Royal Parks Ltd v Bluebird Boats Ltd

No Substantial Judicial Treatment

Court
Queen's Bench Division (Technology & Construction Court)

2021 WL 03516195

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE.

Case No: HT-2020-000453

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES TECHNOLOGY AND CONSTRUCTION COURT (QBD)

[2021] EWHC 2278 (TCC)

Royal Courts of Justice Rolls Building, London, EC4Y 1NL

Date: 11/08/2021

Before :

MRS JUSTICE O'FARRELL DBE

- -

Between :

1. THE ROYAL PARKS LIMITED 2. THE SECRETARY OF STATE FOR DIGITAL, CULTURE, MEDIA AND SPORT	Claimants
- and -	

BLUEBIRD BOATS LIMITED	Defendant

- -

- -

Ms Camilla Chorfi (instructed by Bates Wells) for the Claimants

Mr Kevin Leigh (instructed by RIAA Barker Gillette (UK) LLP) for the Defendant

Hearing dates: 4th & 5th May 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

"Covid-19 Protocol: This judgment was handed down by the judge remotely by

circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 11 th August 2021 at 10:30am"

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. This is the expedited trial of a dispute concerning the ownership of a boathouse and jetties ("the Boathouse") located on the north west side of the Serpentine Lake, Hyde Park, London.

2. The freehold land known as Hyde Park is owned by the Crown. The First Claimant is a charity incorporated on 19 February 2016 at the instigation of the Second Claimant to assume the functions previously carried out by one of its executive agencies, the Royal Parks Agency, including the management of Hyde Park.

3. Since 1998, the Defendant has operated boating facilities at the Serpentine for the public.

4. By a concession contract dated 17 December 2004, made between the Second Claimant and the Defendant ("the Contract"), the Defendant agreed to replace the existing boathouse and jetties with the Boathouse and to provide boating services at the Serpentine Lake.

5. The original contract period of fifteen years was extended by agreement of the parties to 10 November 2020 but thereafter the Contract expired. The Defendant's concession has not been renewed, although it has been extended on an interim basis pending resolution of a challenge in separate proceedings by way of judicial review.

6. In these proceedings, the Claimants seek declaratory relief as to the ownership of the Boathouse, together with orders to restrain the Defendant from continuing to trade from the Boathouse and from removing the Boathouse from Hyde Park.

7. The Claimants' case is that the Boathouse is part of Hyde Park; it was constructed to form part of the land and belongs to the Crown. The Defendant has no right to remove the Boathouse on expiry of its interim concession rights in October 2021.

8. The Defendant's case is that it retained ownership of the Boathouse which remained a chattel and was not a fixture to the land; alternatively the Claimants are estopped from denying the Defendants' ownership of that part of the Boathouse that can be removed. It was designed so that it could be assembled in parts at the lakeside and subsequently dismantled. The Boathouse was a substantial capital investment for the Defendant and was intended to be removeable in the event the concession ended by effluxion of time or otherwise.

Background to the dispute

9. By a contract made on 1 April 1998, the Second Claimant granted the Defendant a concession for operating a boating service on the Serpentine Lake from the boat house and jetties then located at the lakeside.

10. In about 2002, the Claimants took the decision to re-tender the concession. Mr McErlean, former employee of the Royal Parks Agency, explained in his witness statement that the intention was to provide enhanced boating facilities that would generate income for the Claimants and for the operator. It was recognised that the existing boathouse and infrastructure required investment. As a result, applicants were

required to include within their bids provision for replacing the existing boathouse and jetties at their own cost.

11. The Specification of Requirements document provided that the concession holder would be required to operate a boating service on the Serpentine. The concession holder would also be required, at his expense, to replace the existing boathouse and jetties, and to maintain them throughout the term of the concession. The Contract duration would be a minimum of ten years but subject to the investment proposals from the tenderer.

12. Paragraph 5.1.1 of the Specification provided that the price for a ten year concession was replacement of the existing boathouse and jetties i.e. that was the minimum level of capital investment required from the Defendant.

13. Paragraph 6.1.1 of the Specification stated that factors relevant to the Claimants' assessment of the tenders

included the level of capital investment, the terms of the offer and the percentage share of gross profits that would be paid to the Claimants.

14. On 30 January 2004 the Defendant made its initial tender submission. On 8 June 2004 the Second Claimant invited the Defendant to re-submit the tender in accordance with specification and tender documents sent to the Defendant by email.
15. On 12 July 2004 the Defendant re-submitted its tender, including the following option: “The present boathouse, nearing the end of its useful aesthetic

life, will be replaced.

The new boathouse will be relocated nearer to the water’s edge by 1 metre. This will allow the pavement to be reclaimed for pedestrians.

The kiosk AND ice-cream unit will be re-housed in the new boathouse’s north-eastern corner, allowing Serpentine Road to be cleared.

Ernie Colicci has indicated his willingness to relocate to this new location if he wins the new mobile catering contract, and will pay a nominal rent to BlueBird. BlueBird will remain solely responsible for the entire building.

A new jetty will be floated on the south side of the new boathouse.

The existing jetties will be re-furbished with new decking timber, ‘D’ fenders and trim.

A new ferry and ferry service will run to a new jetty located near the Diana Memorial Fountain.”

16. The financial offer made by the Defendant was for a contract term of 15 years. Payments to the Claimants would comprise ten percent of gross annual turnover in respect of the boating service and five percent in respect of retail sales, with a minimum guaranteed income of £85,000.

17. Expenditure models produced by the Defendant showed indicative capital costs of

£573,625 for the new building and £89,000 for the new jetties if they were extended; alternatively, £429,875 for the building and £76,000 for the new jetties, if a simpler design were used.

18. By letter dated 4 November 2004 the Defendant clarified that, if awarded the contract, the capital investment in the Hyde Park project would include £430,000 in respect of replacement of the existing boathouse and £76,000 in respect of the new/refurbished jetties. The financial schedules attached to the letter showed depreciation of the Defendant's capital investment over a period of 15 years to £0.

19. By letter dated 17 December 2004 the Claimants awarded the Defendant the Contract pursuant to which the Defendant would provide boating services at Hyde Park and Greenwich Park, stating:

"1. On behalf of the Secretary of State for Culture, Media and Sport, I accept your offer to provide the above services on the basis of your tender submitted on 12 July 2004 and varied as follows:

(iv) You will pay the Authority 10% of net [sic] turnover for the boating operation but will guarantee a minimum payment of £85K per annum…

2. This letter, your tender submission (as varied by the above) together with the following documents, will form a binding contract between the Secretary of State and your Company.

Schedule 1 – Specification of Requirements Schedule 2 – Conditions of Contract (as varied)

Schedule 3 – Tender Submissions and Price Schedule dated 12 July 2004 (as varied)…"

20. The Contract Period commenced on 17 December 2004, with a term of 15 years, expiring on 30 November 2019.

21. By a licence dated 10 October 2007, the Second Claimant granted the Defendant permission for the demolition of the old boathouse and the initial preparation work for the construction of the new boathouse ("the Demolition Licence").

22. By a further licence dated 22 February 2008, the Second Claimant granted the Defendant permission to carry out the works to construct the Boathouse ("the Construction Licence").

23. Practical completion of the Boathouse was achieved on 9 September 2008.

24. By an agreement dated 14 January 2009, the parties agreed to vary the terms of the Contract, including a concession for the Defendant to sell additional items from the Boathouse and provision for events giving rise to compensation ("the Variation Agreement").

25. By a further agreement set out in the Claimants' letter dated 19 March 2019, signed by the parties, they agreed to extend the duration of the Contract from 30 November 2019 to 10 November 2020 and to increase the percentage of gross turnover payable by the Defendant from ten percent to fifteen percent.

Proceedings

26. In 2020 the Defendant sought to renew the concession beyond November 2020 but the Claimants refused to do so. The Defendant issued a claim for judicial review, seeking to quash the First Claimant's decision not to extend the concession and requiring it to retake its decision, together with an injunction requiring the First Claimant to allow the Defendant to continue trading from the Boathouse.

27. On 9 December 2020 the Claimants issued these proceedings, seeking the following declarations:

1. the Defendant does not own the Boathouse;

2. the boathouse jetties are attached to the land as fixtures and, as such, form part of the land at Hyde Park;

3. the boathouse building has become part and parcel of the land at Hyde Park;

4. the Boathouse is the property of the Crown (in the alternative, the Second Claimant);

5. the Defendant has no right to remove from Hyde Park or retain the Boathouse.

28. Further, the Claimants seek orders (if and to the extent necessary):

1. restraining the Defendant from continuing to trade from the Boathouse and/or at Hyde Park (and/ or at Greenwich Park);

2. restraining the Defendant from removing the Boathouse (or any part of it) from Hyde Park;

3. requiring the Defendant to remove its equipment and other chattels from the Boathouse.

29. On 17 December 2020 permission was granted to the Defendant to bring the judicial review proceedings but refusing to grant interim relief.

30. Pending resolution of the dispute between the parties, the First Claimant has granted an interim contract to the Defendant until 30 October 2021 to permit boating services to continue over the summer season.

The Witnesses

31. The following factual witnesses gave evidence:

1. Mr Greg McErlean, former director of major developments at the Royal Parks Agency;

2. Mr Stephen Edwards, former manager of Hyde Park, who evaluated the tenders for the concession contract (now Head of Special Projects);

3. Mr Peter Scott, Director of the Defendant.

32. The parties relied on the following expert evidence:

1. Mr Ellingworth, the Claimants' building surveying expert, prepared a report dated 19 April 2021;

2. Mr Ford, the Defendant's architectural expert, who designed the boathouse, prepared a report dated 16 April 2021;

3. the experts produced a joint statement dated 9 April 2021.

The Issues

33. Although there was a degree of movement on the identification of the issues during the hearing, by closing submissions the parties agreed the following formulation:

1. Issue 1: Does the Boathouse comprise the superstructure (the part attached to but sitting on the concrete slab) for the purposes of considering its removal for re-use or does it comprise both the superstructure and concrete slab for these purposes?

2. Issue 2: Has the Boathouse become part of the land? What is its degree of annexation and what is the purpose of its design and erection?

3. Issue 3: Do the terms of the 2004 Contract preclude the Defendant from removing the Boathouse?

4. Are the Claimants estopped from denying the Defendant's ownership of "that much of the Boathouse that can be removed from the land". In this respect:

The Contract

34. Before turning to the issues, it is helpful to examine the commercial context in which the Boathouse was constructed and used during the period of the boating concession.

35. The Specification of Requirements document, forming part of the Contract, included the following provisions:

"1.2.3 The Concession Holder will be required to operate a Boating Service on the Serpentine in the summer season. The Boathouse and jetties are located on the North side of the Serpentine, their maintenance being the responsibility of the concession holder.

1.2.4 The Concession Holder will be required, at his expense, to replace the boathouse and replace the jetties.

…

1.2.6 The design of the new boathouse will require specialist advice and will be dependent on planning approval being given. The Royal Parks will work with the successful concession holder in developing a proposal that will satisfy the planners.

…

1.4.1 All of the existing boats are owned by the current Concession Holder, as is the equipment required for the provision of the Service. Ownership of the fixtures and fittings transfers to the Authority on termination of the existing contract.

…

iv. Operate the public boating concession on behalf of the Authority and pay the Authority the tendered percentage of the gross receipts and / or a flat rate concession.

…

…

8.4.1 As the level of capital investment required will influence the percentage of gross turnover offered to the Royal Parks and the contract term required, detailed and accurate estimates of expenditure are requested in the tender return. The Royal Parks will, upon completion of the works, arrange for an independent inspection and audit of the receipts to verify expenditure on the project for depreciations purposes and to ensure correct Commission levels are applied.

…

8.4.3 The Concession Holder is required to depreciate the capital investment in the facilities over the contract period using a straight-line depreciation. Should the contract be terminated early, through no fault of the Concession Holder, the Royal Parks shall be responsible for the undepreciated sum outstanding (see also General Condition 51.4).”…

36. The Contract Conditions included the following provisions: “Contract” was defined as:

“the agreement to the Conditions between the Authority and the Concession Holder consisting of the following Schedules which, in event of ambiguity or contradiction between Schedules, shall be given precedence in the order listed:

Schedule 2: Conditions of Contract;

Schedule 1: Briefing and Specification of Requirements; Schedule 3: Tender Submissions and Price Schedule; Schedule 4: Form of Tender.”

“Authority’s Premises” and “Premises” were defined as:

“land, buildings and other structures, conducting media and underground services owned or occupied by the Authority and from which Services are performed.”

“Authority” was defined as:

“The Royal Parks Agency on behalf of the Secretary of State for Culture, Media and Sport and includes the Authority’s Representative.”

37. Condition 3 was an entire agreement provision.

38. Condition 5 set out the boating services to be provided by the Defendant.

39. Condition 6.1 stated:

"At all times the structure and envelope of the Premises shall remain the property of the Authority and at no time shall it vest in the Concession Holder."

40. Condition 10.1 stated:

"During the currency of this Contract, the Concession Holder shall be granted a non-exclusive licence (subject to all necessary rights and access whether arising expressly or by implication pursuant to the terms of this Contract) to occupy the Premises."

41. Condition 10.6 stated:

"Upon completion or earlier termination of this Contract, the Concession Holder shall remove all equipment not transferred by this Contract and shall clear from the Premises all waste arising from the provision of the Services and shall leave the Premises in a clean and tidy condition."

42. Condition 20 set out the provisions for handover of the Premises, including the following:

Condition 20.3:

"Upon completion of the dilapidations survey required by Condition 20.2 the firm of Chartered Surveyors will prepare a schedule of works which they consider the Concession Holder needs to undertake in respect of the Premises to return it to a reasonable condition."

Condition 20.5:

"The Concession Holder shall remove from the Premises, prior to the expiry of this Contract within seven days of termination, all of the property that the Authority agrees is in the Concession Holder's ownership."

Condition 20.8:

"The Concession Holder is not to remove from site any finishes, signage, fixtures, fittings, furniture or equipment which belongs to the Authority in accordance with the terms of this Contract."

43. Condition 25 imposed on the Defendant obligations to maintain the Premises and Boats.

44. Condition 50.1 gave the Authority the right to terminate the Contract, or to terminate the provision of any part of the Services, by giving one month's written notice to the Defendant.

45. The consequences of termination were set out in Condition 51, including the following: "51.2 If the Authority terminates the Contract, or terminates

the provision of any part of the Services, under Condition 50, the Authority shall reimburse the Concession Holder in respect of any loss, not including loss of profit, actually and reasonably incurred by the Concession Holder as a result of the termination, provided that the Concession Holder takes immediate and reasonable steps, consistent with the obligation to provide the Services during the period of notice, to terminate all contracts with subcontractors on the best available terms, to cancel all capital and recurring cost commitments, and to reduce Equipment and Labour costs as appropriate

…

51.4 The Concession Holder is required to depreciate the capital investment in the facilities over the contract period using a straight-line depreciation. Should the contract be terminated under Condition 50, the Authority shall be responsible for the undepreciated sum outstanding."

46. The contractual documents indicate that the basis of the commercial arrangements between the parties was the grant by the Claimants to the Defendant of a commercial concession for the provision of boating services on the Serpentine for a period of 15 years. The Defendant agreed to pay the Claimants ten percent of gross turnover for the boating concession, subject to a guaranteed minimum payment of £85,000 per annum, as set out in the Financial Offer in the July 2004 tender, updated financial schedules attached to the letter dated 4 November 2004 and the letter dated 17 December 2004.

47. The Defendant was obliged to invest in Hyde Park by replacing the existing boathouse and jetties at its own expense. The capital investment "in the facilities" would be depreciated over the term of the Contract, as set out in the Specification paragraph 1.2.4, and letters dated 4 November 2004 (with updated financial schedules) and 17 December 2004. The "facilities" were not defined in the contract documents but the only facilities in respect of which a capital investment was made were the Boathouse and new boats. The depreciation figures used by the Defendant in its financial forecasts are consistent with the indicative capital costs of the Boathouse, identified in the bid expenditure models, being written down over the period of the Contract.

48. The Defendant was required to maintain the Boathouse throughout the term of the Contract (Specification paragraphs 1.2.3 and 4.1.1 (ii) and Condition 25). At the end of the concession term, a dilapidations survey would be undertaken to identify the

schedule of works that the Defendant was required to carry out to restore the property to a reasonable condition (Condition 20.3).

49. The Defendant was required to fund and bear the risk of its initial capital investment in the Boathouse. Further, the Defendant carried the risk of attracting sufficient business to satisfy the guaranteed minimum payments to the Claimants and produce a return on its investment. However, it was protected against the consequences of early termination on the part of the Claimants. In such event, the Claimants would be responsible for losses resulting from the termination (excluding loss of profit), including the undepreciated capital investment sum outstanding (paragraph 8.4.3 of the Specification; Conditions 51.2 and 51.4).

50. In its Amended Defence the Defendant pleaded that the 2008 Construction Licence provided that the Defendant was owner of the Boathouse. That position was diluted by Mr Leigh, counsel for the Defendant, in his written opening and abandoned in oral submissions. The Defendant's final position is that none of the Contract, the 2007 Demolition Licence, the 2008 Construction Licence or the 2009 Variation Agreement deals with ownership of the Boathouse or transfer of ownership following construction of the same.

51. The Contract did not in terms address the parties' understanding or agreement as to ownership of the Boathouse. Condition 6.1 provided that the structure and envelope of the Premises would remain the property of the Authority. Condition 1 defined the "Authority's Premises" and "Premises" as: *land, buildings and other structures … owned or occupied by the Authority and from which Services are performed"*. The Contract did not expressly state whether the Boathouse fell within those definitions. However, the services provided by the Defendant were in fact performed from the Boating House, suggesting that the parties intended the Boathouse to fall within the definition of Premises. Further, the express grant of a non-exclusive licence to the Defendant to occupy the Premises during the Contract (in Condition 10) must have been a reference to the Boating House because there were no other premises occupied by the Defendant.

52. The Construction Licence included the following provisions at clause 5:

"Following the Practical Completion of the Works and until the earlier of the termination of the Concession Contract or any other earlier date for the termination of this Licence the following provisions shall apply insofar as they may relate to the Boathouse:-

the new Boathouse in accordance with and on terms that shall be consistent with the Licensee's obligations for repair under the terms of the Concession Contract …

…

…

53. The Construction Licence did not include any express provision as to ownership of the Boathouse. However, the limitation imposed on the Defendant regarding use of the Boathouse, the express obligation to repair, and the requirement for the First Claimant's permission for any alterations, are inconsistent with the Defendant's case that it has a proprietary interest in the Boathouse.

Issue 1 - Composition of the Boathouse

54. The Claimants' case is that the Boathouse comprises both the superstructure and the concrete slab on which the superstructure sits. The Defendant's case is that the Boathouse is limited to the superstructure, that is, the part attached to but sitting on the concrete slab.

55. The components comprising the Boathouse construction have been agreed by the experts in their joint statement as follows:

"1. The Boathouse comprises a purpose-built single-storey building constructed on an area of hardstanding projecting from the pavement on the northern side of the Serpentine. There is also a series of fixed and floating jetties. The fixed jetties are secured to the bed of the Serpentine using existing steel piling.

2. The concrete ground-bearing reinforced concrete floor slab is supported on piles, behind a sheet piled wall and the structural steel framework is supported on the concrete slab.

2. The main walls and roof comprise a structural steel frame of columns and trusses. The steel lattice girders weigh between 400 kg and 600 kg. The steelwork, due to the size & weight of the elements, would possibly have been erected using a one man operated crane or similar from inside the building. The steel sections have been bolted together on site and the columns bolted into

the floor slab using anchor bolts and threaded rods, giving the required rigidity to the installation.

2. The columns are spaced in the clerestory at 4m centres, spanning 8m across the building, supported on timber / steel columns / mullions, which in turn support the roof above.

2. The roof comprises insulated deck panels on 18mm thick WBP plywood on timber joists, which span between the roof trusses.

2. The wall panels are factory made, insulated timber panels, which are fixed to vertical posts.

2. The roof is covered with a single ply membrane and was originally designed to be a 'Blue roof' (i.e. to hold water like as bunded tank), although the roof is not holding water at this time.

2. Heating to the building is provided via a wet underfloor system. The building has a dedicated mains cold water supply from the Hyde Park utility main. Above ground the drainage is provided by three sub stack positions. Electrical supply enters the building via a dedicated duct terminating into a UKPN cut-out."

56. The experts agree that the reinforced concrete ground-bearing floor slab of the Boathouse is supported by screw piled foundations that are driven into the ground of the site. As such, they agree that the piled foundations and ground bearing floor slab have a high degree of permanence. The experts disagree on whether the piled foundations and reinforced concrete ground bearing floor slab form part of the Boathouse. Mr Ellingworth's view is that those elements were essential to the construction of the Boathouse and form an integral part of the structure. Mr Ford's view is that those elements do not form part of the structure because, although they are permanent, together with the jetties and walkways, the other parts of the building above slab level could be removed and re-used elsewhere.

57. Mr Ellingworth's opinion is that the Boathouse comprises a number of key elements, including the jetties, the

foundations and the concrete slab, all of which form part of the substructure, together with the superstructure. The Boathouse required adequate foundations to transfer its structural load into the ground supporting it. A specialist piling contractor designed the foundations, comprising forty-four piles, some of which are installed in the bed of the Serpentine lake in water depths of up to two metres. The concrete ground floor slab is cut into the sloping bed of the lake. The structural steel frame of the building is fixed into the concrete slab by a series of sunken threaded bolts and rods. Therefore, the piled foundations support the structural frame as well as the reinforced concrete slab. The fixed jetties are secured to the bed of the lake by using existing steel piling. The building is substantial and, together with the jetties forms an integral part of the land in which it sits.

58. In cross-examination Mr Ellingworth agreed that the superstructure was a modular construction, which could be temporary or permanent. He accepted that, if the superstructure elements were removed, the remaining substructure could be re-used for another building, although the layout of the new building might necessitate extension or alteration to the slab.

59. Mr Ford's opinion is that the Boathouse was designed and constructed using a "kit of parts" because it was always intended that it should be temporary and capable of removal. The wall panels are factory made insulated timber panels fixed to vertical steel posts that are bolted down through a plate into the slab.

60. In his report Mr Ford stated that he conceived and designed the Boathouse on the basis of the Defendant's instructions, as a temporary building that could be removed in the future. However, in cross-examination he accepted that the concept for the Boathouse was designed by the original architect, Michael Hopkins. In the Design and Access Statement prepared for planning permission purposes, Mr Hopkins did not describe the building as temporary or removable.

61. In his evidence Mr Ford stated that he interpreted the Hopkins design but on the GFA website he described his design work as designing the layouts for the interior, revising the planning drawings and completing the working drawings for the facility, consistent with the terms of his letter dated 12 May 2007 to the Defendant. He agreed that his description of the client brief on the GFA website was a new facility on the Serpentine Lake, with a fixed deck and two floating jetties. He accepted that although the website referred to Mr Ford's introduction of sustainable elements into the design, there was no reference to the structure as temporary or demountable.

62. In my judgment the Boathouse comprises both the superstructure and substructure of the building. The concrete slab and piled foundation provide necessary support for the superstructure. The steel frame of the superstructure is bolted into the concrete floor slab, creating a permanent connection between the two elements, capable of being broken only by severing the fixings. The drawings and design statements by Mr Hopkins, the original architect, indicate that it was designed as an integral, permanent structure for Hyde Park. There is no suggestion in any of the contemporaneous documents that the design of the slab was intended to accommodate a number of different superstructure buildings. The method of construction adopted, materials used and the extent to which it has been anchored to the land, partially cut into the sloping bank of the Serpentine, indicate that the substructure and superstructure elements of the Boathouse were built to be permanent and immobile.

Issue 2 – whether the Boathouse has become part of the land

63. Ms Chorfi, counsel for the Claimants, submits that the Boathouse has become part of the land. The Boathouse is affixed to a solid concrete slab by a series of structural beams or steels. The bolts fixing the vertical steels into the concrete slab have to be severed to release the building from the concrete slab. The Boathouse has been constructed in such a way that it cannot be removed without breaking it up into its constituent elements, with a substantial amount of destruction. Contrary to the assertion of the Defendant in its pleaded case and in the witness statement of Mr Scott, the experts agree that dismantling the superstructure would take some three to four weeks, and result in a substantial part of the fabric of the Boathouse being destroyed.

64. Ms Chorfi submits that the Boathouse was designed specifically for Hyde Park and is not a temporary structure. It is clear from the context of the tender process and the Contract that significant investment for the purposes of

improving the land was a fundamental ambition of the concession competition.

65. Mr Leigh, counsel for the Defendant, submits that the Boathouse was designed and installed so that it was capable of disassembly, to be removed and used elsewhere. This is consistent with the contractual terms which did not define the Boathouse, as a replacement, to become part of the premises and of land owned by the Claimants. Just because something is fixed to the ground and even attached to services does not make it part of the land. An example would be mobile homes that are brought to a caravan park or other site in two parts, bolted together and attached to services. Often a brick plinth surrounds the base for visual effect and to keep out people and animals from going underneath. At the end of the mobile home's life or when it needs to be relocated, the plinth is removed, the services disconnected, the unit unbolted into two and then the whole thing is transported elsewhere for re-use.

66. Mr Leigh submits that the main function of the Boathouse was to serve the Defendant's business, rather than the creation of something to enhance Hyde Park and The Serpentine.

Legal principles

67. *Woodfall on* ***Landlord*** ***and*** ***Tenant*** (Vol.1) categorises objects on the land as follows at para.13.131:

"An object that is brought onto land may be classified under one of the broad heads. It may be (a) a chattel; (b) a fixture; or (c) part and parcel of the land itself. Objects in categories (b) and (c) are treated as being part of the land."

68. It is a question of fact whether a particular object falls within one of these categories. The main factors are the degree of annexation to the land, and the object of the annexation. Where an item has been attached or connected in some way to the land, there is a rebuttable presumption that it has become a fixture, as summarised by Blackburn J in *Holland v Hodgson (1872) L.R. 7 C.P. 328* :

"Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend it is a chattel."

69. In *Elitestone Ltd v Morris [1997] 1 WLR 687 (HL)* , the issue for the House of Lords was whether a bungalow that rested on concrete block foundations was part of the land.

In giving the judgment with which their Lordships agreed, Lord Lloyd of Berwick observed at p.690:

"The nature of the structure is such that it could not be taken down and re-erected elsewhere. It could only be removed by a process of demolition. This, as will appear later, is a factor of great importance in the present case. If a structure can only be enjoyed in situ, and is such that it cannot be removed in whole or in sections to another site, there is at least a strong inference that the purpose of placing the structure on the original site was that it should form part of the realty at that site, and therefore cease to be a chattel."

70. Although the *mode* of annexation of the object to the land is a relevant factor, the significance of the *purpose* of annexation was emphasised by Lord Lloyd at p.693:

"A house which is constructed in such a way so as to be removable, whether as a unit, or in sections, may well remain a chattel, even though is connected temporarily to mains services such as water and electricity. But a house which is constructed in such a way that it cannot be removed at all, save by destruction, cannot have been intended to remain as a chattel. It must have been intended to form part of the realty."

71. Also per Lord Clyde at p.699:

"That the bungalow was constructed where it is for the purpose of a residence and that it cannot be removed and re-erected elsewhere point in my view to the conclusion that it is intended to serve a permanent purpose. If it was designed and constructed in a way that would enable it to be taken down and rebuilt elsewhere, that might well point to the possibility that it still retained its character of a chattel. That the integrity of this chalet depends upon it remaining where it is provides that element of permanence which points to its having acceded to the ground."

72. The test is an objective one. The terms of any contract, or other agreements between the parties, do not affect the determination as to whether, in law, the object in question has become part of the land: *Melluish (Inspector of Taxes) v BMI (No.3) Ltd [1996] AC 454 (HL)* , per Lord Browne-Wilkinson at 473:

"…the intention of the parties as to the ownership of the chattel fixed to the land is only material so far as such intention can be presumed from the degree and object of the annexation. The terms expressly or implicitly agreed between the fixer of the chattel and the owner of the land cannot affect the determination of the question whether, in law, the chattel has become a fixture and therefore in law belongs to the owner of the soil … The terms of such agreement will regulate the contractual rights to sever the chattel from the land as between the parties to that contract and, where an equitable right is conferred by the contract, as

against certain third parties. But such agreement cannot prevent the chattel, once fixed, becoming in law part of the land and as such owned by the owner of the land so long as it remains fixed."

73. In *Elitestone* (above), Lord Clyde stated at p.698:

"It is important to observe that intention in this context is to be assessed objectively and not subjectively. Indeed it may be that the use of the word intention is misleading. It is the purpose which the object is serving which has to be regarded, not the purpose of the person who put it there. The question is whether the object is designed for the use or enjoyment of the land or for the more complete or convenient use or enjoyment of the thing itself."

74. In *Webb v Frank Bevis Ltd [1940] 1 All ER 247* , the Court of Appeal considered whether the appellant had any right to remove as a trade fixture a shed it had erected, from ground that the respondent held as lessee. Under the terms of the lease, the respondent was permitted to erect or construct buildings or erections of a temporary character only and, at the end of the term of the lease, he covenanted to remove all buildings and erections and restore the site

to its original state. The respondent permitted the appellant to occupy part of the land and the appellant erected the shed for the purposes of housing manufacturing machinery and providing warehouse accommodation for plant and materials. The roof and sides of the shed were of corrugated iron and easily removable. The timber posts supporting the shed were strapped to the concrete base but could be easily removed by undoing the bolts and cutting the upstanding straps.

75. The Court of Appeal determined that the superstructure and the concrete base did not form a single unit and the superstructure was removable – per Scott LJ, delivering the judgment of the Court at pp.250-251:

"That the concrete floor was so affixed to the ground as to become part of the soil is obvious. It was completely and permanently attached to the ground, and, secondly, it could not be detached except by being broken up and ceasing to exist either as a concrete floor or as the cement and rubble out of which it had been made. Does that fact of itself prevent the superstructure from being a tenant's fixture? I do not think so…

The judge held, and I think rightly held, that the superstructure was "to a very large extent" a "temporary" building, by which I understand him to mean that the object and purpose for which the company erected it were its use for such time as they might need it. That view goes a long way, if not all the way, towards the conclusion that, regarded apart from the floor, the shed was in law removable. The very uncertainty of the company's tenure of the site ultimately of necessity determined "the purpose and object" of the erection…"

76. A similar issue arose in *Wessex Reserve Forces and Cadets Association v White [2006] 1 P. & C.R. 22 (QBD)* , the findings of which were not challenged in the ensuing appeal. The court found that huts, a portacabin and garden shed were chattels and could be removed from the land. However, an assembly hall, comprising a sectional pre-cast building resting on a concrete slab, had become part of the land. A significant factor was that, although the unit could be dismantled and re-assembled elsewhere, such exercise would be relatively labour intensive and a not inconsiderable number of components would require replacement.

77. The applicable principles derived from the above authorities for the purpose of this case are:

1. The structure will be treated as being part of the land if: (a) the degree of annexation is such that the structure is permanently fixed to the land and can only be removed by a process of demolition; and (b) the purpose of such annexation must be that it should form part of the land.

2. The structure will be treated as a chattel if its sits on the land but is otherwise unattached, unless there is objective evidence that it was intended to form part of the land.

3. Where the structure is annexed to the land but potentially removable, it will be treated as being part of the land if the purpose for which it was annexed was the permanent and substantial improvement of the land; but it will be treated as a chattel if the purpose for which it was annexed was temporary or for the more complete enjoyment and use of it as a chattel.

4. The test as to the degree and purpose of such annexation is an objective one; it is not determined by the subjective intention of the parties or any contractual arrangements between them.

Evidence and finding on annexation

78. Mr Ford's opinion is that the superstructure of the Boathouse was designed and constructed so as to be brought to the site and then erected on top of the slab to which it was secured. The primary elements of the Boathouse are the

structural frame, factory made timber cladding panels and timber windows and doors. These components could be disassembled easily and would be suitable for re-use elsewhere. Mr Ellingworth's opinion is that removal of the superstructure would not comprise the whole of the Boathouse and additional elements or materials would be required if the building were to be erected elsewhere, including foundations, the floor, the roof, internal layout and services.

79. Mr Ford produced a document dated June 2020, setting out his proposed methodology for disassembly and removal of the building. This would involve the removal of the steel structure, boiler and plant, timber windows and timber panels of the existing building, and internal fixtures and fittings, including bathrooms and kitchen. The existing jetty and concrete foundation slab would remain. All services, including electricity, water, telecommunications, drainage and under floor heating would be capped off. Mechanical and electrical services would be stripped out. The steel lattice girders would be dismantled using a spider crane.

80. The experts agree that the disassembly works could be carried out within a period of about four weeks, the works would be of medium complexity and would require experienced contractors to undertake the work, using appropriate lifting gear.

81. In terms of the elements of the structure that could be removed, the experts agree that the piled foundations, concrete floor slab and underfloor heating system could not be removed. Ninety percent of the main structural steel frame could be removed and re- used in another location but the threaded rods and bolts fixing the steel columns to the concrete floor slab would not be capable of removal and would have to be cut off at the base. Likewise, ninety percent of the clerestory windows and external doors could be removed and used elsewhere. The main steelwork and timber roof structure could be capable of relocation, but the membrane roof covering would be destroyed. Internal timber framework could be reused but not the associated plasterboard walls and ceilings. If carefully removed, the sanitary ware and kitchen cabinets could be reused. The mechanical and electrical fittings and pipework would be destroyed but various component parts could be salvaged. The experts agree that parts of the timber cladding could be re-used but Mr Ford considers that ninety percent would be capable of reuse, whereas Mr Ellingworth's view is that it is likely to be more modest, at seventy-five percent.

82. In my judgment, the Boathouse is part of the land for the following reasons.

83. Firstly, having determined that the Boathouse comprises both the superstructure and the substructure, it follows that the degree of annexation is such that the structure is permanently fixed to the land. It is not disputed that the concrete slab and foundations can only be removed by a process of demolition.

84. Secondly, even if the superstructure could be regarded as separate from the substructure, I accept Mr Ellingworth's evidence that removal of the superstructure would result in substantial destruction of its components, such that any re-use elsewhere would be the salvage of parts and not the reinstatement of the whole. Although the removal operation could be carried out so as to preserve significant materials from the building, this would not be limited to simple dismantling and re-assembly of those parts. Very significant additional works and components would be required to provide foundations, a floor, a roof, internal layout and services for the same. This would amount to a new construction using reclaimed materials.

85. Thirdly, the purpose for which the Boathouse was constructed by the Serpentine was the permanent and substantial improvement of the land. It was inextricably linked to the boating concession operated by the Defendant on behalf of the Claimants, a service that could only be operated from the lakeside. As stated by Michael Hopkins in the application for planning permission, the purpose of the new Boathouse was:

"… to replace the existing Boathouse with a very high quality, elegant addition to both Hyde Park and the Serpentine. The new building will respect and enhance its setting whilst providing improved functions and services for BlueBird Boats, its customers and all users of the Park.

Apart from the current facilities, which include a private office, workshop, staff changing/resting area, storage spaces and a

ticket sales office, the new Boathouse would also provide an Information Centre, shop and first aid point. This additional facility will enable the new Boathouse to function as a public asset to assist the users of the Hyde Park…

Since the building, including its roof, will be highly visible from many areas of the Park, the selection of building materials and treatment of the roof finishes will play a very significant part in blending the design with the setting of the Park."

86. Fourthly, any subjective intention on the part of the Defendant, to procure the design and construction of a building that could be easily dismantled and removed, would not be determinative of this issue. In any event, I reject Mr Scott's evidence that he instructed Mr Hopkins, or Mr Ford, to design the Boathouse so that it could be easily dismantled. Although it is likely that were discussions surrounding the use of a modular design to accelerate the construction phase, given the delays to the project (from 2004, the date of the Contract, to completion of the Boathouse), there is nothing in the contemporaneous documents evidencing any concerted intention to design the building as a temporary structure that could be easily dismantled and removed.

87. Finally, the Court's finding that the Boathouse was intended to be a permanent enhancement to the land is supported by the contractual documents referred to above, which were clear that the Defendant was required to provide capital investment in Hyde Park, by way of improvement to the land.

Issue 3 – whether the Contract precludes the Defendant from removing the Boathouse

88. The Contract does not contain any express provision giving the Defendant any right to remove the Boathouse.

89. The Contract defines the "Premises" as:

"land, buildings and other structures, conducting media and underground services owned or occupied by the Authority and from which Services are performed."

90. As set out above, the Boathouse is part of the land that is Hyde Park. Hyde Park is owned by the Crown. It is occupied and managed by the Claimants. The boating services are performed from the Boathouse. Therefore, the Boathouse falls within the definition of the Premises for the purpose of the Contract.

91. Condition 6.1 provides that the structure and envelope of the Premises remain the property of the Claimants and at no time vest in the Defendant. This would preclude the Defendant from asserting ownership in, or a right to remove the Boathouse.

92. Condition 10.1 granted a non-exclusive licence to the Defendant to occupy the Boathouse during the currency of the Contract. The Contract has expired through effluxion of time. Therefore, the Defendant no longer has any licence to occupy the Boathouse.

93. Condition 20 set out the provisions for handover of the Boathouse on the expiry of the Contract term, including requirements for the Defendant to carry out works to restore the Boathouse to a reasonable state of repair (Condition

20.3), and prohibition on the removal of any fixtures belonging to the Claimants (Condition 20.8). Paragraph 8.4.3 of the Specification and Condition 51.4 required the Defendant to depreciate the capital investment in the Boathouse over the contract period using a straight-line depreciation. As Ms Chorfi submitted, these provisions of the Contract are inconsistent with any contention by the Defendant that it has ownership of, or is entitled to remove, the Boathouse.

94. For the above reasons, the Defendant has no proprietary or contractual right to remove any part of the Boathouse, including the building superstructure.

Issue 4 - estoppel

95. Mr Leigh submits that the Defendant has an alternative case that estoppel arises. Encouraged by the Claimants (or their predecessors), the Defendant spent considerable sums of money designing and installing the Boathouse, thereby acting to its detriment. It did this in the firm and clear belief that it owned the Boathouse. The Defendant deliberately procured the design and construction of a building that was capable of being dismantled so that, in the event that the concession ended without renewal, it would be able either to remove, sell or rent it to a new concession operator and thereby salvage some of its capital investment.

96. Mr McErlean, former employee of the Royal Parks Agency, was not involved at tender stage or in the negotiations for the Contract. He was brought in to assist with delivery of the design and construction project for the new Boathouse in 2005. He was certain that the Defendant would not have been encouraged to believe that it would retain ownership of the Boathouse when constructed because the land belongs to the Crown:

"As far as I am aware, no one within either the Agency or the First Claimant or Second Claimant would have had authority to grant the Defendant an interest in the Boathouse or its removal from Hyde Park at the end of the Contract. If they had, which I do not believe they did, they would have been acting ultra vires."

97. Mr McErlean confirmed that during discussions with Mr Scott of the Defendant, Mr Scott explained that a modular design would be used for the new boathouse to allow for the construction of the building off site and facilitate quicker assembly on site but stated in his witness statement:

"I understand … that the Defendant now alleges the reason for the modular design of the boathouse was because it had been designed to be taken down and built elsewhere. This was never provided as a reason behind the modular design of the boathouse at the time. Further, if it had been given as a basis for the modular design, it would have been made very clear to the Defendant that the boathouse would be remaining in Hyde Park on the expiry of the Contract as it was always intended that the new boathouse was a permanent replacement for the then existing one."

98. When giving oral evidence to the Court, Mr McErlean went further and stated:

"I'm pretty sure I did tell Scott that when built, the Boathouse would belong to the Crown. I would have said: 'it is not your building'. I can't recollect a specific incident when I said that to him; I would have said it if it came up in conversation."

99. When pressed by Mr Leigh, Mr McErlean conceded:

"I have no specific recollection that I discussed it with the Defendant."

100. Mr Edwards, Park Manager for Hyde Park, stated in his witness statement:

"I was part of the team that interviewed those tendering for the concession contract. At those interviews I remember us raising questions with regard to the level of investment and how it was expected that they would get a return on this investment. I remember being particularly concerned as to the level of investment proposed by the Defendant and therefore this was a feature of our interview with him. My recollection of this interview is that when we discussed the proposal for replacing the boathouse it was clear that we were discussing replacing the existing boathouse with a permanent building and there was never any indication that the boathouse would remain the property of the concession holder or that they would in some way be entitled to remove the boathouse on the expiry of the concession contract. It would have made no sense for the Agency to agree to this, as it would leave the Park without a boathouse. Given there has been a boathouse in Hyde Park for well over 100 years, this would never have been something that we would or could have agreed to."

101. In respect of property rights, he stated:

"It was always understood that the concession contracts under which concessionaires operated have a finite end and it was clear to every concessionaire at the time of entering into a concession contract that despite their investment, they would not own any rights in the premises in which they were being asked to invest. I cannot think of any single exception to this. It was always understood by the Agency and the First Claimant and indeed (as far as I could see) by the concession holders that concession holders would occupy any property by way of licence only and would therefore not acquire any rights in the property.

Whilst I cannot recall having any one specific conversation with the Defendant explaining this, I have no doubt that this point would have been made clear to the Defendant at the time of granting of the Contract, not least because of the substantial sums that the Defendant was expected to invest. Alternatively, it

would have been obvious that the Defendant appreciated that it would not acquire any rights of ownership over the boathouse. I do recall advising Peter Scott of the Defendant at time of construction of the boathouse not to invest more than necessary in something that would remain because I was concerned that he would not be able to recoup his investment.

... I have no doubt that the Defendant always knew and has always known that it does not have any right of ownership over the boathouse … Further I reject the assertion that I or anyone else on behalf of the Agency led or would ever have led the Defendant to believe that the boathouse would, once built, belong to the Defendant …"

102. When cross-examined, Mr Edwards was uncertain about the discussions held with Mr Scott regarding property rights. Although he insisted that there had been small conversations about such issues, he could not recall the substance of any specific meeting. He accepted that there was no direct conversation with Mr Scott in which he was told that the Boathouse would belong to the Royal Parks.

103. Mr Scott, the director of the Defendant, stated in his witness statement:

"It was clear to me, and it seemed at the time to both parties, that BBL would own the new boathouse as it assumed the entire risk of the build, provided all funding, would maintain and insure the investment and be responsible for the design, planning application and the build. Nothing was said by the RPA within correspondence or in discussions that suggested otherwise."

104. In cross-examination, Mr Scott stated that he did not have any discussion with Mr Edwards regarding the prudent level of investment and Mr Edwards did not warn him against any overspend on the project. He stated that:

"The issue of ownership didn't come up … It was always clear to me that at the end of the Contract I would take everything I owned, including the buildings. I didn't discuss dismantling the Boathouse."

105. Mr Scott accepted that his profit forecast showed depreciation of the capital investment over the contract period to £NIL but stated that it was for accounting purposes and did not represent the value of the assets.

106. When it was put to him that he did not clarify with the Claimants that he would have ownership of the Boathouse at the end of the Contract, he replied:

"No, I thought it was very clear. It was mine."

107. Having read the witness statements and listened to the oral evidence of Mr McErlean, Mr Edwards and Mr Scott, it is clear that none of the witnesses gives direct evidence that the Claimants (or the Agency) informed the Defendant that it would, or that it would not, retain ownership of, or the right to remove, the Boathouse at the expiry of

the Contract. Further, it is clear that none of the witnesses gives direct evidence that the Defendant told the Claimants (or the Agency) that it considered that it would own the Boathouse, when constructed, or that the Defendant understood that it had the right to dismantle and remove the Boathouse at the end of the Contract. On that basis, the Court finds that nothing was said by any of the parties, during negotiation of the Contract or at any time up to construction of the Boathouse, as to ownership of the Boathouse or any right to remove the Boathouse on expiry of the Contract.

108. The principle of estoppel is set out in *Habib Bank Ltd v Habib Bank AG [1981] 1 WLR 1265* per Oliver LJ at p.1285, (quoting himself in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1981] 2 WLR 576* at p.593):

"Furthermore the more recent cases indicate, in my judgment, that the application of the Ramsden v. Dyson, L.R. 1 H.L. 129 principle - whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial

- requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has

allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour."

109. Both counsel referred to Snell's Equity (34th Edition) at paragraph 12-24 as setting out the basis on which promissory estoppel may arise.

1. Although promissory estoppel may arise in the absence of an express statement by A, a court will require clear evidence before finding that A impliedly encouraged B.

2. The general position is that mere silence and inaction by A cannot found a promissory estoppel, as A's failure to act, if capable of communicating anything, will generally be open to differing reasonable interpretations, at least one of which will be inconsistent with A's right not being enforced.

3. There are two exceptions to that general rule. First, if A is under a duty to disclose the existence of a particular matter giving rise to a right in A's favour, A's failure to do so may possibly support a promissory estoppel by leading B reasonably to believe that A does not have, or does not intend to enforce, that right. Secondly, if A stands by, knowing that B has a mistaken belief as to B's current legal rights and fails to take a reasonably available opportunity to assert A's inconsistent right, the doctrine of acquiescence may then apply to prevent A's later asserting that right.

110. Mr Leigh submits that the First Claimant encouraged the Defendant to expend substantial sums believing, as part of its ongoing commercial relationship with the First Claimant, that the Defendant retained ownership of the Boathouse. That encouragement was an integral part of the bargain between the parties. It would now be unconscionable

for the Claimants to take advantage of the Defendant's belief as to its ownership and to rely on legal rights which they failed to deal with in express terms in the Contract.

111. The Court rejects the Defendant's case that any estoppel arises in this case. Firstly, there is no evidence of any express or implied encouragement by the First Claimant (or the Agency) to the Defendant to believe that it would retain ownership, or rights in, the Boathouse once constructed. As set out above, the Court's finding, based on the evidence of the witnesses, is that there were no discussions to that effect.

112. Secondly, the Claimant's silence does not give rise to estoppel. It has not been suggested that the Claimants were under any duty to disclose the Crown's ownership of the land; it is a matter of public record. Therefore, the first exception to the rule does not arise. There is no evidence that, if the Defendant were under a mistaken belief as to ownership in the Boathouse, such belief was communicated to the Claimants. Therefore, the second exception to the rule does not arise.

113. Thirdly, there was no detrimental reliance by the Defendant on any belief as to ownership of the Boathouse; further, any such reliance was unreasonable. As Ms Chorfi submits, the Contract imposed an express obligation on the Defendant to make the requisite capital investment and provided a mechanism for depreciation of the investment over the term of the Contract. In the absence of any express statement from the Claimants indicating that property in the Boathouse would be transferred to the Defendant, it was not reasonable for the Defendant to assume, or believe that it would own the Boathouse.

114. Fourthly, in the absence of any contemporaneous intimation from the Defendant that its expenditure on the Boathouse was made pursuant to a belief that it would retain ownership of the same, rather than pursuant to its express contractual obligation to fund the Boathouse, it is not unconscionable for the Claimants to rely on their rights of ownership and occupation.

Conclusion

115. For the reasons set out above:

1. The Boathouse comprises both the superstructure and the substructure, including the concrete slab.

2. By reason of the extent of annexation of the building to the land, and the purpose of its design and construction as a permanent enhancement to the land, the Boathouse has become part of the land and is owned by the Crown.

3. The terms of the Contract preclude the Defendant from dismantling and removing the Boathouse from its location in Hyde Park.

4. The Claimants are not estopped from denying the Defendant's ownership of any part of the Boathouse that can be removed from the land.

116. Following hand down of this judgment, the hearing will be adjourned to a date to be fixed for the purpose of any consequential matters, including any applications for

permission to appeal, and any time limits are extended until such hearing or further order.

Metcalfe v Solicitors Regulation Authority Ltd


No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

2021 WL 03514011

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Neutral Citation Number: [2021] EWHC 2271 (Admin)

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

Case No: CO/4320/2019

ON APPEAL FROM THE SOLICITORS DISCIPLINARY TRIBUNAL

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 10 August 2021

Before :

THE HONOURABLE MR JUSTICE MURRAY

- -

Between :

ROBERT JOHN METCALFE	Appellant
- and -	

SOLICITORS REGULATION AUTHORITY LIMITED	Respondent

- -

- -

Mr Martin Budworth (instructed by Dallas & Richardson Solicitors LLP) for the Appellant Mr Rory Mulchrone (instructed by Capsticks LLP) for the Respondent

Hearing date: 19 January 2021

- -

Approved Judgment

I direct that copies of this version as handed down may be treated as authentic.

……..

THE HON. MR JUSTICE MURRAY

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down are deemed to be 10:30 am on 10 August 2021.

Mr Justice Murray :

1. This is an appeal by the appellant, Mr Robert John Metcalfe, under section 49(1) of the Solicitors Act 1974 against an order of the Solicitors Disciplinary Tribunal ("the SDT") dated 20 September 2019 ("the Order") striking him off the roll of solicitors and making a costs order against him. The Order was made after a hearing by the SDT on 16-20 September 2019 of an application dated 29 April 2019 by the Solicitors Regulation Authority ("the SRA") pursuant to Rule 5(1) of the Solicitors (Disciplinary Proceedings) Rules 2007 SI 2007/3588 ("the 2007 Rules").

2. At all relevant times, including at the hearing of this appeal, the SRA formed part of the Law Society. The functions of the SRA have since, on or about 17 June 2021, been assumed by a separate legal entity, Solicitors Regulation Authority Limited, a company limited by guarantee (company registration number 12608059). This includes the SRA's role as respondent to this appeal.

3. By this appeal, Mr Metcalfe seeks to challenge two findings of dishonesty against him made by the SDT, as set out in the judgment of the SDT handed down on 14 October 2019 ("the Judgment"), which sets out the SDT's reasons for making the Order.

4. In summary, Mr Metcalfe appeals against the Order on three grounds, namely, that:

5. Mr Metcalfe was born in 1971 and was admitted to the roll of solicitors on 15 September 2000 after completing his training at Hill Dickinson LLP, during which he had undertaken a six-month seat in the Commercial and Conveyancing Department. Upon qualification, he worked at BLM in Liverpool, then The Price Partnership, and then Hampson Hughes Solicitors.

6. In April 2013, Mr Metcalfe left Hampson Hughes Solicitors to set up his own practice as a sole principal under the style of RMJ Solicitors (612988) ("the Firm"). At the relevant times, the Firm's offices were at Horton House, Exchange Flags, Liverpool L2 3PF. Mr Metcalfe specialised in the following areas: (i) residential **landlord and tenant**; (ii) general litigation; and (iii) personal injury.

The allegations

7. At the hearing before the SDT, Mr Metcalfe faced twelve allegations, set out in a statement made by the SRA pursuant to Rule 5(2) of the 2007 Rules ("the Rule 5 Statement").

8. The SRA alleged that, during the period commencing on or about April 2014 to March 2017 ("the Relevant Period"), he had committed various breaches of the SRA Principles 2011 ("the 2011 Principles) and the SRA Accounts Rules 2011 ("the 2011

Accounts Rules"), as well as a breach of Rule 8.5 of the SRA Authorisation Rules 2011. These allegations were numbered 1.1 to 1.10.

9. At the conclusion of the hearing, the SDT found that:
   1. allegations 1.1, 1.3, 1.4, 1.5, 1.6 (in part), 1.9 and 1.10 were proved beyond reasonable doubt;
   2. allegations 1.2, allegation 1.6 (in part), allegation 1.7 and allegation 1.8 were not proved and were therefore dismissed.

10. Allegation 1.1 was that, during the Relevant Period, Mr Metcalfe acted, or purported to act, in relation to a number of investment schemes, loans or other transactions ("the Loan and Investment Scheme transactions"), which were dubious, risky or bore the hallmarks of early release pension scams, and by doing so breached any or all of Principles 2, 4, 6 and 10 of the 2011 Principles.

11. Allegation 1.3 was that, during the Relevant Period, Mr Metcalfe acted in relation to, and/or facilitated through client account, the back-to-back sale and purchase of shares in a Gibraltar-based company named Priority Solutions Limited ("the Back-to-Back Share Sale transactions") in circumstances where such transactions were dubious, risky or bore the hallmarks of fraudulent financial arrangements, and by doing so breached any or all of Rules 14.5 and 29.2 of the 2011 Accounts Rules and any or all of Principles 2, 4, 6 and 10 of the 2011 Principles.

12. Allegations 2 and 3 of the Rule 5 Statement made it clear that allegations 1.1 and 1.3 were advanced on the basis that Mr Metcalfe's conduct was dishonest or, alternatively, reckless. Dishonesty or, alternatively, recklessness was alleged in each case as an aggravating feature of Mr Metcalfe's misconduct, rather than as an essential ingredient in proving either of those allegations.

13. The SDT found that not only had allegation 1.1 and allegation 1.3 been proved beyond reasonable doubt, but also that allegation 2 had been proved beyond reasonable doubt, namely, that Mr Metcalfe's conduct had been dishonest in each case. Given its findings of dishonesty, the SDT did not consider it necessary to determine allegation 3, namely, whether Mr Metcalfe's conduct had been reckless in either case.

14. On his first ground of appeal, Mr Metcalfe contests only the findings of dishonesty on allegation 2 in relation to each of allegations 1.1 and 1.3. He does not contest the underlying findings that allegations 1.1 and 1.3 had been proved beyond reasonable doubt.

15. In the Judgment, the names of various companies and individuals involved in the factual background to this matter were anonymised in accordance with the normal practice of the SDT. There is, however, no need to do so on appeal. See, for example, *Solicitors Regulation Authority v Sheikh [2020] EWHC 3062 (Admin)* (Davis LJ).

Background

16. According to Mr Metcalfe's witness statement dated 27 August 2019 provided for the hearing before the SDT, in February/March 2016 the Firm's personal injury department was comprised of Mr Metcalfe and four employees. About that time, Mr Metcalfe found out that two of his fee-earners were setting up a firm in competition with him and would take with them his two remaining personal injury fee-earners. When he discovered their plan, he made all four of them leave the Firm immediately. This, however, left him in the position of having lost overnight all of his personal injury fee-earners. At about the same time, his accounts consultant also left the Firm, leaving the Firm's financial accounting records in disorder. Mr Metcalfe then employed another individual to put the accounting records in order, but that apparently did not happen.

17. Further background is set out in some detail in the Judgment at paragraphs 7-11. For present purposes, I make the following summary.

18. On 20 January 2017, the SRA commenced an investigation of the Firm. On 17 February 2017, Ms Lindsey Barrowclough, Investigation Officer – Forensic Investigations for the SRA, issued her interim forensic investigation report. On 22 February 2017, the SRA disclosed to Mr Metcalfe a copy of a report recommending that there be an intervention in the Firm, so that he could make representations.

19. On 10 March 2017, the SRA decided to: (i) exercise its statutory powers to intervene in the Firm on the basis that there was reason to suspect dishonesty by Mr Metcalfe in connection with his practice as a solicitor; and (ii) refer Mr Metcalfe's conduct to the SDT. Shacklocks Solicitors LLP ("Shacklocks") was appointed to act as the SRA's agent in respect of the intervention.

20. On 14 March 2017, Shacklocks carried out the intervention.

21. On 29 June 2017, Ms Barrowclough conducted an interview with Mr Metcalfe, following this with a number of written interrogatories.

22. On 8 March 2018, Ms Barrowclough issued her final Forensic Investigation Report ("the Final Report"), identifying various alleged breaches of the 2011 Principles, the 2011 Accounts Rules and the SRA Authorisation Rules 2011 and failures to achieve outcomes under the SRA Code of Conduct 2011.

23. On 29 April 2019, the SRA applied to the SDT under Rule 5(1) of the 2007 Rules that Mr Metcalfe be required to answer the allegations set out in the Rule 5 Statement. The SRA's case was set out in the Rule 5 Statement, to which were exhibited a number of supporting documents, including Ms Barrowclough's interim report and the Final Report.

24. Mr Metcalfe provided an Answer to the Rule 5 Statement, which is undated ("the Rule 5 Answer"). He also provided his witness statement dated 27 August 2019.

25. The hearing before the SDT took place, as already noted, on 16-20 September 2021 before a panel of three members of the SDT, one lay member and two solicitor members. Mr Metcalfe was represented at the hearing by Mr Martin Budworth, of

counsel, who represents him on this appeal. The SRA was represented by Mr Rory Mulchrone, of counsel, who is employed by the SRA's solicitors, Capsticks LLP. Mr Mulchrone prepared the Rule 5 Statement. He represents the SRA on this appeal.

26. By the time of the hearing before the SDT in September 2019, Mr Metcalfe no longer held a current practising certificate but remained on the roll of solicitors as a non- practising solicitor.

2011 Principles

27. The applicable 2011 Principles, which were mandatory and applied to all solicitors, their employees, and other relevant persons, were:

1. Principle 2: "You must … act with integrity";

28. The meaning and scope of Principles 2 and 6 have been considered in various authorities, including *Wingate v Solicitors Regulation Authority [2018] EWCA Civ 366* , 1 WLR 3969 (CA) at [95]-[103] (regarding Principle 2) and at [104]-[106] (regarding Principle 6) (Rupert Jackson LJ).

2011 Accounts Rules

29. The applicable provisions of the 2011 Accounts Rules are:

"You must not provide banking facilities through a client account. Payments into, and transfers or withdrawals from, a client account must be in respect of instructions relating to an underlying transaction (and the funds arising therefrom) or to a service forming part of your normal regulated activities."

"All dealings with client money must be appropriately recorded:

No other entries may be made in these records."

30. The proper construction of Rule 14.5 has been considered in *Patel v Solicitors Regulation Authority [2012] EWHC 3373 (Admin)* [18] (Cranston J) and *Fuglers LLP v Solicitors Regulation Authority [2014] EWHC 179 (Admin)* [39]-[42] (Popplewell J).

SRA warning notices

31. The SRA, in its case against Mr Metcalfe before the SDT, relied on the fact that the SRA had, since at least

April 2009, issued a number of notices warning members of the solicitors' profession against involvement in dubious investment schemes or transactions bearing hallmarks of fraudulent financial arrangements, particularly those involving use of a solicitor's or firm's client account. The bundle for this appeal included the following examples of such SRA notices:

1. Two of these were issued before the Relevant Period, and two during the Relevant Period. Mr Mulchrone set out in his skeleton argument seven excerpts from these warning notices. The flavour of these is conveyed by the following two excerpts:

"If you do not understand the documents or a transaction in which you are involved, you must ask questions to satisfy yourself that it is proper for you to act. Why have you been approached? Do you have any expertise in this area of law? If you are not wholly satisfied as to the propriety of the transaction, you must refuse to act."

"… Practitioners must not become involved in schemes that appear dubious or bear the hallmarks of possible fraud.

…

It is your duty to ensure you do not become involved in potentially fraudulent financial arrangements. Failure to observe warnings from the SRA could lead to disciplinary action or criminal prosecution. Attempts to limit your involvement, particularly by a purportedly 'limited retainer' are ineffective in protecting you if you simply should not become involved."

33. I note that the SRA warning notice issued on 21 September 2016 says the following at paragraphs 9 and 10:

"9. We first warned about high-yield investment frauds or banking instrument frauds in October 1997 and our warning card is quoted in *Constantinides v The Law Society [2006] EWHC 725 (Admin)* [] … . Our latest warning was issued on 10 September 2013 … .

10. We have also warned for many years about the improper use of client accounts. One of our warning cards was discussed in detail in *Attorney General for Zambia v Meer Care Desai [2008] EWCA Civ 1007* []

… . Our latest warning on this subject is dated 18 December 2014 … ."

34. This shows that guidance by the SRA (and, before the SRA's formation, by The Law Society in its own name) on these sorts of issues pre-dates April 2009.

FCA warning about early release pension scams

35. The SRA also drew the SDT's attention to a warning published by the Financial Conduct Authority ("FCA") about early release pension scams, the text of which was set out in quotation in paragraph 20.5 of the Judgment. At paragraph 20.6 of the Judgment, the SDT recorded Mr Mulchrone's admission that this FCA warning was not available during the Relevant Period together with his submission that it set out in clear terms some of the hallmarks of early release pension scams. The FCA warning about early release pension scams was first published on 10 August 2017.

The SRA's evidence as to allegation 1.1

36. The SRA's evidence as to allegation 1.1 is summarised in the Rule 5 Statement at paragraph 14, which cross-refers to section G.1 of the Final Report. The evidence was said to show the following:

1. Following the SRA's intervention, 18 client files were identified by Shacklocks on which the Firm had been instructed to act in respect of the Loan and Investment Scheme transactions, which involved clients taking out loans with a company named Shawhill Limited (each loan with a term of 5 years, according to Mr Metcalfe's evidence) and then, after various deductions had been made, either investing these loan funds in or lending them to a company named Sandymoor Consultancy Limited ("Sandymoor"), a broker firm based in Malta but trading from Wirral, to be deployed into student property and other investment schemes, for example, a "Vaccicure Pharmaceutical investment".

The SRA's evidence as to allegation 1.3

37. The SRA's evidence as to allegation 1.3 is summarised in the Rule 5 Statement at paragraph 42, with a cross-reference at paragraph 43 to section G.4 of the Final Report. The evidence was said to show the following:

The hearing before the SDT and the Judgment

38. As already noted, the hearing before the SDT took place on 16-20 September 2019 before a panel of the SDT comprised of two solicitor members and a lay member. Originally, two of the clients in relation to the Loan and Investment Scheme

transactions were to have given oral evidence at the hearing. One witness withdrew unexpectedly the day before the hearing commenced. The other witness was due to give evidence on the afternoon of the second day of the hearing, but due to technical difficulties she was unable to give evidence then. The SDT directed that her evidence be given the following morning, however she was not available then.

39. The SDT heard submissions about whether arrangements could be made for a witness summons in relation to the first witness and whether the second witness could be interposed when she was available, concluded that the

hearing should continue without these witnesses giving oral evidence. The SDT would have regard to their witness statements but would ascribe little weight to the statement of the first witness, who had withdrawn the day before the hearing. As the second witness, who remained willing to give evidence, the SDT would ascribe some weight to her statement.

40. The SDT recorded that it had reviewed all the documents submitted by the parties, including: the SRA's Notice of Application dated 29 April 2019; the Rule 5 Statement; the Rule 5 Answer; Mr Metcalfe's witness statement dated 29 August 2019; the SRA's schedule of costs dated 5 September 2019; and testimonials submitted on Mr Metcalfe's behalf. Ms Barrowclough and Mr Metcalfe each gave oral evidence.

41. The SDT acknowledged that the SRA was required to prove each allegation beyond reasonable doubt. As for dishonesty, it noted at paragraph 15 of the Judgment that the test for dishonesty was that set out in *Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67* , *[2018] AC 391 (SC)* [74]:

"74. … When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

42. At paragraph 16 of the Judgment, the SDT said:

"16. When considering dishonesty the Tribunal firstly established the actual state of the Respondent's knowledge or belief as to the facts, noting that the belief did not have to be reasonable, merely that it had to be genuinely held. It then considered whether that conduct was honest or dishonest by the standards of

ordinary decent people. When considering dishonesty, the Tribunal had regard to the references supplied on the Respondent's behalf."

43. At paragraph 17 of the Judgment, the SDT said:

"17. The test for integrity was that set out in *Wingate and Evans v SRA and SRA v Malins [2018] EWCA Civ 366* , as per Jackson LJ:

'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 … [Professionals] are required to live up to their own professional standards … Integrity connotes adherence to the ethical standards of one's own profession.' "

Allegation 1.1

44. In relation to allegation 1.1, the SDT summarised the SRA's case and submissions at paragraphs 20.1-20.13 of the Judgment, and Mr Metcalfe's response at paragraphs 20.14-20.22. It set out its findings on allegation 1.1 at paragraphs 20.23- 20.34, which, in summary, were as follows:

was to lend credibility to the transaction. The SDT found that Mr Metcalfe's explanation as to the actual legal work he undertook on each transaction to be vague and unsatisfactory.

1. in taking his instructions solely from Sandymoor, failing to scrutinise the underlying documents, failing to make direct contact with his clients, and failing to inquire into the appropriateness of the transactions, Mr Metcalfe had failed to act in his clients' best interest and failed to protect client monies and assets in breach of Principles 4 and 10;
2. in paying client monies on the instructions of the payee without express consent from the clients and acting on behalf of his clients on the express condition that he would provide no advice, Mr Metcalfe's conduct plainly failed to maintain the trust the public placed in him and in the provision of legal services in breach of Principle 6; and

3. in allowing himself and the Firm to become involved in transactions that were clearly dubious and in taking instructions and conducting the matter in the way Mr Metcalfe had, Mr Metcalfe had failed to act with integrity in breach of Principle 2.

As I have already noted, there is no appeal against these conclusions.

45. The SDT went on at paragraphs 20.35-20.36 of the Judgment to conclude that Mr Metcalfe had, in effect, been "paid large amounts of money for doing very little work" and "had deliberately closed his eyes and ears, and had deliberately not asked questions, lest he learned something he would rather not know" and that ordinary and decent people would consider such conduct to be dishonest. The SDT thus found beyond reasonable doubt that Mr Metcalfe's conduct had been dishonest.

Allegation 1.3

46. During his submissions to the SDT on allegation 1.3, Mr Mulchrone drew the SDT's attention to the following passage from *Patel v Solicitors Regulation Authority [2012] EWHC 3373 (Admin)* [18] (Cranston J):

"18. … [R]ule 14.5 [of the 2011 Accounts Rules] is a crystallization of the principle established in *Wood and Burdett* [a decision of the SDT handed down on 23 December 2003 (No 8669/2002)]. … The first sentence of the rule contains the prohibition on the use of a client account to provide banking facilities. Use of the term 'instructions' in the next sentence of the rule implies professional instructions, in other words instructions relating to the accepted professional services of solicitors. The term is being used in rules concerned with the work of solicitors and takes its meaning from that context. Thus the import of the first limb of the second sentence of rule 14.5 is that movements on a client account must be in respect of instructions relating to an underlying transaction which is part of the accepted professional services of solicitors. In shorthand the instructions must relate to an underlying legal transaction. The other limb of that second sentence requires that movements on a client account must be in respect of instructions related to a service forming part of the normal regulated activities of solicitors. …"

47. Mr Mulchrone submitted to the SDT that none of the movements on the Firm's client account in relation to the

Back-to-Back Share Sale transactions were in respect of instructions related to an underlying transaction that was part of the accepted professional services of solicitors. In other words, he submitted, the instructions did not relate to an underlying legal transaction, nor were any of the movements on client account in respect of instructions related to a service forming part of the normal regulated activities of solicitors. Mr Metcalfe had therefore breached Rule 14.5 of the 2011 Accounts Rules. Furthermore, by failing to record all dealings with client money appropriately, Mr Metcalfe also breached Rule 29.2 of the 2011 Accounts Rules.

48. In response to these points, Mr Budworth submitted that Mr Quillan and each client were entitled to instruct Mr Metcalfe in relation to the Back-to-Back Share Sale transactions, and he was entitled to undertake the work. Mr Metcalfe was performing

a legitimate advisory function in assessing that the documentation drawn up was effective to achieve the purpose of the documentation and in taking steps to process the transactions. Mr Metcalfe was subject to no overarching requirement to take responsibility for and advise on the commercial merits of the scheme. Mr Metcalfe had provided professional services and therefore the monies paid into the Firm's client account were not paid in breach of Rule 14.5 of the 2011 Accounts Rules.

49. In relation to allegation 1.3, the SDT summarised the SRA's case and submissions at paragraphs 22.1-22.9 of the Judgment and Mr Metcalfe's response at paragraphs 22.10-22.13. It set out its findings on allegation 1.3 at paragraphs 22.14- 22.20, which in summary were as follows:

1. in allowing his clients to become involved in a dubious transaction, Mr Metcalfe had failed to act in their best interests in breach of Principle 4 and had failed to protect their monies and assets in breach of Principle 10;

2. in engaging in such conduct, Mr Metcalfe failed to maintain the trust the public placed in Mr Metcalfe and the provision of legal services in breach of Principle 6;
3. in facilitating transactions that were dubious and bore the hallmarks of fraudulent financial arrangements, Mr Metcalfe had fallen below the standards expected of him by the public and by members of the profession, demonstrating a failure to act with integrity in breach of Principle 2; and

4. in acting where there was no underlying legal transaction and having failed appropriately to record his dealings with client money, Mr Metcalfe had breach Rules 14.5 and 29.2 of the 2011 Accounts Rules.

As I have already noted, there is no appeal against these conclusions.

50. The SDT went on at paragraphs 22.21-22.22 of the Judgment to conclude that Mr Metcalfe had turned a blind eye to the dubious nature of the transaction and had deliberately not asked questions lest he learned something he would rather not know. Ordinary and decent people would consider that, in turning a blind eye and facilitating transactions that bore the clear hallmarks of fraudulent financial arrangements, Mr Metcalfe's conduct had been dishonest. The SDT thus found beyond reasonable doubt that Mr Metcalfe's conduct had been dishonest.

51. As already noted, the SDT also found that allegations 1.4, 1.5, 1.6 (in part), 1.9 and

1.10 were proved beyond reasonable doubt. None of those conclusions is challenged on this appeal.

Mitigation and sanction

52. At paragraph 30 of the Judgment, the SDT noted that there were no previous disciplinary matters recorded against Mr Metcalfe. At paragraphs 31-35, the SDT noted Mr Budworth's submissions in mitigation and on sanction, which were:

the SRA Code of Conduct to the best of his ability with a genuine belief at all times that he was acting in his clients' best interests.

53. The SDT set out its conclusions on the question of sanction at paragraphs 36-43 of the Judgment. These were:

Costs

had little recollection of Sandymoor or the Loan and Investment Scheme transactions was not credible.

"113. … [I]n my judgment, pressure of work or extreme working conditions whilst obviously relevant, by way of mitigation, to the assessment which the SDT has to make in determining the appropriate sanction, cannot either alone or in conjunction with stress or depression, amount to exceptional circumstances. Pressure of work or of working conditions cannot ever justify dishonesty by a solicitor … ."

54. At paragraphs 44-47 of the Judgment, the SDT set out its conclusions on costs. It noted Mr Mulchrone's submissions that:

55. The SDT also noted Mr Budworth's submissions on costs, which, in summary, were:

1. The SDT concluded that the SRA's internal costs were both reasonable and proportionate and should not be reduced. It also concluded that a small reduction in costs should be made for the allegations found not to be proved. The time taken on the unproven matters was, however, minimal, and a reduction in costs of £1,500 plus VAT was appropriate. The SDT therefore ordered that Mr Metcalfe pay costs to the SRA in the sum of £30,573.50.

The legal framework for the appeal

57. This is an appeal under section 49(1) of the Solicitors Act 1974. It proceeds by way of review unless the court considers that it would be in the interests of justice to hold a re-hearing: CPR r 52.21(1). The appeal will only be allowed if the court concludes that the Order was wrong: CPR r 52.21(3). This means that the court must conclude that the SDT, in reaching its decision to make the Order, made a material error of law or fact or erred in the exercise of its discretion outside the generous ambit within which reasonable disagreement is possible.

58. The proper approach of the High Court to an appeal from the SDT was succinctly summarised by Maddison J in *The Law Society v Waddingham [2012] EWHC 1519 (Admin)* [46]:

"46. … In essence, when considering an appeal from a Solicitors Disciplinary Tribunal this court should accord considerable respect to the findings of and penalties imposed by the Tribunal, it being an expert and informed body; but as to the Tribunal's findings, this court is entitled to substitute its own view in an appropriate case, and it is also entitled to interfere with the Tribunal sentencing decision if it was clearly inappropriate. (See e.g. Bolton v. The Law Society *[1994] 1 WLR 512*, 516 G-H, *per [2008] EWHC (Admin.) 2233* Sir Thomas Bingham M.R.; Otchere v. The Law Society at paragraph 18 per Lloyd Jones J.; and Salsbury v. The Law society *[2008] EWCA Civ 1285 at paragraph 30*, *per* Jackson L.J."

59. The proper approach of an appellate court to appeals from a professional disciplinary tribunal, with specific reference to appeals from the SDT, is considered and set out in more detail in *Solicitors Regulation Authority v Day [2018] EWHC 2726 (Admin)* [61]-[78] and *Martin v Solicitors Regulation Authority [2020] EWHC 3525 (Admin)* [27]-[33], each of which is a decision of the Divisional Court. *SRA v Day* was an appeal by the SRA against the dismissal of all allegations of breach of professional conduct rules brought by the SRA against three solicitors. *Martin v SRA* was an appeal by a solicitor against findings of serious misconduct, including dishonesty, and the sanction of striking-off. I have had regard to the relevant principles. It is not necessary for me to set them out in full here.

60. One point, however, worth noting specifically, given the submissions made on Mr Metcalfe's behalf, is that the SDT was required to apply the criminal standard of proof, namely, beyond reasonable doubt, to each allegation pursued by the SRA against Mr Metcalfe, including to any finding of dishonesty: *Law Society v Waddingham* at [54]; *SRA v Day* at [75]. I have already noted at [] that the SDT acknowledged in the Judgment that the SRA was required to prove each allegation beyond reasonable doubt.

61. At the hearing, Mr Budworth drew my attention to *Yerolemou v The Law Society [2008] EWHC 682 (Admin)* , a decision of the Divisional Court on a substantive appeal from the SDT under section 49(1)(a) of the Solicitors Act 1974 by a solicitor who had been struck off the roll of solicitors for persistent delays in complying with solicitor's undertakings. In that case, Lloyd Jones J set out at [5] the principles relevant to an appeal from the SDT by reference to the judgment of Sir Thomas Bingham MR in the well-known case of *Bolton v The Law Society [1994] 1 WLR 512* (cited in the quotation from *Law Society v Waddingham* set out at [] above).

62. Lloyd Jones J then made clear in *Yerolemou v Law Society* at [6] that the general approach taken by Sir Thomas Bingham MR in *Bolton v Law Society* was not disturbed or qualified by the Human Rights Act 1998 as to the relevant principles. The 1998 Act did, however, affect the general approach of the court to an appeal of this kind. He demonstrated this by reference to the decision of the Divisional Court in *Nahal v The Law Society [2003] EWHC 2186 (Admin)* at [31]-[33], which in turn discussed the decision of the Divisional Court in *Langford v The Law Society [2002] EWHC 2802 (Admin)* .

63. *Langford v Law Society* was an appeal by a solicitor against the SDT's decision to strike him off the roll of solicitors for breach of client money rules, misapplication and misappropriation of client monies, and failure to maintain proper accounts.

64. In *Langford v The Law Society [2002] EWHC 2802 (Admin)* at [14]-[15], Rose LJ said:

"14. … in dealing with an appeal of this kind, a greater flexibility is now appropriate than was suggested in *Bolton* which was decided before the coming in to force of the Human Rights Act.

…

… In *MacMahon v The Council of the Law Society of Scotland*, Lord Gill (Lord Justice Clerk), giving the opinion of the court, having referred to [*Ghosh v General Medical Council [2001] 1 WLR 1915 (PC)*] and [*Preiss v General Dental Council [2001] 1 WLR 1926 (PC)*], said:

'… we must now apply a less rigorous test. We should simply look at the tribunal's decision in the light of the whole circumstances of the case, always having due respect for the expertise of the tribunal and giving to their decision such weight as we should think appropriate.'

Then at paragraph 16 he went on:

'Nevertheless, in following this approach we think that it is good sense to keep in view the obvious reasons that have been repeated over the years for according respect to the views of specialists tribunals in appeals of this kind …'

15. For my part, I approach determination of this appeal in accordance with the tests there indicated."

The Grounds of Appeal

65. I briefly summarised Mr Metcalfe's grounds of appeal at [] above. In more detail, his first ground of appeal ("Ground 1") is that the SDT erred in making findings of dishonesty in relation to allegations 1.1 and 1.3 by either failing to apply the correct standard of proof, namely, the criminal standard, or by wrongly concluding that the evidence was capable of supporting a finding of dishonesty to the criminal standard. The Grounds of Appeal set out three sub-grounds that are, for the most part, submissions in support of Ground 1. I will deal with the sub-grounds when I set out and then analyse below the submissions and issues raised by Ground 1.

66. Mr Metcalfe's second ground of appeal ("Ground 2") is that, whether or not Ground 1 succeeds, in all the circumstances the sanction of striking-off from the roll of solicitors imposed on Mr Metcalfe was disproportionate to the fault found by the SDT and too severe.

67. Mr Metcalfe's third ground of appeal ("Ground 3") concerns the costs order made by the SDT. Mr Metcalfe appeals on the basis that, in awarding the SRA "virtually all" of its costs, the SDT erred in the exercise of its discretion outside the generous ambit within which reasonable disagreement is possible, having failed to take account of various matters.

Ground 1: the SDT was wrong to make findings of dishonesty in relation to allegations 1.1 and 1.3

Submissions

68. Mr Budworth submitted that the facts found by the SDT in relation to each of allegations 1.1 and 1.3 were not capable of supporting a finding that Mr Metcalfe had acted dishonestly in relation to either matter.

69. In relation to allegation 1.1, Mr Budworth submitted that the following were relevant considerations to which the SDT failed to have proper regard:

1. Mr Metcalfe submitted that the fact that neither client approached by Ms Barrowclough in relation to the Loan and Investment Scheme transactions recalled having heard of RMJ Solicitors showed no more than that the clients

were inattentive to, or simply failed to recall, the documents that they had signed, one of which was a retainer letter from and confirmation of instructions to the Firm, together with terms and conditions. The retainer letter made clear that the client was instructing the Firm to review and assess the documentation for the loan from Shawhill Limited to the client and the transfer of those loan proceeds to Sandymoor for investment.

71. Mr Budworth noted that Mr Metcalfe acknowledged that he had not been in direct contact with the clients that were contacted by Ms Barrowclough but submitted that Mr Metcalfe had no reason not to take at face value the signed documentation with which he was presented for each client, which included the signed retainer letters in which his instructions were set out. Those instructions were clear and complete and enabled him to do what was needed, namely, to review and assess whether the documentation properly gave effect to the loan to the client from Shawhill Limited and the transfer of the loan proceeds to Sandymoor as a loan or for investment, as well as to effect the payment of fees and interest.

72. Mr Budworth submitted that none of the SRA warning notices relied on by the SRA and referred to by the SDT in the Judgment was relevant to the Loan and Investment Scheme transactions or the Back-to-Back Share Sale transactions. None of the "warning signs" listed in the April 2009 warning notice applied to the transactions. Mr Metcalfe had no reason to think that either arrangement was a "high-yield investment scheme" of the type referred to in the 10 September 2013 warning notice.

73. Mr Budworth submitted that it was notable that neither of the two clients contacted by Ms Barrowclough in relation to the Loan and Investment Scheme transactions made any complaint about the transaction into which they had entered to the SRA, the FCA or any other body.

74. Mr Budworth submitted that, while the SDT may have considered that Mr Metcalfe's involvement in the Loan and Investment Scheme transactions and the Back-to-Back Share Sale transactions was "grubby work", there was nothing on the facts found by the SDT that enabled it to reach a conclusion beyond reasonable doubt that Mr Metcalfe was guilty of dishonesty in relation to any of the transactions.

75. Mr Budworth submitted that the fact that Mr Metcalfe was doing execution-only work for his clients and not providing legal advice to them did not support a finding of dishonesty. There is no rule that prohibits a solicitor, by agreement with his client, from limiting the scope of his instructions to execution-only work. It was not necessary, in other words, that Mr Metcalfe should provide legal advice to his clients in order for the services provided to be legal services.

76. Mr Budworth submitted that the concerns raised by the SDT regarding the significant upfront costs to the clients, including a 20% upfront interest payment for the full term of the loan, the payment to the introducers, and Mr Metcalfe's fee of 5%, suggesting that these were unusual and/or too high, did not support a finding of dishonesty. It is well-established, he submitted, that a solicitor has no general duty to advise a client on the prudence of a transaction the client proposes to enter into, nor were there any special circumstances arising in this case that could give rise to such a duty.

77. Mr Budworth submitted that the SDT did not correctly apply the test for dishonesty set out in *Ivey v Genting Casinos*. It failed properly to apply the first step, namely, to ascertain the actual (subjective) state of Mr Metcalfe's knowledge or belief as to the facts and then, at the second step, to explain why his conduct was dishonest applying the (objective) standards of ordinary decent people. The SDT's reasoning on dishonesty was inadequate. It was speculative to suggest that if Mr Metcalfe had spoken directly to his clients, they would have given him information that would have alerted him to the possibility of a scam. The SDT drew an inference of dishonesty

from its finding that Mr Metcalfe "deliberately" did not ask questions of his clients, but, Mr Budworth submitted, the SDT could not, on that basis, reach a conclusion to the criminal standard that Mr Metcalfe was dishonest.

78. Mr Budworth submitted that it appeared that the SDT, rather than making a principled determination on sufficient evidence to the proper standard of proof that Mr Metcalfe had been dishonest in relation to the circumstances of allegations 1.1 and 1.3, had simply made a value judgment.

79. Finally, Mr Budworth submitted that Mr Metcalfe accepted that he had breached Principle 2, but a failure to act

with integrity does not amount to dishonesty.

80. Mr Mulchrone began his submissions by reminding the court of the proper approach of this court to an appeal from the SDT.

81. In relation to Mr Budworth's submission that the SDT had failed to apply the criminal standard of proof, Mr Mulchrone submitted that it is clear throughout the Judgment that the SDT bore in mind and applied the criminal standard. He submitted that Mr Metcalfe's real complaint was that the SDT should not have found dishonesty proved to that standard on the evidence before it, including Mr Metcalfe's own evidence. The appeal, therefore, is essentially a challenge to the SDT's primary findings of fact in relation to allegations 1.1 and 1.3 that Mr Metcalfe's conduct was dishonest.

82. Mr Mulchrone reminded the court of the principles applicable to an appellate court's approach to primary findings of fact and inferences made by the lower court. As noted at []-[] above, I have had regard to the relevant authorities and principles, including the case of *Martin v SRA*, referred to by Mr Mulchrone in his submissions.

83. On the basis of the relevant principles, Mr Mulchrone submitted, Mr Metcalfe was required to satisfy the court that the SDT's findings of dishonesty in relation to allegations 1.1 and 1.3 had no basis in the evidence, or disclosed a demonstrable misunderstanding of relevant evidence, or disclosed a demonstrable failure to consider relevant evidence, or were otherwise findings that no reasonable division of the SDT could have reached. In other words, Mr Metcalfe needed to show that the dishonesty findings of the SDT were perverse, which is a very high standard.

84. Mr Mulchrone submitted that the fact that there were no client complaints about the Loan and Investment Scheme transactions is incapable of supporting the conclusion that the SDT reached a perverse conclusion. The SDT taken that fact into account but did not consider that it gave rise to a reasonable doubt.

85. Mr Mulchrone submitted that Mr Budworth's point that the SDT should have had regard to the fact that the clients approached by Ms Barrowclough in relation to the Loan and Investment Scheme transactions may simply have been "inattentive" to the documentation understated the SDT's actual conclusion. The SDT did not make any finding that the clients' signatures on the retainer letter were forged, nor did it need to. The SDT found dishonesty by Mr Metcalfe on the basis that he had "deliberately turned a blind eye" to the "clear and obvious 'red flag'" indicators identified by the SDT "lest he learned something he would rather not know".

86. Mr Mulchrone noted that, on his own case Mr Metcalfe did not have the loan agreements or the investment agreements involved in the Loan and Investment transactions. He never contacted his clients directly but simply relied on what he was told by Sandymoor, the ultimate recipient of the funds generated by the transactions. He was not, therefore, in a position to "review and assess that the documentation was effective" for any purpose. Furthermore, his own terms of business specifically excluded his giving advice regarding the transactions. Given that background, the SDT was entitled to conclude that there was no need for his involvement, save to lend the scheme a veneer of credibility.

87. Mr Mulchrone submitted that the fact that Mr Metcalfe carried out the limited instructions set out in the retainer letters he had drafted for the Loan and Investment transactions and the Back-to-Back Share Sale transactions provides no support for the submission that the SDT's finding of dishonesty in relation to each was plainly wrong or perverse.

88. Mr Mulchrone submitted that it was not part of the SRA case to the SDT that a solicitor was required to act as a "general advisor" to its clients or owed a duty over and above the duty to act in the best interests of the client to advise on the prudence of any transactions. The SDT was concerned, he submitted, with the propriety, rather than prudence, of the transactions and concluded that Mr Metcalfe had deliberately turned a blind eye to that aspect.

89. Mr Mulchrone submitted that, contrary to Mr Budworth's submissions, the Loan and Investment Scheme transactions and the Back-to-Back Share Sale Transactions bore a number of the hallmarks of dubious transactions, as set out in the SRA warning notices. The point was that Mr Metcalfe should have considered the characteristics of the transactions in which he was being asked to be involved, particularly given the very limited nature of the role he was being asked to undertake, and should have made appropriate further enquiries, including communicating directly with his prospective clients. The SDT took into account that he was not aware that the Loan and Investment Scheme transactions involved early release of his client's pension funds.

90. Mr Mulchrone disputed Mr Budworth's criticism of the SDT in relation to its application of the *Ivey v Genting* Casinos test. The SDT plainly did ascertain Mr Metcalfe's state of mind, which it was able to do with the benefit of having seen and heard him give evidence and be cross-examined. The SDT was entitled to conclude that his deliberate participation in schemes that bore a number of hallmarks of dubious transactions, in circumstances where he had no direct contact with the clients concerned and took his instructions from a party that would benefit from the funds generated by the transactions, would be dishonest by the standards of ordinary decent people.

91. As for Mr Budworth's distinguishing of the SDT case of *SRA v Wilson-Smith* from the facts of this case, Mr Mulchrone acknowledged that the facts were different. *SRA v Wilson-Smith*, however, had simply been cited by the SRA for the principles that are summarised at paragraph 20.9 of the Judgment. Contrary to Mr Budworth's submission at paragraph 14.1 of his skeleton argument that *SRA v Wilson-Smith* did not establish the propositions set out in paragraph 20.9 of the Judgment, that paragraph set out the relevant principles virtually *verbatim* from the SDT's decision in *SRA v Wilson-Smith* at paragraph 60. These were entirely uncontroversial principles

that had been reiterated by the SDT in a number of cases over the years, both before and after *SRA v Wilson-Smith*.

92. Mr Mulchrone disputed the submission made by Mr Budworth that Mr Metcalfe's defence was hampered by inability to identify relevant files following the intervention in March 2017. In relation to allegation 1.1, the SRA had produced the hard copy files recovered by Shacklocks in the intervention. In relation to allegation 1.3, the SRA's case was that Shacklocks had not recovered those files. Ms Barrowclough only knew about them from her earlier inspection and asked Mr Metcalfe about them in interview. He was not able to assist with their whereabouts other than to suggest that those files had gone to another firm prior to the intervention.

93. In relation to electronic documents, Mr Mulchrone noted that, in interview with Ms Barrowclough, Mr Metcalfe confirmed that the files relevant to allegation 1.1 would not have been on the Firm's "Proclaim" system, which was for personal injury matters. When cross-examined before the SDT, Mr Metcalfe could say no more than that he was not aware of any electronic documents relevant to allegation 1.1 or allegation 1.3 that might have been in the cloud. There might have been some, but he was not sure.

94. Mr Mulchrone noted that Mr Metcalfe made no attempt to compel disclosure by Shacklocks, his former clients, or any third parties, either before the SDT or before this court, nor was he able to say with any specificity what document or class of documents would demonstrate his innocence of dishonesty.

Analysis and conclusions

95. To a large extent, Mr Budworth has made to this court the arguments that he made to the SDT, when Mr Metcalfe's position was essentially that, although he may have made some mistakes, he had always acted with integrity. The more difficult starting point for Mr Metcalfe on this appeal is that he has not challenged and therefore must accept the SDT's findings that, in relation to allegations 1.1 and 1.3 he had breached Principles 2, 4, 6 and 10 of the 2011 Principles and, in relation to allegation 1.3, he had also breached Rules 14.5 and 29.2 of the 2011 Accounts Rules. In other words, he must now accept that in relation to each of these allegations he has failed to act with integrity, failed to act in the best interests of each client, failed to behave in a way that maintains the trust that the public places in a solicitor and in the provision of legal services, and failed to protect client money and assets.

96. I fully accept that those findings, without more, do not necessarily mean that Mr Metcalfe has been dishonest in relation to the Loan and Investment Scheme transactions and the Back-to-Back Share Sale transactions. But a number of the points raised by Mr Budworth on appeal, which may have been of relevance and assistance before the SDT when, for example, the issues of whether Mr Metcalfe had acted with integrity or in the best interests of his clients, remained to be determined, do not materially assist on this appeal in determining whether the SDT's findings of dishonesty in relation to allegations 1.1 and 1.3 are plainly wrong or perverse, which is the standard that he is required

to meet.

97. As to the alleged failure by the Rule 5 Statement to set out "proper particulars" of dishonesty, I am satisfied that Mr Metcalfe was given proper notice of the particulars

of the case that he was required to meet based on the Rule 5 Statement. I note that it does not appear to have been part of Mr Metcalfe's case before the SDT that the SRA's case was improperly pleaded.

98. Mr Budworth criticises the SDT for reaching its conclusions, and purporting to do so to the criminal standard, on the basis of various inferences. As is regularly demonstrated in the criminal courts, however, a case based on inferences can, nonetheless, be a powerful one. The fact that a tribunal relies on inference does not mean that the criminal standard of proof cannot be satisfied.

99. I reject Mr Budworth's suggestion that the SDT needed to find the Loan and Investment Scheme transactions and the Back-to-Back Share Sale transactions to be fraudulent before concluding that Mr Metcalfe had been dishonest in his conduct in relation to those transactions. It was enough that the transactions bore clear and obvious hallmarks of fraud and that Mr Metcalfe had deliberately turned a blind eye to those hallmarks.

100. In my view, the SDT clearly and sufficiently identified what it considered to be the relevant dubious aspects and hallmarks of fraud in relation to the Loan and Investment Scheme transactions and the Back-to-Back Share Sale Transactions. It was not necessary that either type of transaction fell squarely within any of the SRA warning notices referred to by the SRA. The warning notices were intended to raise awareness and remind members of the profession of the need for caution. The warning signs described in the notices were given as examples. Furthermore, the general statements in the warning notices that I have highlighted at [] were clearly relevant to the facts of allegations 1.1 and 1.3. In any event, the SDT did not place specific reliance on the warning notices in reaching any of its determinations. They were simply part of the background.

101. The SDT accepted that Mr Metcalfe had no reason to know that the Loan and Investment Scheme transactions involved the release of relevant clients' pension monies, but it was open to the SDT to conclude on the evidence before it that he deliberately turned a blind eye, asked no questions of his clients, and undertook no enquiries to establish the true nature of the schemes.

102. The SDT accepted that Mr Metcalfe was not obliged to advise his clients as to the prudence of the transactions. But it was his role to advise his clients as to the nature of the transactions generally (for example, as to the effectiveness of the documents to achieve their purported purposes), which he could not do given that he had no access to the underlying documents and therefore had no real knowledge of the nature of the transactions. He relied exclusively on what he was told by Sandymoor, the ultimate recipient of the funds generated by the transactions.

103. It was open to the SDT to conclude that Mr Metcalfe had turned a blind eye and failed to undertake any adequate inquiries as to the nature of the Loan and Investment Scheme transactions because such an arrangement was to his financial benefit. That conclusion cannot be said to be perverse or plainly wrong.

104. There is no substance, in my view, in Mr Budworth's submission that the SDT failed correctly to apply the test for dishonesty set out in *Ivey v Genting Casinos*. Having had Mr Metcalfe's written and oral evidence, including the benefit of cross-

examination of Mr Metcalfe, the SDT was in a position to ascertain the actual state of Mr Metcalfe's knowledge or belief as to the facts of the Loan and Investment Scheme transactions.

105. It is, of course, not certain that if Mr Metcalfe had spoken with his clients, he would have discovered that the transactions involved the early release of the clients' pensions. However, it was open to the SDT to conclude that if had he questioned his clients properly and diligently, it is likely that he would have discovered the early pension

release aspect. More importantly for purposes of the test of dishonesty, it was open to the SDT to conclude that Mr Metcalfe's decision not to speak to his clients about the transactions was deliberate, motivated by a desire to avoid learning something that he would rather not know. Having concluded that, it was open to the SDT to conclude that ordinary decent people would consider such conduct to be dishonest and, therefore, to conclude to the criminal standard that Mr Metcalfe's conduct had been dishonest.

106. That, in my view, disposes of ground 1 of this appeal.

107. Dealing, briefly, with some of Mr Budworth's other points in relation to ground 1:

1.1 and 1.3. This he failed to do. I noted at []-[] above Mr Mulchrone's submissions on this point.

this point does not materially assist Mr Metcalfe. There is nothing in this that raises a material doubt regarding the SDT's findings of dishonesty against Mr Metcalfe in relation to allegations 1.1 and 1.3.

108. For the foregoing reasons, Mr Metcalfe's appeal on ground 1 is dismissed. *Ground 2: in any event, the sanction of striking-off was disproportionate and too severe* Submissions
109. Mr Budworth submitted that, even in a case where the SDT has found that a solicitor has been dishonest, it does not necessarily follow that the proportionate sanction is striking-off. He referred to the judgment of the Divisional Court in *Solicitors Regulation Authority v Sharma [2010] EWHC 2022 (Admin)* , where Coulson J said at [13]:

"It seems to me, … looking at the authorities in the round, that the following impartial points of principle can be identified: (a) Save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the roll …. That is the normal and necessary penalty in cases of dishonesty …. (b) There will be a small residual category where striking off will [be] a disproportionate sentence in all the circumstances …. (c) In deciding whether or not a particular case falls into that category, relevant factors will include the nature, scope and extent of the dishonesty itself; whether it was momentary …, or [over] a lengthy period of time …; whether it was a benefit to the solicitor …, and whether it had an adverse effect on others."

110. Mr Budworth submitted that this was a case falling within the small residual category where striking-off is disproportionate, having regard to the limited nature, scope and extent of dishonesty, Mr Metcalfe's limited benefit from the dishonesty, and the limited extent of the adverse effect on others.

111. Mr Budworth gave *Solicitors Regulation Authority v Imran [2015] EWHC 2572 (Admin)* as an example of a case where the SDT had a suspended a solicitor, rather than striking him off the roll of solicitors, after making findings of dishonesty against him, and the Administrative Court dismissed the SRA's appeal under section 49(1)(b) that the sanction of suspension was excessively lenient.

112. Mr Budworth reminded the court that matters of punishment are for criminal sanction and civil financial penalty. The role of a professional regulator in imposing a sanction is two-fold, namely:

1. Mr Budworth also referred to the observation of Collins J in *Giele v General Medical Council [2005] EWHC 2143 (Admin)* , *[2006] 1 WLR 942* at [29], where he said:

"… in considering the maintenance of confidence [of the public in the medical profession], the existence of a public interest in not ending the career of a competent doctor will play a part."

114. Mr Budworth submitted that the same observation applies in this context. He submitted that the proper purposes of the jurisdiction to sanction would be met by the imposition of restrictions on Mr Metcalfe's practice, whether alone or together with a fine or reprimand, for example, a prohibition on his acting as a sole practitioner, holding client monies.

115. As I have already noted at [], at the hearing Mr Budworth drew my attention to *Yerolemou v Law Society*, which highlights the principles that I have summarised at []-[]. *Yerolemou v Law Society* was a case in which a solicitor was found by the SDT to have persistently neglected the interests of his client and persistently failed to respond to reminders, both from the client and, in turn, from the Law Society. He was not alleged to have been dishonest. Mr Yerolemou admitted his failings, and the SDT struck him off the roll of solicitors. On appeal against that sanction, the Divisional Court concluded that the solicitor's breaches were not so serious as to require striking-off, quashed the order for striking-off, and substituted an order of suspension for two years.

116. Mr Budworth submitted that in imposing the sanction of striking-off from the roll of solicitors, the SDT failed to take proper account of the following matters:

1. no client made any complaint about any of the transactions involved in allegations 1.1 and 1.3;
2. Mr Metcalfe made various straightforward admissions promptly, engaged properly and conscientiously with this process, and co-operated throughout;
3. at worst Mr Metcalfe simply became overwhelmed to a degree by the pressure of running the Firm, exacerbated by the departure of members of his personal injury department and the consequent financial pressure;

(b) the supporting witness statements (character references) dated 28 May 2019 from Mr Steven Lynch and dated 17 June 2019 from Mr Andrew Williams, both solicitors, which were provided to the SDT and which confirm his longstanding positive contribution to the work of the profession in his local area, and (c) the statement from Mr Metcalfe's treating doctor dated 21 June 2017, which was provided before his interview by Ms Barrowclough on 29 June 2017.

117. In light of the foregoing, Mr Budworth submitted, this is a clear case falling within the residual category of cases of professional dishonesty referred to by Coulson J in *SRA v Sharma* where striking-off is disproportionate and a lesser sanction would suffice to meet the purposes of sanction by a professional regulator.

118. In response, Mr Mulchrone reminded the court of the observation of Lloyd Jones J in *SRA v Sharma* at [13], the relevant part of which I have quoted at [] above, that the "normal and necessary penalty" following a finding of dishonesty by the SDT against a solicitor is to strike him off the roll of solicitors. In order to succeed on this ground of appeal, Mr Metcalfe needed to show that the SDT's decision to impose that sanction on him was wrong: CPR r 52.21(3).

119. Mr Mulchrone referred to *Salsbury v Law Society [2009] 1 WLR 1286 (CA)* , where Jackson LJ said at [30] that:

"… the Solicitors Disciplinary Tribunal comprises an expert and informed tribunal, which is particularly well placed in any case to assess what measures are required to deal with defaulting solicitors and to protect the public interest. Absent any error of law, the High Court must pay considerable respect to the sentencing decisions of the tribunal. Nevertheless if the High Court, despite paying such respect, is satisfied that the sentencing decision was clearly inappropriate, then the court will

interfere. ….”

120. Mr Mulchrone noted that no error of law is alleged against the SDT in respect of Ground 2. In order to show that the sanction imposed by the SDT on Mr Metcalfe was wrong, he submitted, it was necessary for Mr Metcalfe to satisfy the court that the sanction was “clearly inappropriate”. Mr Mulchrone did not dispute Mr Budworth’s summary of the relevant principles as set out in *Bolton v Law Society* at 518-519 and *SRA v Sharma* at [13], save to say that the “exceptional circumstances”, referred to in *SRA v Sharma*, in which the SDT should not impose the sanction of striking-off following a finding of dishonesty, must in some way relate to the dishonesty, as made clear by the Divisional Court in *SRA v James* at [101].

121. In *SRA v James* the Divisional Court considered three cases where the SDT had made findings of dishonesty against a solicitor but went on to find that there were exceptional circumstances, principally on mental health and pressure of work

grounds, justifying a lesser sanction than striking-off. In all three cases, the SDT imposed a suspension order, that was itself suspended subject to compliance with a restriction order. In each case, the Divisional Court quashed that sanction and imposed the sanction of striking-off.

122. Mr Mulchrone distinguished this case from *SRA v Imran*, where the SDT had found that the dishonesty was, in effect, a “moment of madness” by Mr Imran (*SRA v Imran* at [30]; see also, *SRA v James* at [109]). Mr Mulchrone noted that the SDT had found at paragraphs 37-39 of the Judgment that:

1. These findings, Mr Mulchrone submitted, were profoundly serious. There was no proper basis for disturbing them.
2. Mr Mulchrone submitted that, although Mr Metcalfe relied on “certified serious mental stress” in mitigation, the only medical evidence before the SDT was the letter from his treating doctor dated 21 June 2017, which was provided before Mr Metcalfe’s interview by Ms Barrowclough on 29 June 2017. That letter made it clear that the serious mental stress being suffered by Mr Metcalfe was caused by the SRA’s intervention and the investigation. That letter post-dated the Relevant Period, during which the dishonest conduct occurred. There was no expert medical evidence before the SDT relating to the Relevant Period. In any event, *SRA v James* made it clear that mental stress and pressure of work alone would not amount to exceptional circumstances.

125. Mr Mulchrone submitted that the SDT had carefully noted Mr Metcalfe’s mitigation (at paragraphs 31-35 of the Judgment), had regard to its Guidance Note on Sanction (paragraph 36), and correctly applied the “bottom up” approach to sanction (paragraph 40). The SDT was entitled to conclude that Mr Metcalfe had failed to demonstrate that there were exceptional circumstances justifying a sanction other than striking-off.

Analysis and conclusion

126. I accept Mr Mulchrone’s submissions on Ground 2. In my view, it is not arguable that there were exceptional circumstances justifying a sanction other than striking-off, much less that the sanction of striking-off was clearly inappropriate. The SDT properly applied its Guidance Note on Sanctions, taking an appropriate “bottom up” approach, and fully justified the sanction of striking-off, by reference to the seriousness of Mr Metcalfe’s conduct, including his dishonesty as found in relation to allegations 1.1 and 1.3.

127. Accordingly, Mr Metcalfe’s appeal on Ground 2 is dismissed.

Ground 3: the SDT’s exercise of discretion in making the costs order exceeded the ambit within which reasonable

disagreement is possible

Submissions

128. Mr Budworth submitted that, in exercising its discretion to award the SRA virtually all of its costs, the SDT exceeded the ambit within which reasonable disagreement is possible. He submitted that the SDT failed to take proper account of the following factors:

1. making a wholly unsubstantiated allegation that witnesses had been told by Mr Metcalfe not to speak to the SRA;

2. making a wholly unsubstantiated allegation that the Firm's bank account was misused to provide unregulated services, in relation to which the SRA never made a positive case or put the allegation to Mr Metcalfe; and

3. making the wholly unsubstantiated allegation that the Firm's client files for the Loan and Investment Scheme transactions contained "bogus correspondence", when neither of the two witnesses spoken to by Ms Barrowclough in relation to those transactions made any such claim;

1. In response Mr Mulchrone noted that the SDT set out its reasons for its costs order at paragraphs 44 to 47 of the Judgment. It properly noted the submissions made on behalf of the SRA and on behalf of Mr Metcalfe. The SRA sought costs in the sum of

£32,373.50, comprised of £10,173.50 for the SRA's internal costs and £18,500 plus VAT for the costs of Capsticks LLP. The SDT found, for reasons that were open to it having regard to the SRA's schedule of costs, that the SRA's internal costs of

£10,173.50 "were both reasonable and proportionate". The SDT also found that "the time taken on the unproven matters was minimal" such that it was appropriate to apply a small reduction of £1,500 to the fixed fee claimed by Capsticks LLP for all the work it had done on the case.

130. Mr Mulchrone submitted that the SDT properly understood the submissions on costs made by Mr Budworth on Mr Metcalfe's behalf. The SDT had heard all of the evidence, including Mr Metcalfe's evidence, during the course of a hearing that lasted four days. The SDT was in the best position to make a proper assessment of the costs. None of the points put forward by Mr Budworth demonstrated that the SDT's decision fell outside the generous ambit of its discretion. It was not open to Mr Budworth simply to reargue points on costs argued before the SDT in the hope that this court might take a different view.

131. Mr Mulchrone disputed the suggestion that the SRA had been awarded "virtually all" of its costs. The total figure awarded by the SDT was 94.4% of the amount claimed by the SRA. Dealing with the points made by Mr Budworth, which I have summarised at [], Mr Mulchrone made the following points:

1. Contrary to Mr Budworth's submission, the SDT did apply a discount in recognition that some matters were unproven but concluded that only a modest reduction of £1,500 was necessary.

132. As to the submission of Mr Budworth that costs should not be imposed as an additional penalty, Mr Mulchrone referred to the judgment of the Divisional Court in *Merrick v The Law Society [2007] EWHC 2997 (Admin)* , where at [61]-[62] Gross J said:

"61. First, there can be no general rule that the SDT should not impose an order for costs in addition to an order of suspension or an order striking off a solicitor. Were it otherwise, the more serious the misconduct, the less likely that the Law Society could recoup the costs to which it had been put in dealing with it. That cannot be right.

62. Secondly, whether in any individual case it is appropriate to add an order for costs to an order suspending a solicitor from practice or striking him off must depend on the facts. In some cases, the order for suspension or striking him off will be sufficient punishment. In others, it may not be."

133. Mr Mulchrone noted that Mr Metcalfe had not claimed before the SDT that he did not have the financial means to meet the costs order.

134. More generally, Mr Mulchrone submitted that none of the factors cited by Mr Budworth was sufficient, individually, or collectively, to establish that the SDT had exercised its discretion outside the generous ambit within which reasonable disagreement is possible.

135. Finally, Mr Mulchrone denied that the time claimed on the costs schedule was excessive.

Analysis and conclusion

136. None of Mr Budworth's submissions in relation to the costs order made by the SDT comes close to persuading me that the SDT exercised its discretion to award costs outside the generous ambit within which reasonable disagreement is possible. The SDT had regard to the submissions made on behalf of Mr Metcalfe. There is no basis for me to disturb their assessment of what was reasonable, having regard to nature of the issues, the number of allegations, the amount of evidence, the length of the hearing, and all of the other factors that the SDT was in a better position to assess than this court.

137. Accordingly, Mr Metcalfe's appeal on Ground 3 is dismissed.

Conclusion

138. The appeal is dismissed on all grounds.