesty.

23. The disciplinary tribunal found the appellant guilty of all charges. I will analyse its reasoning later in this judgment.

24. It can be seen that the charges as framed accuse the appellant of dishonesty in relation to the deployment of the documents created on 2 May 2014 but not in relation to their creation, which as I have explained above must have occurred about seven or eight minutes before they were first deployed. In relation to their creation the appellant was accused of acting without integrity but not with dishonesty. This is intellectually virtually impossible to understand, and led to great confusion in the proceedings before the tribunal which has led me to conclude that the case must be retried.

25. Before I turn to the authorities I address the position as if I had a blank canvas, and only the Oxford English Dictionary to help me. The dictionary defines dishonesty as "the reverse of honesty; lack of probity or integrity; disposition to deceive, defraud, or steal; thievishness; theft, fraud. Also, a dishonest or fraudulent act.". And it defines integrity as "soundness of moral principle; the character of uncorrupted virtue, esp. in relation to truth and fair dealing; uprightness, honesty, sincerity". Therefore, it seems to me to be obvious that based on the dictionary definitions honesty and integrity are synonyms and that dishonesty and integrity are antonyms.

26. It is noteworthy that in criminal proceedings juries are generally directed that "dishonesty" is a word in ordinary use and has no special legal meaning. If a direction is given it tends to be to explain that dishonesty requires both an objective and subjective element that is to say the jury must be satisfied (a) that the defendant was acting dishonestly by the ordinary standards of reasonable and honest people and (b) that the defendant himself realised he was acting dishonestly by the ordinary standards of reasonable and honest people. This dual requirement derives from *R v*

Ghosh [1982] QB 1053. Curiously, it applies to disciplinary proceedings but not to all other civil proceedings where only the objective element is needed – see *Kirschner v The General Dental Council* [2015] EWHC 1377 (Admin).

27. I have mentioned above that the Bar Code of Conduct requires a barrister to act with "honesty and integrity". In *BSB v Howd* [2017] EWHC 210 (Admin) Lang J grappled with the question whether this phrase signified two different things or was a single composite noun of a tautological nature, like "terms and conditions". She referred to the dictionary definition of the words which suggested that they were synonyms. She referred to a decision of a Bar Disciplinary Tribunal which stated that:

> "The juxtaposition of dishonesty and discreditableness is, in our view, significant. We do not think that the word "discreditable" has to be construed as the lawyers would say, *eiusdem generis*, but we do think that the gravity of the conduct takes colour from the fact that the first description of the untoward conduct is 'dishonest'"

She referred to a decision of the Divisional Court in *Scott v Solicitors Regulation Authority* [2016] EWHC 1256 (Admin) where Sharp LJ cited a decision of the Financial Services and Markets Tribunal (*Hoodless v FSA* [2003] UKFTT FSM007) where it was stated:

> "In our view 'integrity' connotes moral soundness, rectitude and steady adherence to an ethical code. A person lacks integrity if unable to appreciate the distinction between what is honest or dishonest by ordinary standards. (This presupposes, of course, circumstances where ordinary standards are clear. Where there are genuinely grey areas, a finding of lack of integrity would not be appropriate.)"

And she referred to the decision of the Divisional Court in *Solicitors Regulation Authority v Chan* [2015] EWHC 2659 (Admin) where Davis L.J. declined to define integrity, concluding that a lack of integrity could be identified by reference to the facts of a particular case. That approach mirrors the zoological metaphor of Stuart-Smith LJ in *Cadogan Estates Ltd v Morris* [1998] EWCA Civ 1671 where he stated at [17] "this seems to me to be an application of the well known elephant test. It is difficult to describe, but you know it when you see it", which is a common enough technique used by lawyers and judges where they cannot define something with precision.

28. I acknowledge that in the iconic decision of *Bolton v The Law Society* [1994] 1 WLR 512 Sir Thomas Bingham MR at 518 B – E drew a distinction between being found guilty of acting with dishonesty, on the one hand, and, on the other, of acting without "integrity, probity and trustworthiness". In the former case a strike-off is almost invariable; in the latter case a striking off order does it not necessarily follow, but it may well. However, in those passages no attempt was made to explain the difference between the two concepts.

29. In *Solicitors Regulation Authority v Wingate & Anor* [2016] EWHC 3455 (Admin) at [37] Holman J stated:

> "He submitted, and I agree, that dishonesty and lack of integrity are not the same. While all dishonesty involves a lack of integrity, not all lack of integrity involves dishonesty. The law requires a subjective element to any finding or conclusion of dishonesty, but the question whether a person lacked integrity is objective."

I must respectfully disagree. If this were right, then the SRA could side-step the requirement of proving the subjective element of dishonesty in any case by the simple expedient of charging the same facts as want of integrity. It can be seen from the charges set out above that in this case the SRA has done just that in relation to charges 1 and 2.

30. In my judgment, the approval by Sharp LJ in *Scott* of the *Hoodless* definition means that the legal and dictionary definitions of the words honesty and integrity are aligned and that they are synonyms. It means that dishonesty and integrity are antonyms. This would explain why the SRA principles do not additionally require a solicitor to act with honesty. This is because it is the same thing as integrity. Want of integrity and dishonesty are not only the same thing but must be proved to the same standard, in my judgment.

31. That they are the same thing is demonstrated by the discussion between me and Mr Williams QC where I asked him to give me some examples of conduct that was lacking in integrity but which was not dishonest. His first example was of a person (A) who was given some money by a friend (B). A and B agreed that A would place a bet on a horse with the money on B's behalf. A did not do so. The horse won. Mr Williams argued that A would be guilty of a want of integrity but not dishonesty. I do not agree. If A did not place the bet because he genuinely forgot to do so, then he would be morally blameless. If he did not do so because he had a good excuse then, again, he would be blameless. But if he did not do so without a good reason then in my opinion he would be acting dishonestly. Mr Williams' second example was of a solicitor who had given an undertaking which he breaches causing pecuniary loss to his client or another party. This would be an act of want of integrity but not dishonesty, he argues. Again, I disagree. If there was a good excuse for the breach, then the solicitor would be blameless. If the breach was deliberate then that would, in my opinion, be an act of dishonesty.

32. It follows from this that the attempts in this case to accuse the appellant, in relation to the creation of the documents, of acting without integrity, but not dishonesty, and to try to maintain a cordon sanitaire between the two concepts was always going to run into trouble. As will be seen, the cordon sanitaire was repeatedly breached and the appellant found himself defending dishonesty allegations in relation to the first two charges which he never expected to have to meet, and which had not been spelt out against him.

33. In his skeleton argument placed before the SDT counsel for the appellant, Mr Treverton-Jones referred at para 5 to the charges and described them as "confusingly drafted". He pointed out that neither of the actions in charges 1 and 2 (i.e. creation of the Form N251 and the covering letter) were said to have been dishonest. In contrast, he pointed out that charge 3 was alone said to have been dishonest. In para 6 he said:

> "This is a somewhat strange allegation of dishonesty. If the creation of the two documents is not said to have been dishonest, it is difficult to see why alleged subsequent reliance upon them should be dishonest. It is not easy to understand how the respondent can have not been dishonest at the time of the re-creation of the documents, but became dishonest at some later unspecified date, or how he can have dishonestly acquiesced in the non-dishonest conduct of others. Presumably this will be explained in opening by the SRA. …"

34. In opening the case to the SDT Mr Williams QC sought to maintain the cordon sanitaire which I have mentioned. He stated that dishonesty was alleged only with regard to the third allegation. He stated that the first two allegations were very serious but they were not put as dishonesty. But he went on to say that the respondent might be considered fortunate that dishonesty was not alleged in relation to the first two allegations. He submitted that lack of integrity does not equate to dishonesty and that there was no requirement for proof of a subjective element in the case of lack of integrity. But the boundary soon became blurred. He later stated:

> "by the creation of the backdated documents, there was a clear demonstration of a lack of integrity and public trustworthiness. Then by relying on them and asserting their authenticity and integrity he has behaved dishonestly."

A little later when talking about the covering letter Mr Williams QC pointed to a mistake in the DX address of Hill Dickinson. He submitted that this was a "deliberate omission" and that it was a "unique and deliberate error". At this point he was interrupted by Mr Treverton-Jones QC, who said this:

> "I do not want to interrupted my learning friend, but he is here essentially alleging that the creation of this document was dishonest, whereas that is not as I understand the Rule 5 statement, any part of his pleaded case"

To which the response was:

> "the circumstances in which the documents came to be created are essential to the allegation of lack of integrity. I hope I have been clear as to the scope of the allegation of dishonesty for it is the deployment of them [which] is dishonest"

35. In cross-examination Mr Williams QC squarely put it to the appellant that he had falsified the DX address deliberately. Later it was put to him that in creating the documents he was setting his own standards of honest conduct. There was an exchange where Mr Williams QC suggested that there had been no lack of clarity in the way the case was put against the appellant to which the appellant's response was that he did not understand that at all, and that he hoped it would be clarified. Later, Mr Williams QC suggested that it would have been "so easy to just tell the truth" about the creation of the documents. Later still, it was put by Mr Williams QC to the appellant that the covering letter created by the appellant was a "fake". To my mind that is an unvarnished accusation of dishonesty.

36. It is clear to me that notwithstanding repeated assertions to the contrary the appellant found himself facing a case of dishonesty in relation to the first two allegations. It is elementary, and supported by abundant authority, that if you are accused of dishonesty then that must be spelt out against you with pitiless clarity. In my judgment, you cannot circumvent this obligation by pleading the same facts and matters as want of integrity. We do not have in our system dishonesty in the first degree and dishonesty in the second degree.

37. In his final submissions Mr Treverton-Jones QC referred to the email of 2 May 2014 at 16:40 to Sarah Grant and said this:

> "Page 16, sir, is the letter or the email that enclosed the other two documents and we submit that it is an intellectual nonsense for that to form part of allegation 3. The email sent under its cover the two documents which Mr Williams described as fakes, yet it is not open to the tribunal to find that they are dishonest fakes, because that has not been properly alleged. So we are left with the position that the two documents are not said to be dishonest, are not pleadedly said to be dishonest, but which the email which encloses then is set to be dishonest. We submit that is intellectual nonsense."

I have to say that I fully agree with that. How it can be said with any kind of logical rigour that documents which were finalised a few minutes before the email was sent were not dishonest, but that the email itself was, is beyond me.

38. In its judgment the tribunal made its determination in relation to the first two allegations at paragraph 49.12 – 49.15. In these paragraphs the tribunal made the following findings:

i) The covering letter and Form N251 were not sent in March 2013 to Hill Dickinson. Implicitly, the tribunal found that those documents were not created at that time and had later been lost.

ii) Further, that no handwritten draft of the Form had ever existed.

iii) The appellant had engaged in a quite deliberate act involving the use of the firm's computer system to create the documents.

iv) The appellant falsely used the device of the handwritten draft to justify having created the documents

39. In my judgment, any fair reading of these paragraphs of the tribunal's judgment is that the appellant was found guilty of serious dishonesty. Yet, dishonesty had been explicitly eschewed, and had never been properly spelt out against him. I do not dispute that as findings of fact the findings were open to the tribunal to make. However, they are all stained with dishonesty. They were made in violation of the basic rule that if you are facing a case of dishonesty you have to know you are facing a case of dishonesty. As such they cannot stand.

40. The tribunal dealt with allegation 3 in paragraphs 50.31 – 50.32. The tribunal disbelieved the respondent when he stated that his motive in sending the documents was to prompt Hill Dickinson into searching their files. It is important that I note that the email of 2 May 2014 is said to be a gross act of want of integrity as well as dishonesty. If the two subsequent letters had never been sent then it would still have been the SRA's case that the email itself warranted a finding of dishonesty, and the sanction of being struck off. In the email the appellant stated "I attach a copy of our correspondence last year with notice of funding." The word "copy" has two distinct meanings. It either means a transcript or a reproduction of an original (see the Oxford English Dictionary). Mr Williams QC accepted that if the appellant had added a few words to that sentence he could not have been guilty of dishonesty in relation to the email or of want of integrity in relation to the creation of the documents. I insert those words, bold and underlined into the sentence thus: "I attach a copy of our correspondence **which I believe I sent to you** last year with notice of funding." Had those seven words appeared the appellant would have been in the clear.

41. In its judgment the tribunal held:

> "the documents attached were not true copies of anything sent by the respondent or his firm to HD the previous year and he knew that he created these documents without being able to say that they were exact replicas of what he asserted he had sent before and he accepted that in cross-examination in respect of the letter 19 March 2013"

Again, this finding is a very explicit judgment of dishonesty.

42. Of course, the fourth charge additionally alleged dishonesty in relation to charge number 3. The tribunal dealt with dishonesty between paragraphs 50.33 and 50.42. I am persuaded by Miss Morris QC that in five respects the tribunal took into account its findings in relation to the creation of the Form N251 and the covering letter when reaching its decision that the appellant had been guilty of dishonesty. These are:

> "50.36 The Tribunal considered that the Respondent's actions in creating the 19 March 2013 covering letter and the Form N251 were evidence that led to the inescapable conclusion that at least from January 2014 when he was alerted to HD's concerns and could find no supporting evidence for any belief that he had dispatched the documents at the appropriate time, that he did not have a genuine belief that he had done so and that at the time of creating the backdated documents the Respondent did not have a genuine belief that he had prepared and served the originals on the other side in March 2013."

> "50.40 The content of the purported copy Form was irrelevant; what was material to all the allegations was the fact of its creation …"

> "50.41 The Tribunal found that by creating the backdated documents and seeking to persuade HD that they had been served, the Respondent invited HD to accept that was the

> position and thereby avoiding the need to seek relief which would be of benefit to him and the client and the Tribunal found this to be the case".
>
> " 50.41 The Tribunal rejected the Respondent's defence based on the premise that he created and used the documents in order to provoke HD into searching files and finding the Form. He might have believed that the notice had been served originally but once that was questioned in January 2014 and had become a certainty by May 2014 he could not have held that genuine belief."
>
> "50.42 "The Tribunal found that the Respondent … chose to create and deploy backdated documents as if they were genuine copies of originals and in doing so the Respondent knew that he was being dishonest and the subjective test was therefore satisfied. Accordingly, the Tribunal found dishonesty proved …"

These findings demonstrate the insuperable cross-border problems faced by the way that these charges were framed. The very basis of the finding of dishonesty was reached using findings in relation to the creation of the documents that were contaminated and which had been reached in violation of a basic right of the appellant. Mr Williams QC accepts that para 50.42 contains an error in that it indisputably invokes the appellant of dishonesty in creating the documents. He seeks to finesse this away as an editorial error. I do not agree. It was of a piece with a flawed process which bedevilled this case from the start.

43. In relation to the charges generally the appellant had relied on character evidence as to his propensity and credibility, and on medical evidence, showing that he was suffering from serious depression, in relation to his motives and the state of his mind at the relevant time. It is well-established that such evidence needs to be treated with proper respect and subjected to fair analysis. Yet, it was given very short shrift indeed. In my judgment, the analysis was seriously inadequate. In this regard also, I am satisfied that the tribunal erred.

44. In my judgment, the appeal must be allowed. It would not be reasonable to expect the appellant to be retried on the first two charges; it is too late now for them to be boosted to incorporate an allegation of dishonesty. In my judgment, the appellant should be retried on the third charge alone, reframed as follows:

> Having created on 2 May 2014 (a) a Form N251 (notice of funding) which he backdated to 19 March 2013 and (b) a covering letter for a notice of funding with a date of 19 March 2013, the respondent dishonestly relied on and/or acquiesced in others in his firm relying on the said documents from 2 May 2014 until on or around October 2014, as evidence in support of his position when seeking favourably to negotiate a settlement with his opponent in litigation, in breach of Principles 1 and/or 2 and/or 6 of the SRA Principles 2011.

45. That concludes this judgment.