Neutral Citation Number: [2018] EWCA Civ 366

Case No: C1/2017/1002 & 1003 & C1/2017/1249

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM High Court, QBD, Administrative Court
Mr Justice Holman
CO22212016
ON APPEAL FROM High Court, QBD, Administrative Court
Mr Justice Mostyn
CO32232016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/2018

Before :

LORD JUSTICE RUPERT JACKSON
LADY JUSTICE SHARP
and
LORD JUSTICE SINGH

- -

Between :

David Fenton Wingate	**Appellant/ 1st Defendant**
- and -	
Steven Edward Evans	**Appellant/ 2nd Defendant**
- and -	
The Solicitors Regulation Authority	**Respondent**

Between :

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

- -
- -

On the Wingate and Evans appeal, **Mr Gregory Treverton-Jones QC** (instructed by **WE Solicitors LLP**) for the **1st & 2nd Appellant**
Mr Richard Coleman QC (instructed by **Russell Cooke Solicitors**) for the **Respondent**

On the Malins appeal, **Mr Richard Coleman QC & Ms Chloe Carpenter** (instructed by **Russell Cooke Solicitors**) for the **Appellant**

Ms Fenella Morris QC (instructed by **RadcliffesLeBrasseur Solicitors**) for the **Respondent**

Hearing dates: Tuesday 6th & Wednesday 7th February 2018

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Approved Judgment

Lord Justice Rupert Jackson :

1. This judgment is in eight parts, namely:

Part 1. Introduction

2. These are two appeals arising out of disciplinary proceedings against solicitors. In the first case (*Wingate and Evans*) the Solicitors Regulation Authority ("SRA") appealed successfully to the High Court against acquittals by the Solicitors Disciplinary Tribunal. The solicitors are now seeking to reinstate their acquittals. In the second case (*Malins*) a solicitor successfully appealed to the High Court against findings of misconduct and an order that he be struck off the Roll. The SRA now seeks to reinstate the findings of the Solicitors Disciplinary Tribunal.

3. A central issue in both appeals is the meaning of "integrity" as that word is used in the SRA's Code of Conduct and Principles.

4. I shall refer to the ten principles which appear at the front of the SRA's Code of Conduct as "the Principles". They read as follows:

> "You must:
>
> 1. uphold the rule of law and the proper administration of justice;
>
> 2. act with integrity;
>
> 3. not allow your independence to be compromised;
>
> 4. act in the best interests of each *client*;
>
> 5. provide a proper standard of service to your *clients*;
>
> 6. behave in a way that maintains the trust the public places in you and in the provision of legal services;
>
> 7. comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and cooperative manner;
>
> 8. run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles;
>
> 9. run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity; and
>
> 10. protect *client* money and assets."

5. In this judgment:

"ATE" means 'after-the-event' insurance.

"FSA" means Financial Services Authority.

"LASPO" means the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

"Rule 5 Statement" means statement served pursuant rule 5(2) of the Solicitors (Disciplinary Proceedings) Rules 2007.

6. After these introductory remarks, I must now turn to the facts.

Part 2. – The Facts: Wingate and Evans

7. Mr Wingate and Mr Evans practised together as partners for many years in a small firm, W E Solicitors LLP. W E Solicitors occupied a single office in Greater Manchester. They specialised in personal injury work, principally industrial disease claims. The firm employed six staff, two of whom were solicitors. Within the firm, Mr Wingate concentrated on management and finance. Mr Evans concentrated on the current litigation workload.

8. The firm fell into financial difficulties. By 2012 it owed £930,000 to HBOS and could see no way of meeting the monthly interest payments which were due. HBOS recognised the realities of the situation and indicated a willingness to settle for £450,000. Unfortunately, no mainstream lender was willing to lend a sum of that size to W E Solicitors.

9. Mr Wingate learned of a fund called Axiom, which specialised in funding the costs of litigation. Tangerine Investment Management Ltd ("Tangerine") was the manager of Axiom. Between June and August 2012 Mr Wingate had meetings with Jeff Hudson, representing Tangerine, and Richard Barnett, representing Axiom. At the time Mr Barnett was an apparently respectable solicitor and a member of the Council of the Law Society. He has subsequently been struck off.

10. The upshot of those discussions was an oral agreement by Axiom to lend £900,000 to W E Solicitors in order to enable the firm to pay its debts and stay in business. This oral agreement had some unusual features. First, no less than £300,000 was to be paid out of the loan monies as a "facilitation fee" to Tangerine. Secondly, W E Solicitors were required to sign a written funding agreement and facility letter, which, on Mr Wingate's evidence, bore no relationship to the true agreement between the parties. The written funding agreement contained the following terms:

> "1.1 Definitions
>
> In this Agreement, including the Schedules, the words and expressions set out below have the following meanings: …
>
> "Eligible Legal Expenses" means the Legal Expenses relating to a Claim which is evidenced by an invoice, in form and substance the same as the form agreed in relation to that Claim prior to the first Utilisation in respect of that Claim; …

"Termination Date" means [1] in relation to the Facility or the Available Facility the date falling 36 months from the date of this Agreement or [2] in respect of a Loan, the date falling 12 months from the date of this Agreement or the Utilisation Date, whichever shall be the later …

"Utilisation" means an utilisation by the Panel Firm having requested a loan under the Facility;

"Utilisation Date" means the date of a Utilisation being the date on which the relevant Loan, as detailed in any Utilisation Request submitted by the Panel Firm, is made, and which date shall not be less than 10 Business Days prior to the date which is 12 months from the date of this Agreement …

2.2 Purpose

(a) The Panel Firm shall apply the proceeds of each Loan paid to the Panel firm out of the Facility towards payment of the Eligible Legal Expenses in relation to which the Loan was requested. …

6. Repayment

The Panel Firm shall repay all of the amounts owing in respect of each and every Loan, together with the Facilitation Fee thereto, granted under the Facility in full on the Termination Date [being 12 months from the Utilisation Date of each Loan] and without prejudice to the generality of the foregoing all amounts owing shall include all Loans, interest arising, Facilitation Fees, and Financial Guarantee Insurance Premiums

SAVE THAT the Lender may, but entirely at its discretion, at the request of the Panel Firm in relation to a Loan which is repaid in full on the Termination Date in relation to that Loan, immediately lend the Panel Firm that Loan for a further period of 12 months from the date of repayment [whereupon the Termination Date in relation to that Loan shall be at the end of that second period of 12 months] subject to:

A There being no Event of Default as at the date of such request and

B All Conditions Precedent being fulfilled and Repeating Representations confirmed by the Panel Firm as if all such conditions were restated as at the date of such request and

C The interest rate attaching to the Loan shall be 18% from the date of the Loan being re-lent until the Termination Date for that Loan and

> D The Panel Firm signing such documents as shall be reasonably required by the Lender to evidence the further transaction herein described, which shall itself be regarded as a Condition Precedent
>
> BUT in the event that such Loan is re-lent for the further period of 12 months, no further Facilitation Fee will be payable or charged by the Lender in respect of that Loan by the Panel Firm, [so that there will be only one Facilitation Fee paid by the Panel Firm for that Loan which will be at the first Utilisation date for that Loan]"

11. These and other provisions of the funding agreement made it clear that the money coming from Axiom could only be used for funding specific cases. Furthermore any sum loaned had to be repaid within twelve months, subject to the possibility of a single twelve month extension.

12. The facility letter included the following provisions:

> "1. The purpose for which monies may be advanced by the Lender to the Borrower under the Facility is to enable the Panel Firm to fund Claims and Legal Work for Claimants of the Panel Firm as detailed to the Lender [Client Files], together with Eligible Legal Expenses, if applicable, and a Financial Guarantee Insurance premium, together with the Facilitation Fee [all of which is more particularly mentioned and referred to in the Funding Agreement] ("the Agreed Purpose") …
>
> 1.1 The proceeds of the Facility shall be used by the Panel Firm exclusively towards the Agreed Purpose but the Lender shall not be under any obligation to verify the use to which any drawdown against the Facility is put."

13. On 22nd August 2012 Mr Wingate signed the funding agreement and the facility letter on behalf of his firm. Axiom duly provided the agreed sum of £900,000. In reliance upon the oral agreement (namely that this was a loan for general purposes) and in disregard of the two written agreements, the firm dealt with the monies as follows:

    i) It paid £450,000 to HBOS in settlement of the outstanding debt.

    ii) It paid or allowed to be paid £300,000 to Tangerine as a facilitation fee.

    iii) It paid £27,000 as the premium for a financial guarantee policy.

    iv) It paid £10,000 to Mr Wingate and £10,000 to Mr Evans as dividends.

    v) It paid £11,535 to Lease Direct as repayment of a loan.

    vi) It paid £27,047 to HM Revenue & Customs.

vii) The sum of £64,418 was used to fund the firm's general expenses, including salaries and overheads.

14. There was no prospect of W E Solicitors LLP being able to repay the loan, together with interest at the agreed rate of 15%, within twelve months. In other words, no-one treated the two written agreements as having any relevance or effect. Mr Wingate understood from his discussions with Mr Hudson and Mr Barnett that the funding agreement would in due course be replaced by another, much less restrictive, agreement governing the loan. That never happened.

15. Prior to the loan being made, Baker Tilley had prepared a due diligence report in connection with W E Solicitors' request to borrow sums from Axiom.

16. In early 2013 Axiom went into receivership. W E Solicitors failed to repay the loan of £900,000 plus interest on or before the due date under the funding agreement, 29th August 2013. In November 2013 the firm reached a settlement with the receiver of Axiom, under which it repaid only £300,000.

17. As a result of this transaction and other similar transactions the individuals who had invested in Axiom suffered substantial losses. The SRA started an investigation into the activities of Mr Barnett and into the various loans which Axiom had made to a number of solicitors' firms. Disciplinary proceedings followed.

18. In relation to W E Solicitors, the SRA brought proceedings against both Mr Wingate and Mr Evans in the Solicitors Disciplinary Tribunal. The charges against Mr Wingate included the following:

1.1 In breach of Principles 2 and 6, causing or permitting the firm to accept and use the Axiom monies.

1.6 Breach of rules 17 and 20 of the Solicitors Accounts Rules 2011.

1.7 Failing to run the firm effectively in accordance with proper governance and sound management and risk management.

19. In relation to count 1.1, the SRA further alleged that Mr Wingate had acted dishonestly.

20. The charges against Mr Evans included the following:

2.1 In breach of Principles 2 and 6, causing or permitting the firm to accept and use the Axiom monies.

2.3 Breach of Rules 17 and 20 of the Solicitors Accounts Rules.

2.4 Failing to run the firm effectively in accordance with proper governance and sound financial and risk management.

21. Both respondents admitted the alleged breaches of rules 17 and 20 of the Solicitors Accounts Rules. They pleaded not guilty to all the other charges.

22. There was a hearing before the Solicitors Disciplinary Tribunal, which lasted from 7th to 11th December 2015. The tribunal delivered its reserved judgment on 31st March 2016.

23. The tribunal accepted Mr Wingate's evidence that he trusted Mr Hudson and Mr Barnett. Mr Wingate genuinely believed that the funding agreement which he signed was varied by an oral agreement permitting the firm to use all of the Axiom monies for general purposes. The tribunal accepted that Mr Evans relied totally on Mr Wingate in relation to the negotiation and use of the Axiom loan. Having made those findings of fact, the tribunal acquitted both respondents on all the contested charges.

24. The tribunal still had to deal with the breaches of the Solicitors Accounts Rules, which both respondents had admitted. The tribunal imposed a fine of £3,000 on each respondent. It ordered each of them to pay costs in the sum of £26,370.

25. The SRA was aggrieved by the tribunal's decision. Accordingly it appealed to the High Court against the acquittals on counts 1.1, 1.7, 2.1 and 2.4.

26. Mr Justice Holman, sitting in the Administrative Court, heard the appeal on 14th and 15th December 2016. During the course of the hearing the SRA abandoned the allegation of dishonesty against Mr Wingate.

27. The judge delivered his judgment orally on 21st December 2016. He allowed the SRA's appeal and substituted convictions on counts 1.1, 1.7, 2.1 and 2.4, omitting any reference to dishonesty.

28. In respect of count 1.1, the judge held that Mr Wingate had breached Principles 2 and 6 by accepting and using the Axiom monies in a manner contrary to the written agreements and with no prospect of making timely repayment. The funding agreement which Mr Wingate signed was a complete sham: judgment at [83]. Mr Wingate acted in breach of Principles 2 and 6 by signing the funding agreement and drawing down the monies pursuant to it: judgment at [84]. In failing to appreciate the dubious nature of the transaction which Mr Hudson and Mr Barnett were proposing, Mr Wingate displayed manifest incompetence in breach of Principle 6: judgment at [99], [102] and [106].

29. Turning to count 2.1, the judge noted that Mr Evans had not been involved in negotiating the loan and had never met Mr Hudson or Mr Barnett. Nevertheless he ought, at the very least, to have read the funding agreement to satisfy himself as to the propriety of the loan. His failure to do so showed manifest incompetence, but not lack of integrity. Therefore, by permitting the firm to accept and use the Axiom monies, Mr Evans was in breach of Principle 6.

30. In respect of counts 1.7 and 2.4, cheques totalling £155,878 in respect of disbursements were not sent to the intended payees. Consequently both Mr Wingate and Mr Evans were in breach of Principle 8. They had failed to run the firm effectively in accordance with proper governance and sound financial and risk management.

31. I need not discuss the other grounds of appeal on which the SRA failed. No-one suggests that the judge fell into error about those matters.

32. The judge remitted the case to the Solicitors Disciplinary Tribunal, so that the tribunal could reconsider the question of sanctions. The tribunal re-convened on 27th March 2017. After hearing counsel's submissions, it ordered that Mr Wingate be suspended for three months and that Mr Evans pay a fine of £12,000. The tribunal ordered Mr Wingate to pay costs of £40,000 and Mr Evans to pay costs of £27,000.

33. Both Mr Wingate and Mr Evans were aggrieved by the judge's decision. Accordingly they appealed to the Court of Appeal.

Part 3. The Facts: Malins

34. John Malins was a partner in Bond Pearce LLP. He specialised in construction law. On 1st May 2013 that firm merged with Dickinson Dees to become a new firm, Bond Dickinson LLP. Mr Malins continued as a partner in the new merged firm.

35. In 2012 Mr Malins started to act for Stephen Shirley in a claim against a building firm, STMC, concerning the quality of works carried out to Mr Shirley's family home. Hill Dickinson were the solicitors for STMC. In March 2013 Mr Malins arranged ATE cover in respect of the litigation which he was planning to launch on behalf of his client. The total premium paid in respect of that insurance was £181,862.

36. On 1st April 2013 LASPO came into force. LASPO made it impossible for a successful party in litigation to recover under a costs order the amount of any ATE premium which it had paid. In order to avoid the consequences of LASPO, it was necessary for Bond Pearce to serve form N251 giving notice of the ATE premium on Hill Dickinson, before the 1st April 2013. They did not do so.

37. The litigation proceeded satisfactorily. STMC made a reasonable Part 36 offer. On 4th March 2014 Mr Shirley accepted that offer and became entitled to recover his costs, assessed on the standard basis.

38. Mr Shirley claimed the ATE premium as part of his recoverable costs. Hill Dickinson maintained that Mr Shirley was not entitled to recover the ATE premium, because Bond Pearce had not served any notice of funding before 1st April 2013.

39. Mr Malins was unable to find any record in his office of a form N251 having been served. In those circumstances he set about creating such a record and backdating it.

40. On 2nd May 2014, Mr Malins created a letter on the headed note paper of Bond Pearce LLP (i.e. the old pre-merger firm) and dated it 19th March 2013. That letter was addressed to Hill Dickinson and read as follows:

> "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"

41. Mr Malins created a form N251, giving notice of the ATE premium. He dated the notice 19th March 2013 and signed it "Bond Pearce LLP".

42. Having created those two documents, he sent them to Sarah Grant, the relevant partner at Hill Dickinson, under cover of an email dated 2nd May 2014 and timed 16:40. That email read as follows:

> "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
>
> John Malins
>
> Partner
>
> for and on behalf of Bond Dickinson LLP"

43. On 21st July 2014, Mr Malins sent a further letter to Hill Dickinson asserting he had served form N251 in March 2013 and relying upon the copy documents sent in May 2014. On 14th August 2014 Mr Malins allowed the costs team in Bond Dickinson to send a letter to Hill Dickinson to the same effect.

44. Subsequently the true state of affairs came to light. Bond Dickinson notified the SRA. At the instigation of one of his partners, Mr Malins sent a self-report to the SRA making full admissions. The SRA investigated. They then brought proceedings against Mr Malins in the Solicitors Disciplinary Tribunal.

45. The Rule 5 statement lodged with the tribunal charged Mr Malins as follows:

> "1. The allegations against the Respondent, made on behalf of the SRA, are that 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 at his firm relying on the backdated documents mentioned above from 2 May 2014 until on or around October 2014, as evidence in supporting his position when seeking to favourably negotiate a costs 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 Allegation 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."

46. There was a hearing before the Solicitors Disciplinary Tribunal on 20th – 21st April 2016. The tribunal heard oral evidence from John Marshall, Bond Dickinson's Compliance Officer for Legal Practice, and from John Malins. The tribunal also received some written statements, including testimonials as to Mr Malins' good character.

47. The tribunal handed down its reserved judgment on 1st June 2016. The tribunal found all four allegations proved.

48. In relation to allegations 1.1 and 1.2 the tribunal said this:

> "49.12 … It was the Tribunal's understanding that the test was objective. In order to assess whether the Respondent's admittedly wrongful conduct in creating back dated documents crossed the line, as Mr Treverton-Jones put it, over into professional misconduct and constituted acting in breach of the requirement to act with integrity and to maintain public trust, the Tribunal considered that it had to consider his explanation that he had created and served originals of the covering letter and Form N251 in March 2013 and that his creation of the documents was therefore a crude form of duplication.
>
> 49.13 The Tribunal did not overlook the submission that the documents in Mr S's case ran to 12 to 14 boxes. However the information before the Tribunal was clear; there was no evidence that documentation had been sent to HD in March

2013. The Tribunal had the benefit of Mr EW's evidence about searches of the firm's systems and the Respondent's own evidence of his inability to find contemporaneous copies of any such documents. The best evidence that the Respondent could produce that the Form N251 existed in March 2013 was his own oral evidence that he had a handwritten draft of it in his daybook up until he left the firm and that he used that handwritten draft as the basis for the document he created in May 2014. He also stated that the handwritten draft was among a wad of loose documents which he asserted had disappeared from the daybook. The Tribunal considered that his reliance on the retention of a draft was suggestive that a final typewritten version was not prepared. He admitted but could give no reason why he had not retained a copy of the completed and served Form in his daybook when his evidence was that it was his practice to keep key documents in such a book for each matter. The Form N251 was certainly a key document because of the impending deadline for the change in the CPR rules. Even if the Tribunal accepted the Respondent's evidence that a handwritten draft existed and had disappeared, it undermined his credibility that he had also not added it or a copy of the final version of the Form N251 as served to the file either electronically or in hard copy. There was then the obstacle that the electronic and paper filing systems contained no copy of any contemporaneous covering letter which the Respondent asserted he was sure he had sent. In answer to this the Respondent asserted that documents were missing from the electronic file and the paper file for the relevant period. The only other evidence to support the assertion that the documents had been sent was a reference in his oral evidence by the Respondent to a time recording entry for a letter to HD on 19 March 2013. However that did not constitute proof of the contents of any such letter or that it was signed and dispatched on that day. The evidence before the Tribunal led it to conclude that a covering letter and Form N251 were not sent in March 2013 to HD.

49.14 … The Tribunal did not find credible his reliance on the possibility that HD would find the documents in its files and that it had been toying with searching for them for some nine months. It was clear by May 2014 that these documents were not suddenly going to materialise. The Respondent was an experienced lawyer in this particular field and on his own evidence had dealt with two other cases where the CPR deadline was material and where his evidence was that the Forms N251 were in existence and in play during negotiations between the parties. The Tribunal noted that he did not produce the draft to HD in May 2014 and he could not on his own evidence produce it to the Tribunal at the hearing. The Tribunal was not satisfied that the handwritten draft existed but

> considered that the Respondent could not simply admit to having created the backdated documents but instead used the device of the draft to justify having done so. The Tribunal considered the Respondent's explanation that there was no trace of the Form N251 on the firm's systems because he had used a program PDF Filler. Even if this were the case and it left no trace on the firm's systems of the document itself, following normal office procedure he would have created the covering letter on the firm's system but no trace could be found of that either.
>
> 49.15 The Tribunal considered that the Respondent was an experienced litigation solicitor and clearly well versed in court procedure. In a situation where it was obvious what he had to do – apply promptly to the Court for relief from sanction – because he could not prove that he had served notice of ATE funding on the other side and knew (and indeed had always acknowledged) that he had not filed notice at Court, the Respondent chose instead when costs discussions were heading to court proceedings to create two backdated documents. This was a quite deliberate act involving use of the firm's computer system to extract a heading for one of its predecessor firms which would have been in use in March 2013 and a document template. The Respondent had minimised the issues in obtaining relief from sanction in his evidence but the Tribunal considered that the outcome was far from certain thus putting him under additional pressure. The Respondent faced a further complication in that by maintaining his assertion that he genuinely believed that he had served Form N251 at the appropriate time he made it impossible to apply for relief from sanction. In respect of the facts and circumstances surrounding the creation of the two backdated documents there were simply too many factors which militated against the explanation which the Respondent had given for his actions. The Tribunal found that the Respondent's actions in creating Form N251 Notice of Funding (allegation 1.1) and a covering letter for a Notice of Funding (allegation 1.2) both on 2 May 2014 displayed a clear failure to act with integrity (Principle 2) and that he had not behaved in a way that maintained the trust the public placed in him and in the provision of legal services (Principle 6). The Tribunal accordingly found allegations 1.1 and 1.2 proved on the evidence to the required standard."

49. In relation to allegations 1.3 the tribunal said this:

> "50.31 … The e-mail of 2 May 2014 stated: "I attach a copy of our correspondence last year with notice of funding." The statement left the Respondent no room for manoeuvre. It was irrelevant whether he believed that he had sent equivalent documents in 2013 because that was not what he said in the e-

> mail. 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 dated 19 March 2013. It was clear that the purpose of the production of the three documents was to send them to HD. However his asserted motive was to provoke HD to search their files. The Tribunal found this not to be credible; if that was his purpose he would have written in different terms. "
>
> 50.32 … The Tribunal considered that in sending the e-mail of 2 May 2014 the Respondent relied on the backdated documents as evidence in supporting his position as alleged and that in respect of the letters of 21 July 2014 and 14 August 2014 he acquiesced in others at his firm relying on them also. The correspondence formed part of a piece of litigation and in acting as he did the Tribunal found that the Respondent failed to uphold the rule of law and the proper administration of justice (Principle 1). The Tribunal also found that the Respondent acted with lack of integrity (Principle 2). Such action would also diminish the public's trust in the Respondent and the profession (Principle 6). Tribunal therefore found allegation 1.3 proved on the evidence to the required standard."

50. In relation to allegation 1.4 the tribunal said:

> "50.41 … The Tribunal wished to make clear that it arrived at its conclusions about the allegation of dishonesty based on the Respondent's evidence and on the documents in the case. It regarded the self-report as supportive of its conclusions. Based on the evidence the Tribunal considered that by the ordinary standards of reasonable and honest people the Respondent's actions in relying on the backdated documents he had created and by acquiescing in others at the firm doing the same would be considered dishonest and that the objective test in the case of Twinsectra was satisfied.
>
> 50.42 As to the subjective test, the Tribunal considered that the Respondent found himself in the position of having made a mistake regarding non service of the Form N251 which left his firm with the potential exposure of over £181,000 in terms of the premium which had to be paid back to the client Mr S. At the very latest by May 2014 he knew that he could not prove service of the Form on HD and must have had very serious doubts about whether service had been effected. He then consciously covered up his failure and then acquiesced in the costs team innocently doing the same and continued with his denial at least in respect of the covering letter dated 19 March 2013 in the first interview with Mr Marshall on 22 October 2014. While he might not have had the S matter in the forefront

> of his mind over the summer he did nothing to correct the false impression which the 2 May 2014 email and attached documents on the file would have given the costs team. The Tribunal had seen and heard evidence about various medical problems of a serious nature which had affected the Respondent and also close members of his family but it had no evidence that he was incapable of realising what he was doing at the material time. Mr Marshall had testified that the Respondent had an average workload. The medical report which was before the Tribunal was undated. The Tribunal had been informed that it had been prepared in the summer of 2015 but for other purposes than these proceedings. The Respondent in evidence had expressly stated that he did not seek to rely on his personal circumstances in respect of what he did in May 2014 but rather that they affected him in the summer of that year. He had shown himself to be capable of drafting a comprehensive and well prepared self-report at the end of October and early November 2014. Furthermore he had accepted unreservedly in evidence and Mr Treverton-Jones had emphasised that there was no suggestion that he had been "leaned on" by Mr Marshall. The Tribunal found that the Respondent had a choice in May 2014 of applying to the court for relief from sanction and if that failed resorting to the firm's PI insurance in respect of his oversight but instead he 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 in respect of allegation 1.3 on the evidence to the required standard."

51. Having made those findings, the tribunal ordered that Mr Malins be struck off the Roll of Solicitors. The tribunal also ordered him to pay £19,000 costs.

52. Mr Malins was aggrieved by the tribunal's decision. Accordingly he appealed to the High Court. The grounds of appeal were, in summary, as follows:

(i) The tribunal failed to give proper consideration to the medical evidence or Mr Malins' good character.

(ii) The tribunal wrongly made a finding of dishonesty in relation to allegations 1.1 and 1.2, when that was not pleaded.

(iii) If the SRA had pleaded dishonesty in relation to allegations 1.1 and 1.2, Mr Malins would have called further evidence to rebut that allegation.

53. Mr Justice Mostyn heard the appeal on 4th April 2017, sitting in the Administrative Court. On 12th April the judge handed down his reserved judgment, allowing the appeal and remitting the case to the Solicitors Disciplinary Tribunal for reconsideration.

54. I would summarise the Judge's reasoning as follows:

(i) It was illogical that the Rule 5 statement did not charge Mr Malins with dishonesty in creating the documents on 2nd May 2014, but did charge him with dishonesty in deploying those documents a few minutes later.

(ii) That illogical approach led to great confusion. Accordingly the case must be re-tried.

(iii) Honesty and integrity have the same meaning. Dishonesty and lack of integrity also have the same meaning.

(iv) The statement by Holman J in *SRA v Wingate and Evans* that lack of integrity has a broader meaning than dishonesty is wrong. In cases where the SRA cannot prove dishonesty, they cannot sidestep the problem by alleging lack of integrity.

(v) From time to time in the hearing Mr Williams suggested that counts 1 and 2 involved dishonesty. So Mr Malins found himself facing unpleaded allegations of dishonesty. That was not fair.

(vi) In paragraphs 49.12–49.15 and 50.31–50.32 (passages quoted above) the tribunal found Mr Malins guilty of serious dishonesty in relation to counts 1.1 and 1.2, even though that had not been pleaded. Accordingly, those paragraphs of the tribunal's decision cannot stand.

(vii) The tribunal's wrongful findings of dishonesty in respect of counts 1.1 and 1.2 were the foundation of its finding of dishonesty in relation to count 1.3.

(viii) The tribunal failed to give adequate consideration to Mr Malins' good character and the medical evidence.

(ix) It would be unjust for Mr Malins to be re-tried on counts 1.1 or 1.2. Therefore he should be re-tried on count 1.3 alone, suitably re-formulated.

55. The SRA were aggrieved by the Judge's decision. Accordingly they appealed to the Court of Appeal.

Part. 4 The appeals to the Court of Appeal

56. Mr Wingate and Mr Evans have appealed against the decision of Mr Justice Holman. The SRA have appealed against the decision of Mr Justice Mostyn. Very sensibly, both appeals were listed for hearing together.

57. We heard these two appeals on 6th and 7th February 2018. Mr Richard Colman QC represented the SRA in both appeals. Ms Chloe Carpenter was his junior in the *Malins* case. Mr Gregory Treverton-Jones QC represented Mr Wingate and Mr Evans. Ms Fenella Morris QC represented Mr Malins. I am grateful to all counsel for their helpful skeleton arguments and oral submissions.

58. There has been much debate in both appeals about the meaning of "dishonesty" and "lack of integrity". There is also disagreement about this matter between the two

judges from whom we are hearing appeals. I shall therefore tackle that question first, before grappling with the other issues which arise.

Part. 5 Honesty, integrity and related concepts

59. This part of the judgment is not a Socratic quest for ultimate truth. It is simply an examination of what meaning the law ascribes "honesty", "integrity" and related concepts.

60. The Theft Act 1968 introduced the concept of "dishonesty" as one element of the offence of theft. The court therefore had to explain what that term meant. In *R v Ghosh* [1982] 1 QB 1053 the Court of Appeal explained it as follows at 1064 D-E:

> "In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.
>
> If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest."

61. I shall refer to the two elements of dishonesty which the Court of Appeal identified in *Ghosh* as "element 1" and "element 2".

62. All professions have codes of conduct and procedures for dealing with members who fail to live up to the expected standards. There is a vast body of literature about the professions, some of which is summarised in R and D Susskind's book *The Future of the Professions* (Oxford University Press, 2015). I too have touched upon some of that literature in a recent lecture to The Professional Negligence Bar Association (*The Professions: Power, Privilege and Legal Liability*, 21st April 2015, on the Judiciary Website). I do not base any part of this judgment on that literature. I do note, however, that an enduring feature of professional codes of conduct is that they set higher standards for their members than the general norms of society.

63. In some instances, "dishonesty" is not defined as a specific offence under a professional code of conduct. Nevertheless, any tribunal considering allegations of misconduct will be astute to identify whether or not there was dishonesty. If the respondent was dishonest, the tribunal will reflect that in the sanction which it imposes.

64. Under the Solicitors' Practice Rules 1990 the charge most often laid against errant solicitors was "conduct unbefitting a solicitor". If that charge was proved, the Solicitors Disciplinary Tribunal would assess the gravity of the offending conduct and would, in particular, consider whether that conduct involved dishonesty. In *Bolton v Law Society* [1994] 1 WLR 512 a solicitor acting in a transaction for the sale of a house received a sum advanced to the prospective purchaser by a building society. Instead of retaining the sum in his client account, he disbursed the money in anticipation of completion. The sale was not completed and security documentation in

the building society's favour was never executed. On investigation by the Solicitors Complaints Bureau the shortage on the client account was discovered and promptly made good by the solicitor. He was charged with "conduct unbefitting a solicitor". The Solicitors' Disciplinary Tribunal found that allegation proved. The tribunal held that the solicitor's conduct, whilst not deliberately dishonest, was naive and foolish, and that although such conduct would normally be regarded very seriously so as to merit being struck off the Roll, in the circumstances the appropriate penalty was suspension from practice for two years. The Divisional Court on appeal quashed the order for suspension and substituted a fine. The Court of Appeal held that the Divisional Court had erred and ought not to have interfered with the decision of the Solicitors Disciplinary Tribunal. Sir Thomas Bingham MR then stated the guiding principles as follows at 518 A-D:

> "It is required of lawyers practising in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness. That requirement applies as much to barristers as it does to solicitors. …
>
> Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors. Only infrequently, particularly in recent years, has it been willing to order the restoration to the Roll of a solicitor against whom serious dishonesty had been established, even after a passage of years, and even where the solicitor had made every effort to re-establish himself and redeem his reputation. 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."

65. In *Twinsectra Ltd v Yardley and others* [2002] UKHL 12; [2012] 2 AC 164 the issue arose whether a solicitor, L, had dishonestly assisted in a breach of trust. In acquitting L of dishonesty the House of Lords adopted the same two-stage approach as was set out in *Ghosh*. In relation to element 2, Lord Hutton (with whom Lord Slynn and Lord Steyn agreed) observed at [35]:

> "the defendant must himself appreciate that what he was doing was dishonest by the standards of honest and reasonable men."

66. In *Hoodless v Financial Services Authority* [2003] UKFSM FSM007 the applicant challenged decisions by the FSA to withdraw their approvals to perform the functions

of investment adviser and investment management. The criteria for assessing the fitness of approved persons were set out in the FSA's handbook. They included "honesty, integrity and reputation". In considering these criteria, the Financial Services and Markets Tribunal referred to *Ghosh* and *Twinsectra*. At paragraph 19 the tribunal stated:

> "19. It may be asked whether the combined test is really appropriate in the present context, where one of the statutory objectives is the protection of consumers. It might be thought that a purely objective test would be a better protection. But we think it right to adopt the approach urged upon us, since it was not in dispute that we were required, as an additional matter, to consider the applicants' integrity, which both sides accepted involved the application of objective ethical standards. 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.)"

67. In *Bultitude v The Law Society* [2004] EWCA Civ 1853 the Court of Appeal upheld a finding of dishonesty made against a solicitor. The Court of Appeal applied the two-stage test of dishonesty at [32]:

> "… first, did Mr Bultitude act dishonestly by the ordinary standards of reasonable and honest people, and if so; secondly, was he aware that by those standards he was acting dishonestly."

68. A few months later there was a significant development. In *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* [2005] UKPC 37; [2006] 1 WLR 1476 the issue arose whether the respondents had deliberately assisted C to misappropriate investors' funds. The Privy Council re-interpreted *Twinsectra* in such a way as to eliminate element 2 from the definition of dishonesty, at least in civil proceedings. At [10]-[12] Lord Hoffmann stated:

> "10. ⋯ Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree.
>
> 11. The judge found that during and after June 1987 Mr Henwood strongly suspected that the funds passing through his hands were monies which Barlow Clowes had received from members of the public who thought that they were subscribing to a scheme of investment in gilt-edged securities. If those

> suspicions were correct, no honest person could have assisted Mr Clowes and Mr Cramer to dispose of the funds for their personal use. But Mr Henwood consciously decided not to make inquiries because he preferred in his own interest not to run the risk of discovering the truth.
>
> 12. Their Lordships consider that by ordinary standards such a state of mind is dishonest. The judge found that Mr Henwood may well have lived by different standards and seen nothing wrong in what he was doing."

69. After summarising counsel's submissions and quoting from *Twinsectra*, Lord Hoffmann said:

> "15. Their Lordships accept that there is an element of ambiguity in these remarks which may have encouraged a belief, expressed in some academic writing, that *Twinsectra* had departed from the law as previously understood and invited inquiry not merely into the defendant's mental state about the nature of the transaction in which he was participating but also into his views about generally acceptable standards of honesty. But they do not consider that this is what Lord Hutton meant. The reference to "what he knows would offend normally accepted standards of honest conduct" meant only that his knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were."

70. The wider implications of the *Barlow Clowes* decision were not appreciated at the time.

71. In *Bryant and Bench v Law Society* [2007] EWHC 3043 (Admin); [2009] 1 WLR 163 HB faced seven charges of conduct unbefitting a solicitor. The Solicitors Disciplinary Tribunal found all seven charges proved and held that two of them entailed dishonesty. The Administrative Court set aside the finding of dishonesty. The Court distinguished *Barlow Clowes* and held that in the context of the solicitors' disciplinary proceedings the traditional two-stage test continued to apply. At [153] Richards LJ, delivering the judgment of the court, said:

> "153. In our judgment, the decision of the Court of Appeal in *Bultitude* stands as binding authority that the test to be applied in the context of solicitors' disciplinary proceedings is the *Twinsectra* test as it was widely understood before *Barlow Clowes*. That is a test that includes the separate subjective element. The fact that the Privy Council in *Barlow Clowes* has subsequently placed a different interpretation on *Twinsectra* for the purposes of the accessory liability principle does not alter the substance of the test accepted in *Bultitude* and does not call for any departure from that test."

72. In 2007 the Solicitors' Practice Rules 1990 were repealed. In their place the SRA introduced a new and lengthy Code of Conduct, which not everyone found easy to apply in practice. This underwent numerous revisions before being replaced by the SRA Code of Conduct 2011. The code currently in force is Version 19 of the SRA Code of Conduct 2011.

73. Under the Code of Conduct, as it has existed since 2011, it is normal to charge errant solicitors with breach of one or more of the Principles set out in Part 1 of the Code. Principle 2 requires the solicitor to act with integrity. Principle 6 requires the solicitor to behave in a way that maintains "the trust the public places in you and in the provision of legal services".

74. None of the Principles in Part 1 of the Code specifically require a solicitor to act honestly. Therefore dishonesty by a solicitor is not a discrete offence under the Code. It is an aggravating feature. If the SRA consider that a solicitor's breach of any of the Principles involved dishonesty, they will assert that as a separate allegation. If the Solicitors Disciplinary Tribunal finds there was dishonesty, it will take a more serious view of the breach of Principle which has been proved.

75. In *Iqbal v Solicitors Regulation Authority* [2012] EWHC 3251 (Admin) a solicitor wrongly held out two other persons as his partners, in order to conceal the fact that he was a sole practitioner. The Solicitors Disciplinary Tribunal found breaches of Principle 6, but did not expressly make a finding of dishonesty. The tribunal ordered that the solicitor be struck off. The Divisional Court upheld that decision. Sir John Thomas P, with whom Silber J agreed, noted that the solicitor's conduct amounted to manifest incompetence. At [23] he said:

> "23. … If a solicitor exhibits manifest incompetence, as, in my judgment, the appellant did, then it is impossible to see how the public can have confidence in a person who has exhibited such incompetence. It is difficult to see how a profession such as the medical profession would countenance retaining as a doctor someone who had showed himself to be incompetent. It seems to me that the same must be true of the solicitors' profession. If in a course of conduct a person manifests incompetence as, in my judgment, the appellant did, then he is not fit to be a solicitor. The only appropriate remedy is to remove him from the roll. It must be recalled that being a solicitor is not a right, but a privilege. The public is entitled not only to solicitors who behave with honesty and integrity, but solicitors in whom they can impose trust by reason of competence."

76. In *SRA v Emeana* [2013] EWHC 2130 (Admin) solicitors gave the appearance of practising in partnership, when the firm was really a sole practice operated by an inexperienced solicitor. There was other deliberate flouting of the rules. The SRA alleged lack of integrity, but not dishonesty. The Solicitors Disciplinary Tribunal made findings of lack of integrity and imposed heavy fines. On appeal the Administrative Court held that the solicitors should be struck off the Roll.

77. In *Brett v SRA* [2014] EWHC 2974; [2015] PNLR 2 the Administrative Court held that recklessness by a solicitor in allowing the court to be misled did not amount to dishonesty. But it did amount to a lack of integrity, in breach of Principle 1.02.

78. In *SRA v Chan* [2015] EWHC 2659 (Admin) the respondent solicitors operated schemes which were designed to avoid or mitigate stamp duty land tax. These schemes were highly profitable for the solicitors, but involved considerable risks for the clients. The solicitors did not make proper disclosure to the clients who entered into those schemes. The solicitors were subordinating the interest of their clients to their own financial interests.

79. The Divisional Court, reversing the decision of the Solicitors Disciplinary Tribunal, held that the solicitors were guilty of lack of integrity, in breach of Principle 2. At [48] Davis LJ, with whom Ouseley J agreed, said:

> "48. As to want of "integrity", there have been a number of decisions commenting on the import of this word as used in various regulations. In my view, it serves no purpose to expatiate on its meaning. Want of integrity is capable of being identified as present or not, as the case may be, by an informed tribunal or court by reference to the facts of a particular case."

80. In *Scott v Solicitors Regulation Authority* [2016] EWHC 1256 (Admin) the appellant solicitor made improper payments out of his firm's client account. The Solicitors Disciplinary Tribunal held that he was guilty of acting without integrity, in breach of Principle 2, but his offending did not involve dishonesty. This was because element 2 of the two-stage test had not been established. The tribunal ordered that the appellant be struck off the Roll of Solicitors. The Administrative Court dismissed his appeal in relation to both the finding of lack of integrity and the sanction imposed.

81. Sharp LJ gave the leading judgment, with which Holroyde J agreed. At [48] Sharp LJ said:

> "48. The fact that the appellant was, in the event, found not to have been dishonest, plainly did not mean that it was not open to the SDT to conclude that he lacked integrity. There is an obvious distinction between the two concepts, as Mr Williams QC submits, and Mr Kendal did not argue to the contrary. A person can lack integrity without being dishonest. One example which applied here, was by being reckless as to the use of various client accounts. As the SDT found, the appellant had not enquired as to the reasons for the improper payments and transfers out of client account; he had not cared at all about what he was instructed to authorise, and he had not shown any steady adherence to any kind of ethical code. Accordingly it was not so much a case of what the appellant thought, but that he neither thought nor cared about what was required by the rules governing his profession, of which he was aware."

82. In *Bar Standards Board v Howd* [2017] EWHC 210 (Admin); [2017] 4 WLR 54 the appellant barrister made inappropriate sexual contact with females at a chambers

party. He was charged with breaches of Core Duty 3 and Core Duty 5 under the Bar's Code of Conduct. Core Duty 3 (at the relevant time) required the barrister to act with integrity and honesty. A disciplinary tribunal of the Bar Standards Board found six of the charges proved. Lang J allowed the barrister's appeal. She held that the barrister's misconduct did not fall within the scope of Core Duties 3 or 5. In relation to Core Duty 3, she said at [45]:

> "45. … "Integrity" in CD3 takes its colour from the term "honesty" in CD3 and connotes probity and adherence to ethical standards, not inappropriate and offensive social or sexual behaviour."

83. In *Newell-Austin v Solicitors Regulation Authority* [2017] EWHC 411 (Admin); [2017] Med LR 194 the Solicitors Disciplinary Tribunal held that the appellant solicitor had acted without integrity but not dishonestly, in that she had allowed her firm to become involved conveyancing transactions which bore the hallmarks of mortgage fraud. It also held that she had acted dishonestly by providing misleading information to the SRA. It struck her off the Roll. The solicitor argued on appeal that the finding of lack of integrity on the first allegation should be overturned. Morris J dismissed her appeal.

84. At [47] Morris J derived the following principles from the authorities:

> "1) Integrity connotes moral soundness, rectitude and steady adherence to an ethical code: see *Scott* §§38 and 59, both citing *Hoodless* §19.
>
> 2) No purpose is served by seeking to expatiate on the meaning of the term. Lack of integrity is capable of being identified as present or not by an informed tribunal by reference to the facts of a particular case: see *Chan* §48.
>
> 3) Lack of integrity and dishonesty are not synonymous. A person may lack integrity even though not established as being dishonest."

85. At [48]-[50] Morris J explained that the test for lack of integrity was objective. Nevertheless the state of a person's knowledge was relevant to determining whether they had acted without integrity.

86. *SRA v Libby* [2017] EWHC 973 (Admin) was one of the cases arising out of Axiom's improper lending. L borrowed a substantial sum from Axiom pursuant to a funding agreement similar to that described in Part 2 above. His firm used most of the money for general purposes, rather than for funding specific claims. The Divisional Court, reversing the decision of the Solicitors Disciplinary Tribunal, held that L was in breach of Principle 6. Lindblom LJ, delivering the judgment of the court, said at [35]:

> "35. In our judgment, the Tribunal did err in failing to address the question of whether the carelessness exhibited by the Respondent in dealing with the loan money, and failing to ensure that it was only used for purposes which were permitted,

> was such as to amount to a breach of Principle 6 of the Principles, notwithstanding the absence of any dishonesty or any lack of integrity on his part. Furthermore, in our judgment on the facts as found by the Tribunal in this particular case, the only conclusion that the Tribunal could reach was that the conduct complained of did involve such a failure to show the care and attention to be expected of a reasonably competent solicitor as would undermine the trust and confidence that the public would place in a solicitor."

87. In *Williams v SRA* [2017] EWHC 1478 (Admin) the Solicitors Disciplinary Tribunal found that the appellant solicitor had made three sets of false representations to third parties. In each instance he had acted in breach of Principles 2 and 6, in that he had acted without integrity and in a way that would not maintain the trust of the public in himself and in the provision of legal services. In one instance he had acted dishonestly. The Divisional Court allowed the appellant's appeal against the finding of dishonesty and against one of the findings of want of integrity, on the grounds of serious procedural irregularity.

88. In the course of argument Mostyn J's decision in *Malins v SRA* was discussed. Neither counsel supported Mostyn J's statement that "dishonesty" and "want of integrity" had the same meaning. Carr J, giving the leading judgment, said that she did not agree with Mostyn J's analysis. At [54] she said:

> "54. I proceed on the basis, both on the authorities and as a matter of principle, that, in the field of solicitors' regulation, the concepts of dishonesty and want of integrity are indeed separate and distinct. Want of integrity arises when, objectively judged, a solicitor fails to meet the high professional standards to be expected of a solicitor. It does not require the subjective element of conscious wrongdoing."

89. Sir Brian Leveson P agreed. At [130] he said:

> "130. As to paragraph 54, lest Mr Williams feel that Mr Lawrence has failed to take a point which could have been argued, I ought to make it clear that, in the absence of compelling justification, I would reject Mostyn J's description of the concept of want of integrity as second degree dishonesty. Honesty, i.e. a lack of dishonesty, is a base standard which society requires everyone to meet. Professional standards, however, rightly impose on those who aspire to them a higher obligation to demonstrate integrity in all of their work. There is a real difference between them."

90. Some four months after *Williams*, the tectonic plates of the legal firmament moved. The Supreme Court disapproved the Court of Appeal's decision in *Ghosh*. In *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2017] UKSC 67; [2017] 3 WLR 1212 Mr Ivey won substantial sums while playing Punto Banco at the defendant's casino. He achieved this by a means known as edge-sorting. The casino refused to pay out and Mr Ivey's claim to recover his winnings failed, because he had

been cheating. Mr Ivey considered, wrongly, that what he had been doing did not amount to cheating. That circumstance led the Supreme Court to review the whole concept of dishonesty on a broader basis. At [60] Lord Hughes said:

> "60. It is plain that in *Ghosh* the court concluded that its compromise second leg test was necessary in order to preserve the principle that criminal responsibility for dishonesty must depend on the actual state of mind of the defendant. It asked the question whether "dishonestly", where that word appears in the Theft Act, was intended to characterise a course of conduct or to describe a state of mind. The court gave the following example, at p 1063, which was clearly central to its reasoning:
>
> > "Take for example a man who comes from a country where public transport is free. On his first day here he travels on a bus. He gets off without paying. He never had any intention of paying. His mind is clearly honest; but his conduct, judged objectively by what he has done, is dishonest. It seems to us that in using the word 'dishonestly' in the Theft Act 1968, Parliament cannot have intended to catch dishonest conduct in that sense, that is to say conduct to which no moral obloquy could possibly attach."
>
> But the man in this example would inevitably escape conviction by the application of the (objective) first leg of the *Ghosh* test. That is because, in order to determine the honesty or otherwise of a person's conduct, one must ask what he knew or believed about the facts affecting the area of activity in which he was engaging. In order to decide whether this visitor was dishonest by the standards of ordinary people, it would be necessary to establish his own actual state of knowledge of how public transport works. Because he genuinely believes that public transport is free, there is nothing objectively dishonest about his not paying on the bus. The same would be true of a child who did not know the rules, or of a person who had innocently misread the bus pass sent to him and did not realise that it did not operate until after 10.00 in the morning. The answer to the court's question is that "dishonestly", where it appears, is indeed intended to characterise what the defendant did, but in characterising it one must first ascertain his actual state of mind as to the facts in which he did it. It was not correct to postulate that the conventional objective test of dishonesty involves judging only the actions and not the state of knowledge or belief as to the facts in which they were performed. What is objectively judged is the standard of behaviour, given any known actual state of mind of the actor as to the facts."

91. At [62] Lord Hughes said:

> "62. Dishonesty is by no means confined to the criminal law. Civil actions may also frequently raise the question whether an action was honest or dishonest. The liability of an accessory to a breach of trust is, for example, not strict, as the liability of the trustee is, but (absent an exoneration clause) is fault-based. Negligence is not sufficient. Nothing less than dishonest assistance will suffice. Successive cases at the highest level have decided that the test of dishonesty is objective. After some hesitation in *Twinsectra Ltd v Yardley* [2002] UKHL 12; [2002] 2 AC 164, the law is settled on the objective test set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378: see *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37; [2006] 1 WLR 1476, *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492; [2007] Bus LR 220; [2007] 1 Lloyd's Rep 115 and *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314; [2011] Lloyd's Rep FC 102."

92. After further analysis of the authorities, Lord Hughes concluded at [74]:

> "74. These several considerations provide convincing grounds for holding that the second leg of the test propounded in *Ghosh* does not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* and by Lord Hoffmann in *Barlow Clowes*: see para 62 above. 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."

93. Let me stand back from the kaleidoscope of the authorities and consider what the law now is. Honesty is a basic moral quality which is expected of all members of society. It involves being truthful about important matters and respecting the property rights of others. Telling lies about things that matter or committing fraud or stealing are generally regarded as dishonest conduct. These observations are self-evident and they fit with the authorities cited above. The legal concept of dishonesty is grounded upon the shared values of our multi-cultural society. Because dishonesty is grounded upon basic shared values, there is no undue difficulty in identifying what is or is not dishonest.

94. The general law imposes criminal and/or civil liability for many, but not all, dishonest acts or omissions. As explained most recently in ***Ivey***, the test for dishonesty is objective. Nevertheless, the defendant's state of mind as well as their conduct are relevant to determining whether they have acted dishonestly.

95. Let me now turn to integrity. As a matter of common parlance and as a matter of law, integrity is a broader concept than honesty. In this regard, I agree with the observations of the Divisional Court in ***Williams*** and I disagree with the observations of Mostyn J in ***Malins***.

96. Integrity is a more nebulous concept than honesty. Hence it is less easy to define, as a number of judges have noted.

97. In professional codes of conduct, the term "integrity" is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members. See the judgment of Sir Brian Leveson P in ***Williams*** at [130]. The underlying rationale is that the professions have a privileged and trusted role in society. In return they are required to live up to their own professional standards.

98. I agree with Davis LJ in ***Chan*** that it is not possible to formulate an all-purpose, comprehensive definition of integrity. On the other hand, it is a counsel of despair to say: "Well you can always recognise it, but you can never describe it."

99. The broad contours of what integrity means, at least in the context of professional conduct, are now becoming clearer. The observations of the Financial Services and Markets Tribunal in ***Hoodless*** have met with general approbation.

100. Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. To take one example, a solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead. Such a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse.

101. The duty to act with integrity applies not only to what professional persons say, but also to what they do. It is possible to give many illustrations of what constitutes acting without integrity. For example, in the case of solicitors:

    i) A sole practice giving the appearance of being a partnership and deliberately flouting the conduct rules (***Emeana***);

    ii) Recklessly, but not dishonestly, allowing a court to be misled (***Brett***);

    iii) Subordinating the interests of the clients to the solicitors' own financial interests (***Chan***);

    iv) Making improper payments out of the client account (***Scott***);

    v) Allowing the firm to become involved in conveyancing transactions which bear the hallmarks mortgage fraud (***Newell-Austin***);

    vi) Making false representations on behalf of the client (***Williams***).

102. Obviously, neither courts nor professional tribunals must set unrealistically high standards, as was observed during argument. The duty of integrity does not require professional people to be paragons of virtue. In every instance, professional integrity is linked to the manner in which that particular profession professes to serve the public. Having accepted that principle, it is not necessary for this court to reach a view on whether *Howd* was correctly decided.

103. A jury in a criminal trial is drawn from the wider community and is well able to identify what constitutes dishonesty. A professional disciplinary tribunal has specialist knowledge of the profession to which the respondent belongs and of the ethical standards of that profession. Accordingly such a body is well placed to identify want of integrity. The decisions of such a body must be respected, unless it has erred in law.

104. Let me now turn from Principle 2 in the SRA's code to Principle 6. A solicitor breaches Principle 6 if he behaves in a way that undermines the trust which the public places in himself/herself and in the provision of legal services.

105. Principle 6 is aimed at a different target from that of Principle 2. Principle 6 is directed to preserving the reputation of, and public confidence in, the legal profession. It is possible to think of many forms of conduct which would undermine public confidence in the legal profession. Manifest incompetence is one example. A solicitor acting carelessly, but with integrity, will breach Principle 6 if his careless conduct goes beyond mere professional negligence and constitutes "manifest incompetence"; see *Iqbal* and *Libby*.

106. In applying Principle 6 it is important not to characterise run of the mill professional negligence as manifest incompetence. All professional people are human and will from time to time make slips which a court would characterise as negligent. Fortunately, no loss results from most such slips. But acts of manifest incompetence engaging the Principles of professional conduct are of a different order.

107. Against that background, let me know turn to the appeal in *Wingate and Evans*.

Part 6. Mr Wingate's and Mr Evans' appeal against the judgment of Mr Justice Holman

108. By an appellant's notice filed on 10th April 2017, Mr Wingate and Mr Evans appealed against the judgment of Holman J on the following grounds:

i) The judge erred in finding Mr Wingate in breach of Principle 6. The funding agreement was not a sham and Mr Wingate did not display manifest incompetence.

ii) The judge erred in finding Mr Wingate in breach of Principle 2. Mr Wingate did not act without integrity. The judge erred in saying that lack of integrity was a purely objective concept.

iii) The judge erred in finding that Mr Evans was in breach of Principle 6. Mr Evans was not manifestly incompetent.

iv) The judge erred in making a costs order against Mr Wingate and Mr Evans.

Grounds (i) and (ii)

109. Mr Treverton-Jones submits that once dishonesty had dropped out of the picture (as it did during the hearing on 21st December 2016) it was not open to the judge to hold that the funding agreement was a sham. I do not agree.

110. On the tribunal's findings of fact, indeed on Mr Wingate's own case, the funding agreement bore no relationship to the true arrangements between the parties. Therefore it was a sham. Mr Wingate carefully read through the agreement. He knew perfectly well that he could not and would not comply with its terms. He believed that in due course another agreement which was not a sham would replace it. Nevertheless, unless and until that happened, the funding agreement was the effective contract between W E Solicitors LLP and Axiom. As Mr Treverton-Jones accepted in argument, Mr Wingate knew that the money would not arrive unless he signed the funding agreement. Accordingly, as he well knew, that sham funding agreement was going to trigger substantial financial consequences.

111. I agree with the judge's analysis of these events. The arrangements with Axiom were on their face highly dubious. It was extraordinary that a solicitors' firm should be asked to sign a sham contract for no satisfactory reason. For Mr Wingate honestly, but foolishly, to go along with that arrangement was manifest incompetence.

112. It is true that the facts of this case are not on all fours with the facts of ***Bryant*** or ***Iqbal***. But the principles are the same. The incompetence of Mr Wingate in going along with the highly dubious arrangements proposed by Mr Barnett and Mr Hudson would inevitably undermine the trust which the public placed in W E Solicitors LLP and more generally in the provision of legal services.

113. I accept that the investors in Axiom were not clients to whom W E Solicitors LLP owed any duty of care. On the other hand, investors stand behind almost every third party funder. The investors put up monies to fund litigation in the expectation that there will be proper safeguards for their funds. No competent solicitor could seriously believe that a sham agreement of the kind which existed in this case would be an adequate safeguard for the investors in Axiom.

114. The appellants place heavy reliance on the respectability and apparent probity of Mr Barnett and Mr Hudson. But I do not see where that gets them. Their insistence on Mr Wingate signing a sham agreement as a condition of releasing funds of £900,000 seems to me to be incompatible with the conduct of any respectable and reliable solicitor, even if such a solicitor has secured election to the Council of the Law Society.

115. It is quite true that in considering the issue of integrity, the judge treated the test as an objective one. At [37] the judge said:

> "The law requires a subjective element to any finding or conclusion of dishonesty, but the question whether a person lacked integrity is objective."

116. In that regard the judge was stating the law as it was understood to be in December 2016. He did not have the advantage of seeing the discussion of objective and subjective tests in the more recent authorities, in particular *Ivey*.

117. We now know that the test for dishonesty is objective and that even an objective test involves having regard to the state of mind of the actor.

118. Although the judge did not have access to the most recent jurisprudence, I think that his analysis of the integrity issue was sound. He said at [76]:

> "Any solicitor who signs a sham contract of this magnitude and significance in relation to a loan of £900,000 must objectively lack integrity in that regard."

119. In reaching that conclusion the judge was not simply looking at what Mr Wingate did and said. He also expressly took into account the facts which Mr Wingate knew and his state of mind.

120. In my view, therefore, the judge applied the right test. Did he reach the right answer?

121. At this point in the analysis, the distinction between honesty and integrity becomes crucial. The SRA accept that Mr Wingate was acting honestly and the judge proceeded on that basis. But, as explained in Part 5 above, the word "integrity" in a professional code of conduct means something more than mere honesty. It involves adherence to the ethical standards of one's own profession.

122. A solicitor, barrister or legal executive, perhaps more than any other profession, should appreciate the importance of a written contract, especially a contract which will trigger the payment out of £900,000 of investors' money. A member of the general public may be entitled to say "I was assured by a respectable person that the written contract did not matter. It was going to be torn up later. I was acting with integrity, but foolishly." But a solicitor is not entitled to say that. In my view, by proceeding in the way he did Mr Wingate failed to act in accordance with the ethical standards of the solicitors' profession.

123. I would therefore reject grounds (i) and (ii) of the appeal.

Ground (iii)

124. Mr Evans was in a different position from Mr Wingate. Mr Evans concentrated on the firm's litigation case load and fee-earning work. Given the parlous state of the firm, this activity was of critical importance.

125. Mr Evans did not meet either Mr Barnett or Mr Hudson. He did not read the funding agreement. On the tribunal's findings of fact, Mr Evans left everything on the financial and management side to Mr Wingate.

126. Mr Wingate and Mr Evans reported back to each other. But they did not do so in such detail as to arouse Mr Evans' suspicions about the Axiom loan.

127. At paragraph 380.11 the tribunal made the following finding of fact:

> "The second respondent had made adequate, if not full, inquiries."

128. This was a finding of fact made by a specialist tribunal with knowledge about how solicitors firms, both large and small, allocate responsibilities between partners.

129. I appreciate that in the first part of paragraph 380.11 the tribunal wrongly exculpated Mr Wingate from the allegations of professional misconduct. But the last part of that paragraph is a separate finding of fact, which stands on its own. In my view the judge was not entitled to go behind that finding of fact.

130. The judge has held that Mr Evans' failure to obtain and read the funding agreement was manifest incompetence. I agree that Mr Evans was imprudent in that regard. But on the facts presented to Mr Evans, it was obviously advantageous to take a loan from Axiom and to repay the HBOS debt, which he had personally guaranteed. Mr Evans was hard pressed with other matters and he trusted Mr Wingate to deal with the finances. Mr Evans' failure to read the funding agreement and then to challenge his partner may be characterised as carelessness or negligence, but it did not amount to "manifest incompetence", engaging the Principles of professional conduct. In my view, the judge's decision in that regard is a bridge too far.

131. I would therefore allow the appeal on ground (iii) and set aside the finding that Mr Evans was in breach of Principle 6.

Ground (iv)

132. The judge's costs order made against Mr Evans will fall away as a result of the successful appeal on ground (iii). Ground (iv) therefore only affects Mr Wingate.

133. If the SRA succeeds before the Solicitors Disciplinary Tribunal, it normally obtains an order for costs against the errant solicitor. If the SRA fails in such a prosecution, the tribunal normally makes no order for costs. At first sight this may seem harsh. There are, however, good reasons for this regime, which the Court of Appeal has explained in *Baxendale-Walker v Law Society* [2007] EWCA Civ 233; [2008] 1 WLR 426.

134. Mr Treverton-Jones submits that, having regard to the costs regime before the tribunal, it is unjust for the SRA to recover costs against the respondent solicitor if there is a successful appeal against an acquittal. The solicitor should not have to pay two sets of costs.

135. I do not agree with that analysis. When the parties arrive in the Administrative Court, because one or other of them is appealing against decisions made by the Solicitors Disciplinary Tribunal, they are entering a conventional costs shifting regime. They stand on an equal footing. Subject to any special circumstances, the losing party will normally pay the winning party's costs: see CPR rule 44.2. In this case the SRA will pay the costs of Mr Evans in the Administrative Court. They will recover their costs in that court against Mr Wingate.

136. Mr Treverton-Jones states that it is rare for solicitors to be insured against the costs of disciplinary proceedings. I have no reason to doubt Mr Treverton-Jones. He has great

experience of these matters. But insurance considerations of this character should not deflect the court from making an otherwise appropriate costs order at the conclusion of an appeal.

137. In the result, therefore, I would dismiss ground (iv). I must now move on to consider the appeal in *Malins*.

Part. 7 The SRA's appeal against the judgment of Mr Justice Mostyn

138. By an appellant's notice filed on 3rd May 2017, the SRA appealed against the judgment of Mostyn J on the following grounds:

i) The Judge erred in holding that "integrity" in Principle 2 had the same meaning as honesty.

ii) The SRA's case was not illogical or contradictory, as the judge held.

iii) In any event, that did not infect the conviction on count 1.3.

iv) The tribunal gave adequate consideration to the character evidence and the medical evidence.

v) If remitting the case to the tribunal, the Judge should have done so on the original grounds.

Ground (i)

139. Mostyn J held that lack of integrity in breach of Principle 1.02 had the same meaning as dishonesty: see the judgment at [25]. In my view, for the reasons set out in Part 5 above, that paragraph is incorrect.

140. To be fair, Ms Morris did not make any strenuous efforts to support that particular passage in the judgment. She pointed out that that passage was not critical to the Judge's decision. As she put it in her oral submissions, "we got more than we asked for." I agree. I uphold the first ground of appeal, but this does not mean that the SRA will succeed in their appeal.

Grounds (ii) and (iii)

141. These grounds go to the central issues in this appeal. It is convenient to deal with them together.

142. Ms Morris draws our attention to a number of authorities, which emphasise the importance of pleading allegations of dishonesty clearly and proving them distinctly. In *Salha v GMC*, Privy Council Appeal No. 35 of 2003, Lord Hoffmann said at [14]:

> "14. It is a fundamental principle of fairness that a charge of dishonesty should be unambiguously formulated and adequately particularised."

143. In *Constantinides v The Law Society* [2006] EWHC 725 (Admin) the Administrative Court was strongly critical of the way that dishonesty had been pleaded in the Rule 4

statement (the equivalent of what is now a Rule 5 statement). Nevertheless the appellant was not misled by the pleading. His appeal was dismissed.

144. In *Chauhan v GMC* [2010] EWHC 2093 (Admin) the Administrative Court set aside certain findings of dishonesty made against a doctor by the Fitness to Practice Panel, because the relevant allegations had not been properly pleaded. At [6] King J said:

> "6. I accept the Appellant's analysis that the rules thus require the Respondent to give notice of any particular allegation being pursued against the practitioner and to particularise the facts upon which it is based and it is those facts, where disputed, which the Panel is required to determine in accordance with Rule 17(2). In so far as the Panel, at stage one of its decision process, makes material findings of fact adverse to the practitioner which could themselves have been the subject of a charge of professional misconduct, which however are not within the charges as formulated and particularised in the Notice of Hearing, then those findings in my judgment cannot properly or fairly be used by the Panel to support its findings under the Notice and in so far as the Panel has so used them, then the Notice findings are liable to be held vitiated and set aside."

145. Foskett J made similar observations in *Fish v GMC* [2012] EWHC 1269 (Admin); [2012] Med LR 512. He said at [69]:

> "69. I do not think that I state anything novel or controversial by saying that it is an allegation (a) that should not be made without good reason, (b) when it is made it should be clearly particularised so that the person against whom it is made knows how the allegation is put and (c) that when a hearing takes place at which the allegation is tested, the person against whom it is made should have the allegation fairly and squarely put to him so that he can seek to answer it."

146. Mr Coleman does not take issue with any of those authorities. He submits that in the present case the various allegations of lack of integrity and dishonesty were properly pleaded and properly presented to the tribunal. The tribunal's decision did not go beyond the case which was put before it.

147. Let me start with the pleading point. Counts 1.1 and 1.2 pleaded that Mr Malins acted without integrity and undermined public trust in himself and the provision of legal services by creating the backdated documents. Those were perfectly proper allegations to plead and put before the tribunal.

148. Count 1.3 pleaded that Mr Malins acted without integrity and undermined public trust in himself and the provision of legal services by deploying the backdated documents in the course of settlement negotiations. That too was a perfectly proper allegation to plead.

149. As previously noted, dishonesty is not *per se* an offence under the SRA Principles. If proved, it is an aggravating factor. If the SRA wish to allege that any particular offence involved dishonesty, they must plead that allegation as a separate item in the Rule 5 statement.

150. In the present case the SRA chose to allege that count 1.3 involved dishonesty. The judge took the view that if the SRA were going to allege dishonesty in respect to count 1.3, they should make the same allegations in respect of counts 1.1 and 1.2. At [24] he said:

> "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."

151. Ms Morris supports the judge's analysis. Mr Coleman submits that the judge fell into error. Mr Coleman accepts that the SRA could have alleged dishonesty in respect of counts 1.1 and 1.2, but he submits that they were not obliged to do so. He says that the SRA were pulling their punches and they were entitled to do so.

152. On this issue, I accept Mr Coleman's submissions. With respect, I reject the judge's analysis. Once Mr Malins had created the backdated documents, he had a chance to think again and ask himself whether he really did want to send off backdated documents which were liable to mislead.

153. It is commonplace that after drafting a significant email, sometimes the author pauses before clicking on "send". Almost everyone has had the experience of regretting an email that was sent off too hastily. That is why people often do pause before clicking on the send button. It was not inevitable that, after creating the backdated documents, Mr Malins would take the disgraceful and irrevocable step of sending them out as genuine documents of March 2013.

154. The SRA were quite entitled to limit their allegations of dishonesty to count 1.3, if they so wished.

155. Let me now turn to ground (iii). Ms Morris points out that during the hearing Mr Geoffrey Williams QC said that Mr Malins was "fortunate" not to be accused of dishonesty in respect to counts 1.1 and 1.2. The tribunal records that observation at paragraph 45 of its decision. Ms Morris submits that the suggestion that Mr Malins was guilty of an offence with which he was not charged prejudiced the defence.

156. As a general rule a prosecutor should not say that the respondent is fortunate not to have been charged with more serious offences. The prosecution should either (a) charge the respondent solicitor with that more serious offending or (b) refrain from suggesting that he is guilty of that more serious offending and lucky to get away with

it. But this case was unusual. The respondent solicitor was complaining about the prosecution's failure to allege dishonesty on counts 1.1 and 1.2. Mr Williams was responding to that complaint. He accepted that the prosecution could have alleged dishonesty in respect of counts 1.1 and 1.2, but he argued that they were not obliged to do so and they had chosen not to make that allegation. This was the context in which Mr Williams used the word "fortunate".

157. I do not think that the slightest harm was done by the prosecutor's choice of language. The tribunal had to determine what was Mr Malins' state of mind on 2nd May 2014. Was Mr Malins simply intending to provoke Hill Dickinson to carry out a thorough search of their files (as Mr Malins asserted)? Or did he intend to deceive Hill Dickinson into thinking that the documents sent on 2nd May 2014 were electronic documents which Mr Malins had created and sent in March 2013? The tribunal held that he had the latter intention. Therefore in creating the documents Mr Malins was acting without integrity. In actually sending the documents off Mr Malins was acting without integrity and dishonestly.

158. Reading the tribunal's decision as a whole, I am quite satisfied that the tribunal had in mind the distinctions between counts 1.1 and 1.2 (where only lack of integrity was alleged) and counts 1.3 and 1.4 (where both lack of integrity and dishonesty were alleged). The penultimate sentence of paragraph 50.42 of the tribunal's decision is ambiguously phrased. But when read in the context of all that precedes and all that follows (noting the specific reference to count 1.3 in the following sentence), I conclude that the words "in doing so" are a reference to deploying the backdated documents. It would not make sense to read those words as referring also to the creation of the backdated documents.

159. I quite agree that the findings of fact which the tribunal necessarily made in relation to the issue of integrity on counts 1.1 and 1.2 could form the foundation for holding that Mr Malins was dishonest in creating the backdated documents. But the tribunal were not asked to decide that question and they did not do so. No harm was done until the moment when Mr Malins actually sent out the backdated documents.

160. I do not think that a single mention of Mr Malins being "fortunate" not to be charged with dishonesty in relation to counts 1.1 or 1.2 could possibly have affected the decisions on counts 1.3 and 1.4. The tribunal made what seems to me to be eminently sensible decisions on those two counts, based upon the evidence before them.

161. Mr Malins says that there is more evidence which he would have called if dishonesty had been alleged in relation to counts 1.1 and 1.2. If such evidence existed, it presumably went to his state of mind on 2nd May 2014. That evidence would have been relevant to the issue of integrity on counts 1.1, 1.2 and 1.3 and to the issue of dishonesty on count 1.4. Therefore I do not accept that Mr Malins has been deterred from calling relevant evidence.

162. In the result, I would uphold ground (ii) and (iii) of the SRA's appeal.

Ground (iv)

163. The medical evidence on which Mr Malins relied comprised an undated report by Dr Field, a psychologist; a one page letter dated 9th March 2015 from Mr Malins' GP and

a three line report from Professor Lovestone concerning a member of Mr Malins family. The psychologist's report records that Mr Malins was under stress in 2013, which significantly impacted on his capacity to work at high standards. The problems got worse during 2014 and Mr Malins became depressed.

164. The medical evidence may explain any instances of carelessness in Mr Malins' work. But I do not see how the medical evidence can exculpate Mr Malins for sending off backdated documents in order to give the impression that they were created and sent 14 months previously.

165. I accept that the medical evidence is relevant to the assessment of Mr Malins' self-report in November 2014. Mr Malins maintains that because of his state of mind at that time, he was too free with his admissions in the self-report.

166. It is clear from paragraphs 50.39 and 50.42 of its decision that the tribunal took the medical evidence into account in relation to Mr Malins' self-report. Nevertheless the tribunal concluded that the admissions which Mr Malins had made in his self-report accorded with the true situation.

167. The tribunal was aware that Mr Malins was of previous good character. The tribunal received character references and had them in mind. Unfortunately, in a case such as this a solicitor's previous good character can do little to mitigate the seriousness of his misconduct or the sanction that must follow. This case is very different from ***R (Campbell) v GMC*** [2005] EWCA Civ 250; [2005] 1 WLR 3488 and ***Donkin v The Law Society*** [2007] EWHC 414 (Admin), upon which Ms Morris relies. The Solicitors Disciplinary Tribunal is not obliged to give itself a good character direction of the kind that Crown Court judges routinely give to juries in criminal trials: see ***Shaw v Logue*** [2014] EWHC 5 (Admin) at [180]-[182].

168. In my view, the tribunal gave adequate consideration to the medical evidence and the character evidence. I would therefore uphold ground (iv).

169. In those circumstances the other grounds of appeal do not arise for consideration. I would therefore allow the SRA's appeal on the first four grounds.

Part 8. Conclusion

170. For the reasons set out in Parts 5 and 6 above, I would dismiss the appeal of Mr Wingate, but allow the appeal of Mr Evans against the judgment of Mr Justice Holman.

171. For the reasons set out in Parts 5 and 7 above, I would allow the appeal of the SRA against the judgment of Mr Justice Mostyn.

Lady Justice Sharp:

172. I agree.

Lord Justice Singh:

173. I also agree.