SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12010-2019

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

ALASTAIR JAMES MCGREGOR GILFILLAN Respondent

Before:

Mr R. Nicholas (in the chair)
Mrs J. Martineau
Mrs L. Barnett

Date of Hearing: 17 and 29 June 2020

Appearances by Video-link (remote hearing)

Nimi Bruce, barrister of Capsticks Solicitors LLP of 1 St George's Road, Wimbledon, London, SW19 4DR for the Applicant.

The Respondent appeared in person.

JUDGMENT

Allegations

1. The allegations against the Respondent were that:

1.1 The Respondent sent a "List of documents" for standard disclosure dated 4 December 2015 to the Court and HF Solicitors which purportedly bore his client's signature, but which had in fact been signed by the Respondent without his client's knowledge or consent. In doing so he breached any or all of Principles 1, 2, 4 and 6 of the SRA Principles 2011 and failed to achieve Outcomes O(5.1) and O(5.6) of the SRA Code of Conduct 2011. It was alleged the Respondent had acted dishonestly.

1.2 From at least 8 January 2016 to 14 October 2016, the Respondent knew, or ought to have known, that his client had no properly arguable basis for recovering the damages being claimed in a personal injury claim but took no, alternatively no adequate steps to limit his client's claim to a sum that was properly recoverable. In so doing, he breached any or all of Principles 1, 2, 4, 5 and 6 of the SRA Principles 2011 and failed to achieve Outcomes O(5.1) and O(5.6) of the SRA Code of Conduct 2011.

1.3 The Respondent sent a witness statement dated 1 September 2016 to the Court and the defendant containing a "statement of truth" bearing his client's signature, which gave the misleading impression that his client had seen and approved the statement, when she had not done so. In doing so, he breached any or all of Principles 1, 2, 4 and 6 of the SRA Principles 2011 and he failed to achieve Outcomes O(5.1) and O(5.6). It was alleged the Respondent had acted dishonestly.

Documents

2. The Tribunal reviewed all the documents submitted by the Applicant and the Respondent which included:

Applicant:

- Application dated 4 October 2019 together with attached Rule 5 Statement and all exhibits
- Emails between the Applicant and the Respondent dated from 21 October 2019 to 28 January 2020
- The Applicant's Statements of Costs dated 4 October 2019, 29 January 2020, 16 March 2020, 10 June 2020 and 22 June 2020
- Letter from the Solicitors Regulation Authority (SRA) to the Respondent dated 26 November 2018

Respondent:

- The Respondent's Answer dated 17 November 2019
- The Respondent's witness statements dated 21 January 2020 and 26 February 2020

- Emails dated 16 January 2020, 21 January 2020, 28 May 2020 from the Respondent to the Tribunal and the Applicant

- The Respondent's Payslips and P60 documents

- SRA Service Complaint Form submitted on 11 November 2018

Factual Background

3. The Respondent, born in 1964, was admitted to the Roll of Solicitors on 2 April 1997.

4. The Respondent was an employee at OCL Solicitors Limited of First Floor, Unit 1, Carolina Court, Doncaster, DN4 5RA ("the firm") from 7 June 2015 to 24 March 2017.

5. The Respondent last held a Practising Certificate for the practice year 2017/2018. As he did not renew his practising certificate, it was revoked on 7 December 2018.

6. The Respondent acted for a Mrs NM ("the client"), who was the claimant in a personal injury matter arising from a road traffic accident. Initially another fee earner at the firm had acted for the client and the Respondent took over conduct of the matter in July 2015.

7. The proceedings were defended on the basis that there was an issue on causation. The defendant had disputed the claim suggesting that as it was a low speed impact and that the threshold for injury was not passed. The defendant also had concerns in relation to the vehicle damage claim, as not all of the damage claimed was caused in the accident with the defendant. The client had been involved in another road traffic accident and some of the items claimed in the proceedings were caused by the second subsequent accident.

8. The claim proceeded in the usual way with directions for disclosure and the exchange of witness statements.

9. On or about 8 January 2016 the client told the Respondent in an email that not all of the items being claimed were caused by the first accident with the defendant. However, on 15 January 2016 the client's first witness statement was sent to the defendant's solicitors by email and filed with the Court without amendment.

10. The Respondent filed a second, corrective, witness statement to address this problem on 26 September 2016 but the statement was still inaccurate on material points. In addition, the second statement did not appear to have been approved by the client prior to it being filed and served.

11. At the trial on 14 October 2016, the client admitted that her first witness statement was misleading and denied having written or signed her (purported) second witness statement.

12. Due to evidence given by the client at the trial, HF Solicitors, who were acting for the defendant's insurers, carried out an investigation into the firm's conduct of the case. HF Solicitors wrote to the firm on 9 January 2017 about the matter. The firm responded in a letter dated 20 January 2017 in which it was accepted there was "a shortcoming as to file handling". However, the letter stated that the firm did not consider that its conduct, or that of the Respondent, warranted a report to the SRA, or committal proceedings.

13. HF Solicitors raised their concerns directly with the Respondent who replied to their allegations in a letter dated 5 July 2017. HF Solicitors later referred the matter to the SRA.

Allegation 1.1

14. The Respondent sent an email to the client on 3 December 2015 attaching the 'List of Documents for Standard Disclosure'. The Respondent asked the client to sign and return the document which contained the following certification:

> "I certify that I understand the duty of disclosure and to the best of my knowledge I have carried out that duty. I further certify that the list of documents set out in or attached to the form, is a complete list of all documents which are or have been in my control and which I am obliged under the order to disclose. I understand that I must inform the court and the other parties immediately if any further document required to be disclosed by Rule 31.6 comes into my control at any time before the conclusion of the case..."

15. The Respondent sent a letter to HF Solicitors dated 3 December 2015 enclosing "a duly signed copy of the Claimant's Disclosure List…." which bore what purported to be the client's signature and was dated 4 December 2015. The signature on the List of Documents differed from the client's signature on the Conditional Fee Agreement, the Form of Mandate, the medical records Consent Form and the Accident Report, which the client had signed. The signature also differed from the client's signatures on the witness statements, which she had amended and signed.

16. The List of Documents was included in a trial bundle, which the Respondent sent to Counsel on 7 June 2016. Whilst the List of Documents was identical to that purportedly signed by the client, the List provided to Counsel was signed by the Respondent.

17. In a later witness statement dated 6 December 2016 prepared for HF Solicitors who were investigating the concerns which arose from the trial, the client confirmed that:

- She was "100% sure" that she did not sign and return the List of Documents and she said it was incorrect, that someone had written her name in the signature box and it was not her handwriting;

- The photographs included in the engineer's report were incorrect as they showed a crack to the nearside rear bumper, which had occurred after the incident date;

- She felt the firm had supplied a false statement on her behalf.

18. The Respondent explained in a letter dated 5 July 2017 to HF Solicitors that he had sent the List of Documents to the client and asked her to sign it. He had presumed the client had signed the document and sent it back. He also stated that:

    - His first thought was that it was the Claimant (i.e. the client) who signed the List of Documents and returned it without amendment;

    - It was unusual for clients to amend their disclosure lists, as they would rely upon their solicitor to do this on their behalf;

    - Whilst he could not recall the date when the document arrived on his desk, from his experience, bits of documents could and regularly did detach from the original document;

    - He could only provide an educated guess that if documents did detach or had become lost or unrecognizable as a result of scanning, an attempt could have been made to copy or replace the original signed document in its place by one of the staff;

    - He could not recall any members of staff drawing his attention to a lost or destroyed document on this case; and

    - He denied that he was the author of the signature and could not explain the signing of the List of Documents or who had signed it.

19. The Respondent also posed the question "Who was it who signed the List of Documents if it was not the correct signature of the Claimant?"

20. In his letter to the SRA dated 25 April 2018, the Respondent explained that:

    - He was "pretty certain" that he would have sent the List of Documents to the client by post and then again by email, because she had not yet acknowledged, signed or returned the list;

    - He would "almost certainly" have telephoned the client to ask whether she had received the list, whether she agreed its content and if so, did he have permission to type sign it on her behalf, purely on the basis that she would sign and return the original to him;

    - He was unable to remember this precisely, but this was the most plausible explanation, as the list was sent to HF Solicitors on 3 December 2015;

    - From memory, he would have asked the client if he could sign the list bearing in mind the imminent/past date of the directions; he may have signed the list in a "stick and ball" fashion so as not to give the impression that it was the Claimant's signature;

- He found it implausible that he would have signed the list without the client's authority;

- He could have made an application to extend time but did not do this probably because he had discussed the contents with the client, and she had agreed the list;

- There was no intention whatsoever to attempt to mislead the Court, the client or the defendant. The client had seen and given him verbal approval of the list, so her name was printed; and

- It was never an intention to pretend to be her handwriting, as he had hoped she would return the original List of Documents signed and dated in time but failed to do so.

Allegation 1.2

21. The Particulars of Claim dated 30 June 2015 included Particulars of Special Damage confirming that the repairs to the client's vehicle amounted to £1,917.36. This was incorrect, as not all of the damage claimed was caused in the accident with the defendant. Some of the damage had been caused in a second subsequent accident, which had taken place approximately a month later.

22. The Respondent sent a first draft of a witness statement to the client on 8 January 2016 by email sent at 13.32. The Respondent stated in his email:

> "I attach the first draft of a statement which I will also send through the Post.
>
> There will be loads of mistakes within and therefore please read it through line by line and make alterations you feel are necessary and I will then prepare a fair copy.
>
> Please sign and date the back page and send it back so I can then send the fair copy onto the other side. I need to serve the statement on the other side by Wednesday 13" Jan so please deal with this asap.
>
> Any questions, please contact me."

23. The client replied to the Respondent on the same day in an email sent at 15.14 and stated:

> "... I have to clarify that the crack on the rear passenger side bumper was not from this incident. As I originally stated, from this incident I had paintwork damage to the driver side bumper and as a consequence of the pressure, the passenger side bumper had dropped slightly. The crack was the result of the car being hit outside my home when parked (after this inciden [sic]), but no details left. I did mention this when I was called to arrange collection on my car."

24. The Respondent replied to the client on the same day in an email sent at 17.31 and stated:

> "Thanks very much for this. Please can you go through the statement and make whatever changes you feel are necessary.
>
> I really don't mind if you change everything as long as it is your account that is given as you may be the one that is giving evidence in the witness box. Please do your best."

25. The Respondent also sent the statement to the client by post and explained in a letter dated 8 January 2016:

> "Should you have any suggested amendments or queries, please telephone me on the above number."

26. The Respondent spoke to the client on 12 January 2016 and recorded in a telephone attendance note what the client had said as follows:

> "She said she was unseat-belted and as so [sic] she was not in situ when the car was struck"

27. The client returned an amended draft statement to the Respondent, which she signed and dated 10 January 2016. The client had made amendments to the statement including removing references to a crack in the bumper on the rear passenger side and instead inserting reference to a "dropped bumper".

28. The Respondent sent the statement to HF Solicitors by email on 15 January 2016 and by post on 18 January 2016. In the email sent on 15 January 2016, the Respondent stated:

> "Please find attached my client's type signed witness statement.
>
> She has signed the statement but we are not yet in possession of the Statement of Truth and therefore we would be extremely grateful if you would consent to the late production of the SOT. We anticipate this to be on the 12" Jan. The substantive material within the statement will not alter."

29. The client had not in fact signed or agreed the version of the statement which the Respondent had sent to HF Solicitors. That statement contained an electronic signature, which the Respondent had typed. That copy of the statement included some, but not all of the amendments contained in the amended draft which had been returned by the client to him on 10 January 2016. The Respondent had removed the reference to the "crack in the bumper on the rear passenger side" in the statement. However, reference to the "crack to the rear bumper" being caused by the defendant was still included. This was not in accordance with the amendments made by his client. The Respondent had therefore sent a statement to HF Solicitors, which contained a material factual inaccuracy.

30. The Respondent spoke to the client on 8 June 2016 and sent a further copy of the witness statement to her following their telephone conversation. The Respondent stated in a covering letter, which accompanied the statement:

> "Enclosed is a copy of your witness statement. You will be asked whether you have seen and read this and whether you signed it. I hope that you will say "Yes" to every question. If not, you will be on the back foot from the start, so it is vital to let the Court know that you have read and had amendments made throughout……
>
> ….. On the other hand, you will say that your vehicle was stationary and you were unseat-belted and you were looking for something in the car when the collision occurred..."

31. The Respondent sent Instructions to Counsel on 7 June 2016 and repeated in those instructions that the damage to the vehicle was £1,917.36. The Respondent also stated in the Instructions:

> "… No doubt, the Claimant will confirm that the damage to the passenger side rear corner was not accident-related."

32. The Respondent spoke with the client on 9 June 2016 and recorded in a file note:

> "Call from Client Driver to say the medical report still says she was wearing a seat belt. She was not. The damage to the passenger side rear was not accident-related. Client to tell Counsel before the hearing."

33. On 15 June 2016, Counsel telephoned the Respondent regarding the trial, which was listed for 16 June 2016. The Respondent recorded in a file note that Counsel was:

> "...Worried about conflicting evidence in paras 10 and 17..... In the med evidence the Dr is unsure about the mechanism of the incident. Where was she etc. This does not tally up with her witness evidence. AG said that she will say that the rear passenger damage was not accident-related."

34. This conversation with Counsel should have prompted the Respondent to confirm that the account of matters set out in the client's witness statement was an inaccurate reflection of the client's evidence. However, he did not do so and, although he sent further documents to Counsel, he did not take any further steps to draw the errors in the witness statement to the attention of either HF Solicitors or the Court.

35. The case was taken out of the Court list the day before the trial. The Respondent informed the principal solicitor at his firm in an email that he had spoken to Counsel who was "pessimistic about this claim". The Respondent also explained in his email to the principal solicitor:

> "Broadly speaking he [Counsel] does not feel there is enough evidential material to win this case. We do not have anything other than an Engineer's report to comment on the damage to the vehicle, no photos of the damage, no medical notes/records. We do have supportive med evidence and P35

> questions and we have a client who is hell-bent on proceeding to Trial. Whilst I accept the negatives of this case, the client is competent and should give credible evidence. Counsel thinks we may go down for the whole shooting match ie Lose, indemnity costs and Fundamental Dishonesty finding being upheld. Whilst we may not prove our case, I very much doubt that the client is fundamentally dishonest."

36. The principal solicitor queried whether the client would have to pay costs if there was a finding of fundamental dishonesty, as 'After the Event' insurance protection would not apply. In consequence, the Respondent sought advice from Counsel regarding whether an updated witness statement should be served.

37. On 15 June 2016, the Respondent sent a second witness statement to the client by post and by email. The Respondent explained in the letter accompanying the statement that the purpose of the second statement was to make it clear to the Trial Judge how and why she was injured and that it was crucial to point out what part of the car was damaged, and where repairs were carried out. The Respondent also explained in his email that Counsel believed the second statement was necessary, as the damage to the car could not be shown by photographs, nor was there contemporaneous evidence from her GP, or hospital to show that she was injured.

38. The client sent a photograph of the damage to her car to the Respondent by email on 15 June 2016. The Respondent sent a further email to the client on 22 June 2016 enquiring whether she had reviewed the statement and made any changes. The Respondent chased the client for her witness statement on 22 June 2016 and continued to chase her to return the statement between 20 July 2016 and 15 September 2016. In an email sent to the client at 17.19 on 15 September 2016, the Respondent stated:

> "I sent a new statement to you the other day and would be grateful for its return.
>
> Trial is looming fast and the statement was designed to fill the gaps in our evidence.
>
> If I do not serve it this week it will certainly not be allowed in and this may prove very difficult for you to win at trial."

39. The client replied to the Respondent's email at 18.02 the same day and stated:

> "I have personally sent back the witness statement and if it hasn't arrived tomorrow please let me know and I will write something and send it to you as, to be honest I'm not sure where some of the information on it was gathered from!? It states that me [sic] car had lots of scratches and marks, this was her car. Up to that point my car was clean, the crack (which she didn't do) was a "hit and run" whilst I was waiting for the car to be repaired."

40. The Respondent replied to the client's email at 18.04 and confirmed that he would "amend the bits you don't like". The client made a number of handwritten amendments to the second statement, which she also signed and dated the statement 1

September 2016. The client confirmed in this statement that her car was hit on the rear passenger side approximately one month later and that this caused the crack in the bumper. She also explained that she had informed her insurers that this damage was not caused by the defendant.

41. On 16 September 2016, the Respondent sent "an addendum witness statement" dated 1 September 2016 to HF Solicitors. That statement did not accurately reflect the amendments that the client had made, as whilst the client had deleted the reference to her noticing that the rear bumper had dropped by two centimetres, it was still included in the statement sent to HF Solicitors.

42. The Respondent sent an email to the client on 19 September 2016 in which he acknowledged receipt of the statement and he also attached a copy of the amended statement, which he had sent to the other side.

43. HF Solicitors called the Respondent querying why a second statement was being adduced and advising that a late application should be made to rely on that evidence. HF Solicitors also confirmed in an email on the same date that they were unable to consent to the inclusion of the witness statement at this stage, and that it should be considered by the trial judge, as it had been served 9 months late and without good reason.

44. The Respondent instructed a different barrister and sent an email to him on 23 September 2016 stating:

> "The case was originally due to be head [sic] at Edmonton CC but was pulled a day before trial as there were no DJs to hear it. The Counsel then did not like the case and asked me to firm up how the client claims she was injured and where the damage was to the car. Please can you have a look at this Application in its bare form and bulk it up if needs be. There really isn't much to say other than what's in."

45. That Counsel replied to the Respondent's email on 26 September 2016 stating:

> "I have taken a look at the statements and must say I find it surprising that the other side are objecting. I think your application notice hits the main points."

46. Counsel suggested adding a paragraph to the application notice, which the Respondent included. However, the Respondent failed to inform Counsel that the witness statements dated 10 January 2016 and 1 September 2016 did not include all of the amendments that the client had made and that this had been due to his error, not that of the client. The Respondent's instructions to Counsel instead gave the impression that there were evidential issues with the case, when those issues had been caused by his failure to amend the client's witness statements in accordance with her instructions, and his failure to address the inconsistencies in the medical and the engineer's reports.

47. The Respondent sent the statement to the Court on 26 September 2016 together with an Application Notice for the statement to be adduced in evidence at the Trial. The Respondent stated in the Application Notice:

> "Pursuant to CPR 32.5(3)(a) the Claimant seeks to rely upon her first statement dated 10 January 2016 together with the attached witness statement dated 1 September 2016. The Claimant seeks to amplify the content of her first statement. She seeks to explain better how and why she was injured and where the damage was to her vehicle. There is nothing within her statement that is new or that will put the Defendant at an evidential disadvantage."

48. On 6 October 2016, the Respondent sent instructions to Counsel to represent the client at the Trial. The Respondent also explained there was nothing new in the amended statement, other than it setting out how and why the client had been injured, and the area of damage to her vehicle. The Respondent further explained that there was very little evidential material to assist Counsel to prove the case, and that everything would depend upon the client's evidence under cross-examination. The Respondent did not inform Counsel that some of the material evidential issues had been caused by his failures.

49. The Respondent also sent an email to the client on 6 October 2016 in which he attached the witness statements. The Respondent stated in his email that the client would be:

> "….asked whether you agree the contents of the statement so if there is anything within, please speak to your Barrister about this as this is crucial to the success of your claim".

50. HF Solicitors sent a letter to the firm dated 11 October 2016 in which they stated that they had reviewed the client's updated witness statement and had made further investigations with her insurers. HF Solicitors explained that the client's insurers had advised them that she did not notify them of any subsequent incident and that she did not advise that any of the damage noted in the engineer's report (which she sought to rely upon for the purpose of the action) was caused in a subsequent incident, or not caused in the index incident. HF Solicitors invited the client to provide copies of the photographs that she took at the scene of the incident and to disclose details of the subsequent incident.

51. The Respondent sent an email to Counsel on the same date attaching a copy of the letter that he had received from HF Solicitors stating:

> "... I enclose a costs schedule from the Defs solicitor regarding the Application and a strange letter about the damage to the client's car that had been done prior to the index accident. I am not sure what relevance this is, as the Claimant clearly says in her first statement that the bump on the rear nearside is not causative of this incident.
>
> Presumably her big thing point [sic] is that this area of damage is considered within the med report as being accident-related."

52. The client spoke to the Respondent on 11 October 2016 regarding her witness statement and the damage to her car. The Respondent also sent an email to the client on 12 October 2016 and spoke to her again about agreeing quantum. The Respondent sent an email to HF Solicitors regarding quantum and proposed, on a without

prejudice basis, that repairs should be as pleaded, despite the client having made it clear, that not all of the damage claimed was caused by the defendant. HF Solicitors did not agree quantum, as causation was still in dispute.

53. The case was listed for trial on 14 October 2016 with the hearing of the application to adduce the amended statement in evidence, also being listed on the same date. Counsel explained at the trial that the purpose of the second witness statement was to amplify the client's account of the circumstances in which she was injured. The Deputy District Judge refused the application and made the following comments about the application to adduce the second statement:

> "Why was it not addressed as a result of the defence? Part of the problem with this - let us be clear - is I am a judge who is constantly unhappy because it is well over a year since I have seen one of these cases properly prepared. They are mostly prepared in a way which makes me ashamed of our profession. They are generally prepared by people who have never done anything to do with the law. You probably have to get four tiers up before you get to a solicitor. The stuff is generally drivel and the people who are in the witness box are constantly embarrassed by the paucity of the work that has been undertaken on their behalf...
>
> Unless it is done properly, unless there is a good reason, it is not coming in because the solicitors were forewarned of it. If they are negligent, they are negligent....
>
> ….If the solicitors have used people who do not know what they are doing or the supervisors are incompetent, then your client has a claim against them and you will have to advise her about that…."

54. When it was brought to the Deputy District Judge's attention that work on the matter was conducted by a "Grade A fee earner", the Deputy District Judge commented:

> "That is straight negligence, then. You are going to have to advise your client that they are negligent, potentially. I cannot believe it was done by a Grade A fee earner…..
> ……
> …. I had assumed, because I did not know it was a Grade A fee earner, that this was the usual debacle where it was someone who had heard of the law, never studied the law and, when we get four tiers up there was a solicitor supervising it. I had no idea that something like this was produced by a Grade A fee earner. I would never dare show my face again if this was the quality of work I produced. That is something else."

55. Whilst giving evidence, the client confirmed that she had not signed the second witness statement dated 1 September 2016, which the Court had refused to admit in evidence. The client also confirmed that her signature from the back page of a previous statement had been used on the second statement.

56. The client admitted during the trial that she did not write some of the paragraphs in the witness statement. She also admitted that she had misled the defendant, and the Court in her witness statement, which had said that the damage detailed in the engineer's report was caused by the accident, when this was not correct. The client further admitted that she had presented a claim which was not true, as all of the damage claimed was not due to defendant.

57. The Deputy District Judge adjourned the hearing so that Counsel could take instructions from the firm on how to proceed. The claim was then discontinued and the Court ordered the firm to pay the defendant's costs in the sum of £12,844.60 within 14 days. The Deputy District Judge stated that had the trial continued, it was inevitably the case that:

> "I would have had to make findings of fundamental dishonesty…….
>
> ..she has on what she says, a potential claim against those solicitors..."

58. The Respondent recorded in a file note dated 14 October 2016 that he had received a call from Counsel during the afternoon of the trial and that the application to adduce a late witness statement had failed due to it being made far too late. The file note also recorded that the client had been cross-examined for two hours or so, had given inconsistent evidence and had got so flustered that she started to blame the conduct of her solicitors for not amending the medical evidence and the witness statement in accordance with what she had written, after returning her signed and amended statement. It was further recorded that the Respondent had said that:

> "…from memory he had included all the amendments made by the client within her witness statement and he was not conducting the file when the medical evidence needed to be amended".

59. The Respondent asked Counsel to prepare a note of the trial after the hearing. Counsel stated in his note that he was concerned about the fact that a claim for £1,917.36 had been made in respect of the replacement of the claimant's bumper but before any repairs relating to the accident in question had been organised, the claimant's car had been struck in a separate incident. Counsel also stated in his note that:

- He had indicated to his instructing solicitor (the Respondent) that it was likely the defendant would contest responsibility for the cost of the repairs to the bumper;
- He had expressed misgivings about the discrepancy between the account of the accident found in the report of the medical expert whereby he said that the claimant had been strapped in as a rear seat passenger; and
- His instructing solicitor had indicated that previous counsel, who had been instructed to attend a previous adjourned listing of the trial, had also expressed misgivings about the strength of the case.

60. In her witness statement dated 6 December 2016 prepared for HF Solicitors after the trial, the client confirmed that:

- On several occasions she had advised the Respondent that there were mistakes in the statement;
- The damage to the vehicle was incorrect and the medical report was also incorrect;
- She believed the firm had copied her signature from her draft statement dated 10 January 2016;
- She had received a copy of the final draft statement on 8 June 2016 and the original draft statement was included however, the statement did not have any photographs attached to it, nor did it include the engineer's report, whilst the final statement presented to the Court included the engineer's report and photographs;
- The photographs included damage to the nearside rear crack to the bumper, which was not related to the incident;
- She would never have agreed or signed the statement;
- She could not recall whether or not she had seen the final draft statement as: "there have been so many that have been sent over, all of which are dated the 15" January 2016 and all of which have mistakes in them";
- There were several amendments and clauses added to the final draft which she did not see before the trial date; and
- The signature used in the final draft statement had been copied over onto each page and that she had never signed a final draft statement or seen the statement used at trial.

61. The firm accepted in its letter of 20 January 2017 that there was "a shortcoming as to file handling". The firm also stated:

> "...We accept that when finalising the first witness statement Mr Gilfillan failed to notice that an amendment was highlighted by [the client] to paragraph 17 and that this amendment was not taken in....
>
> [The client] provided a handwritten amendment to the statement so that the words "crack to the rear bumper" would be replaced by the words "dropped bumper". All other requested amendments were made to the statement but this amendment was not made. This was not so as to mislead you or the Court but was a genuine mistake...
>
> ...Amendments were made to paragraph 10 but the further amendment was not. The evidence was therefore inconsistent, there is clear tension between paragraphs 10 and 17. That is not because Mr Gilfillan was seeking to

> mislead or put forward a case that was inconsistent with our client's evidence but because of a genuine mistake by Mr Gilfillan...."

62. HF Solicitors were not satisfied with the firm's response and considered that the firm had failed to deal with the majority of questions it had asked relating to:

- The Particulars of Claim, which included a claim for repairs which the claimant said were not all caused in the accident;
- The List of Documents which included an engineer's report and repair estimate; and
- Witness statements which included repair charges not caused in the incident.

63. HF Solicitors also explained that the firm had failed to address the issue of the "apparent discrepancy between the signature on the claimant's list of documents and the signature displayed on other documents signed by the claimant" and had failed to provide an explanation "for the gap between your client's statements and the signature page".

64. The firm sent a letter to HF Solicitors dated 28 April 2017 in which it explained that it considered it had provided an explanation for how the mistakes had occurred and there had been no attempt to mislead. The firm also stated that it no longer employed the Respondent.

65. In his letter dated 5 July 2017 to HF Solicitors, the Respondent explained that:

- His recollection of the case was one in which he had made professional mistakes regarding the collation and presentation of evidence but neither he or the client had tried to mislead the defendant, her insurers, her solicitors or the Court;
- The mistakes in the presentation of the evidence were his alone and could not be attributed to the client;
- He had mistakenly included the insurer's outlay within the Particulars of Claim and had not amended the schedule of loss;
- The confusion surrounding the case was caused by the insurers and/or their agents repairing all of the damage to the rear of the car, and then claiming for the cost of repairing all the damage to the rear of the car, when the claim should have been limited to the damage to the rear passenger side only;
- The client had corrected the Particulars of Claim and he should have picked this up but had failed to do so. Whilst the wording of the Particulars of Claim was correct, the causative sum claimed was incorrect;
- He had never got to grips with the facts and the causative damage of the case and his view was wrong throughout;

- Whilst the client had amended the Particulars of Claim, the Respondent had never given a moment's thought to having to revert to the engineer with a view to amend the causative damage figure to the vehicle; and

- There was no intention to mislead the Court and he should have spotted the error but failed to do so.

66. In relation to the witness statements, the Respondent stated:

- He would have made amendments to the statement and rather than send the amended witness statement back to the claimant for her to sign and post back, he would have used the original signed Statement of Truth after making the amendments, and placed this on the amended typed up statement;

- The client had taken a long time to return documents sent to her, so he had decided it would be better to amend the statement on the basis of her few alterations, rather than post material backwards and forwards;

- He forgot to complete the final amendments about the damage caused in the petrol station, which meant that an incorrect statement was served and relied upon;

- He was first alerted to issues regarding where the damage had occurred at the first hearing. He had reviewed the amendments and it was perfectly apparent that he had made a huge error in submitting a statement that had not been properly amended. He had prepared a supplementary statement immediately and sent this to the client who then took several weeks to sign and approve it. There was no material difference between the statement signed on 1 September 2016 and the final version;

- He was the cause of the evidential confusion that was heard under cross-examination and he was to blame for the mistake within the claimant's evidence; and

- At the relevant time he had had some health issues and had been advised by his doctor to have 3 months off work. However, he had returned to work after a week as there was no-one at the firm to handle the huge amount of litigation in the department and he was swamped with work.

67. In his response to the SRA's letter dated 25 April 2018, the Respondent confirmed the following:

- The client had signed the first draft statement on 10 January 2016 after making amendments and created the amended typed statement, which was type-signed on 15 January 2016;

- He had prepared a "fair copy"" of the statement, which was not written precisely word for word and the amended evidence was incorporated, but he had not explained properly and crucially in line with the claimant's instructions at paragraph 16, the damage caused by the incident and what damage was not caused

by the collision. This was his fault and he may have been interrupted whilst amending the fair copy;

- He must have sent this statement to the claimant, as she type-signed the statement and sent it to him giving the impression that this was a document that could be relied upon and served upon the defendant's solicitor;

- Overall, he was responsible for not explaining the precise areas of damage within the statement properly and what was caused by the collision; and

- He was negligent in the preparation of documents. However, throughout his time at the firm, he was under immense pressure with litigation and had very little assistance available to him.

Allegation 1.3

68. The client had confirmed that she did not sign the witness statement dated 1 September 2016, which was used at the trial. She stated that the signature used in the final draft statement had been copied over onto each page from another document. The client also confirmed that she did not see a final draft statement and had never seen the statement presented at the trial.

69. The Respondent sent the second statement to the Court on 26 September 2016 together with an Application Notice for the statement to be adduced in evidence at the trial. The Respondent explained that, whilst the client was seeking to rely upon her first statement, she was also seeking to amplify the content of that first statement. However, both statements were in fact incorrect.

70. Counsel made an application to file the statement dated 1 September 2016 out of time at the start of the trial on 14 October 2016. Counsel explained that the purpose of the second witness statement was to amplify the client's account of the circumstances in which she was injured. The Deputy District Judge refused the application. The client then attempted to correct some of the errors whilst giving evidence. However, because of the inconsistencies in the statement and the client's admissions during the trial, the claim was discontinued. The Court also ordered the firm to pay the defendant's costs of £12,844.60 within 14 days. Had the trial continued, there was a risk that the Deputy District Judge may have made findings of fundamental dishonesty against the client.

71. The Respondent stated in his response to the SRA that it was clear that the client had seen the final version of her amended statement dated 1 September 2016, as she amended it and signed it on the basis that he would prepare a fair copy, this having been altered in line with her instructions. However, the Respondent did not alter the statement in line with the client's instructions and the statement, which was presented to the Court and the defendant, was therefore not in accordance with the client's instructions. The Respondent also stated that, as the client went abroad without letting him know how to conduct the case in her absence, he was largely without instructions for a considerable period of time, at a crucial period immediately prior to the case being re-listed and when a vital application needed to be made.

72. The Respondent had confirmed that he had decided to make the amendments and had used the earlier form of authority that the client had signed. The Respondent denied that he attached a statement of truth signed by the claimant onto a statement that she had not seen, as he had used the statement of truth on the basis that the claimant had read through and approved that statement.

Witnesses

73. No witnesses gave evidence.

Findings of Fact and Law

74. The Tribunal had carefully considered all the documents provided, and the submissions of both parties. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondent's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

75. **Allegation 1.1: The Respondent sent a "List of documents" for standard disclosure dated 4 December 2015 to the Court and HF Solicitors which purportedly bore his client's signature, but which had in fact been signed by the Respondent without his client's knowledge or consent. In doing so he breached any or all of Principles 1, 2, 4 and 6 of the SRA Principles 2011 and failed to achieve Outcomes O(5.1) and O(5.6) of the SRA Code of Conduct 2011. It was alleged the Respondent had acted dishonestly.**

75.1 Ms Bruce, on behalf of the Applicant, submitted that the signature at the end of the List of Documents was misleading because anyone reading that document would expect that the client had signed the document, when she had not. She submitted the declaration at the end of the document was significant as it certified the client understood her duty of disclosure and the need for her to comply with it. Ms Bruce submitted that no caveat had been given with the signature on the document and that the Respondent had acted dishonestly by signing it with the client's name and not making it clear that the client had not signed it herself.

75.2 Ms Bruce also referred the Tribunal to a letter from the Respondent to HF Solicitors dated 3 December 2015 which had attached the List of Documents stating: "…we enclose a duly signed copy of the Claimant's Disclosure List…" Ms Bruce submitted this implied that the List of Documents had been properly, correctly and formally signed by the client. She submitted this had been a dishonest representation by the Respondent, as the client had confirmed in a later witness statement given to HF Solicitors dated 6 December 2016 that she not signed that document

75.3 Ms Bruce further submitted that the Respondent's explanations about what had happened had changed over time and were therefore not credible. In his initial response to HF Solicitors dated 5 July 2017, the Respondent had stated:

> "….bits of documents can and do regularly detach from the original document as they may only be held together by a pin/clip/staple or nothing at all……I can only provide an educated guess, but if the documents did detach or had become lost or unrecognisable as a result of scanning, an attempt could have been made to copy or replace the original signed document in its place by one of the staff…… I was not the author of this signature and I am willing if necessary to provide a handwriting exhibit for testing if requested to do so."

75.4 Ms Bruce submitted that when the Respondent had written to the SRA on 25 April 2018 some months later, his explanation had changed, as he had then stated:

> "From memory, I think that I would have asked her whether I could sign the List bearing in mind the imminent/past date of the Court's directions. I may then have signed this in a 'stick and ball' fashion ie so as not to give the impression that it was her signature….. I find it implausible that I would simply have signed the List without her authority."

75.5 Ms Bruce submitted that the Respondent was the file handler and knew that no other fee earner had been involved. She submitted that in the Respondent's Answer dated 17 November 2019, his explanation had changed again as he had stated:

> "In conclusion, the Respondent accepts that he inappropriately signed the Claimant's Disclosure List but he will say that to explain this and to give an account of what probably happened (but this cannot be proved with the disclosure given but when looking at his efforts generallybto [sic] keeps the client involved by phone call, e-mail and letters) the best possible explanation is that he did everything that he would have done on any other case namely, he sent the client an email with the draft List on 3 December 2015, he then contacted her by telephone to let her know what was in the List and why; he confirmed that these documents had already been disclosed to the other side with her permission. The Respondent would most likely have asked whether there were any other documents to include."

75.6 Ms Bruce referred the Tribunal to the test of dishonesty set out in the case of Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67. Firstly the Tribunal was required to ascertain the actual state of the Respondent's knowledge or belief as to the facts. Having done so, the Tribunal had to consider whether the Respondent's conduct was dishonest by the standards of ordinary decent people. Lord Hughes had set out the test to be applied when considering the issue of dishonesty as follows:

> "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."

75.7 Ms Bruce submitted that signing the declaration on a List of Documents with a client's signature, and not making clear that the client had not signed that document, was not a technical error. She submitted this had been a document in support of a claim for money, which had not been signed by the client but by the Respondent. In failing to make this clear to HF Solicitors and to the court, Ms Bruce submitted the Respondent had acted dishonestly.

75.8 The Tribunal then heard from the Respondent. He reminded the Tribunal that all of his responses had been provided from memory only, as he stated the SRA had refused to allow him access to documents until after the disciplinary proceedings were issued. As the Respondent did not work at the firm any longer, and had no documents to refer back to, he had responded to the matters raised with him "off the top of my head". The Respondent stated that he had always tried to cooperate as best he could.

75.9 The Respondent stated that he had given a great deal of thought to this matter. He believed that his first explanation was the most accurate due to its contemporaneous nature and because he had had control of the file at that time. The Respondent stated that was the best explanation he could give. He stated that the List of Documents contained documents that had already been sent to the defendant and submission of the formal List of Documents was simply an attempt to try and keep the case on track in accordance with the Court's directions. The Respondent stated that he believed the content of the List of Documents was accurate and stated that at no time did he believe he had acted dishonestly or that his actions would lead to him being struck off the Roll.

75.10 The Respondent submitted that, whilst many people would think that the test of dishonesty set out in the case of Ivey v Genting Casinos (UK) Ltd t/a Crockfords was a strict liability test, in his submission a significant number of people would try to understand what had happened and take a different view. He urged the Tribunal to consider the position he had been placed in and submitted that many litigation solicitors found themselves in similar situations. He accepted that he had not dealt with the List of Documents properly but submitted he had not been dishonest.

75.11 The Tribunal noted that the Respondent had admitted the facts in his Answer dated 17 November 2019. He denied, however, that he had acted dishonestly. The Respondent had admitted he had sent a List of Documents purportedly bearing his client's signature, in circumstances when he should not have done so. The key issue was that document had been signed with the client's name but without the client's knowledge or consent. This may well have been with an intention to meet a Court deadline but nevertheless, the Respondent had not made it clear to either the Court or the defendant that the document had not been signed by the client.

75.12 In his Answer, the Respondent had stated:

> "On the basis that the Respondent did not intend to try and forge her signature and it was signed in a very basic format to show that she had approved the List but this was not meant to be her signature, just confirmation that the

documents so far disclosed, had been approved by her. It was then hoped that she would sign the list and send it back, which she never did."

75.13 Given that the Respondent was the only fee earner dealing with the file, the Tribunal concluded that only he could have signed that List of Documents with the client's name. Indeed, the Respondent had admitted he probably did do so in his letter to the SRA dated 25 April 2018. Furthermore, the client herself had confirmed categorically that the signature on the List of Documents was not hers. This was also apparent from the documents which did contain the client's actual signature which was different from the signature on the List of Documents.

75.14 The Tribunal was satisfied that, by sending a List of Documents to the Court as part of a trial bundle, and to the defendant's solicitors, which had been signed by the Respondent and not the client, but failing to make this clear when the document was submitted, the Respondent had failed to uphold the rule of law and the proper administration of justice. As an experienced litigation solicitor, the Respondent would have been aware of the Civil Procedure Rules which made it clear that any party disclosing documents in a List of Documents was required to certify to the Court that that party understood the duty to disclose documents and had complied with it. As the Respondent had signed the List of Documents himself, he could not have been sure that the client agreed with the content of that list or that she had properly searched to locate any other relevant documents, as she was required to do under the rules. The Tribunal was satisfied the Respondent had breached Principle 1 of the SRA Principles 2011 ("the Principles"). He had also breached Outcome O (5.6) of the SRA Outcomes 2011 ("the Outcomes") as he had failed to comply with his duties to the court.

75.15 The Tribunal was satisfied that the Respondent had acted with a lack of integrity and had breached Principle 2 of the Principles. Sending a List of Documents to the Court and to the defendant's solicitors which gave the impression that it had been signed by the client when it had not, was conduct which lacked moral soundness, rectitude and was not a steady adherence to an ethical code. The Respondent had also breached Outcome O (5.1) as he had attempted, either knowingly or recklessly, to mislead the Court.

75.16 Whilst the Respondent may have believed he was acting in the best interests of his client in meeting a Court deadline to submit a document, it was not in the client's best interests to send a document in litigation to the Court and the defendant's solicitors which had not been agreed by the client. The inaccuracies in the List of Documents were not corrected and it was not in the client's best interests to submit it in that form. The Tribunal was satisfied that the Respondent had breached Principle 4 of the Principles.

75.17 The Tribunal was also satisfied that the Respondent's conduct had not maintained the trust that the public placed in him and in the provision of legal services. Members of the public would not expect solicitors to sign documents on a client's behalf without that client's knowledge and consent, and then subsequently send that document to the Court and the other party in litigation. The Tribunal was satisfied that the Respondent had breached Principle 6 of the Principles.

75.18 The Tribunal then considered the allegation of dishonesty. The Tribunal first considered the actual state of the Respondent's knowledge. Although the Respondent may have believed that the content of the List of Documents was accurate, he had not really addressed the fact that the signature was not that of the client, and that he had signed the document instead. As an experienced litigation solicitor, the Respondent knew that the List of Documents was a formal document indeed, it was being filed pursuant to a direction of the Court and was part of the Trial bundle. Whilst the Tribunal understood that the Respondent's motivation was to file the document on time, the Tribunal was also satisfied that he knew his client had not signed that document.

75.19 The Respondent had stated in his Answer that the List of Documents was signed in a very basic format to show the client had approved the List but it was not meant to be her signature. He had stated:

> "It was then hoped that she would sign the list and send it back which she never did."

This confirmed that the Respondent knew the client had not signed the document.

75.20 The Tribunal was satisfied that a member of the public would be shocked to learn that a solicitor had signed a document in a client's name without that client's knowledge or permission. The Tribunal concluded that the Respondent had acted dishonestly by the standards of ordinary decent people.

75.21 The Tribunal found Allegation 1.1 proved, including the allegation of dishonesty.

76. **Allegation 1.2: From at least 8 January 2016 to 14 October 2016, the Respondent knew, or ought to have known, that his client had no properly arguable basis for recovering the damages being claimed in a personal injury claim but took no, alternatively no adequate steps to limit his client's claim to a sum that was properly recoverable. In so doing, he breached any or all of Principles 1, 2, 4, 5 and 6 of the SRA Principles 2011 and failed to achieve Outcomes O (5.1) and O (5.6) of the SRA Code of Conduct 2011.**

76.1 In relation to Allegation 1.2, Ms Bruce submitted that the Respondent was an experienced solicitor who had been informed several times that a witness statement he had prepared on behalf of the client contained errors. Indeed, the client had returned the draft witness statement having made a number of alterations and amendments on it but none of those were incorporated. Ms Bruce submitted that the Respondent failed to make the alterations and amendments which should have been made and as a result, the amount claimed for repairs of £1,917.36 was never changed even though it included an amount which related to damage to the client's vehicle as a result of an unrelated incident.

76.2 Ms Bruce submitted that the Respondent had been given many opportunities to correct the witness statement but failed to do so. He had sent Instructions to Counsel which included a claim for repairs of £1,917.36, yet at the same time he had informed Counsel that the damage to part of the client's vehicle was due to another accident. Ms Bruce submitted that the Respondent had spoken to Counsel on the telephone on

15 June 2016 when there was a discussion about "conflicting evidence in paras 10 and 17" of the client's witness statement and a discussion about the discrepancy in the damage to the vehicle. Shortly after this, on the same day, the Respondent had sent an email to the principal solicitor at the firm about the matter. That Principal had sent an email response to the Respondent stating:

> "If there is a finding of fundamental dishonesty the client will have to pay not us?? ATE protection will not bite as she has been dishonest."

Ms Bruce submitted this was an important point in the case when the Respondent should have thought long and hard about the claim that he was pursuing.

76.3 The Tribunal then heard from the Respondent. He stated that he had been perplexed as to why this allegation had formed part of the Applicant's case against him. He submitted that the claim for the cost of repairs had exposed the client's poor behaviour and he submitted it was the client who had been dishonest. He submitted the client had sought to deflect blame from herself, by stating the Respondent was pursuing a claim for damages that had not been incurred in the accident that he was dealing with.

76.4 The Respondent stated that the client had been involved in a second accident, after the accident he had been dealing with. He stated that the client had been given three opportunities to report the new damage - to her insurers, to the engineer and to her solicitor - but she had failed to do so. The Respondent stated that some eleven months later the client had raised this issue with him, which was somewhat surprising as she had been very attentive to detail in relation to the medical evidence. The Respondent's view was that the client had not mentioned the damage from the second accident because she had got the repairs done for free without losing her 'no claims bonus'. He stated that it was only after the client was informed that there was a dispute about the accident being of low velocity and an issue about her honesty, that she brought up the second accident. The Respondent stated the client had approved the Claim Form and had signed the statement of truth.

76.5 The Respondent accepted that, after the client had reported the second accident to him on 8 January 2016, he was on notice that all the damage claimed in the repair invoice had not been incurred in the first accident. He accepted that he should have recorded a reduced claim and had overlooked this. However, the Respondent stated that he had received no documents from the insurers to confirm the amount of the reduced claim. He stated that, after this point he had lost focus on this particular issue and found himself constantly chasing the client for instructions, whilst under work pressure from a heavy caseload.

76.6 The Tribunal noted that the Respondent had accepted the facts and indeed, admitted that from 8 January 2016, he was aware that not all of the cost of repairs claimed had been due to damage caused in the accident that he was dealing with. At that point, it should have been in the forefront of his mind to ensure the damages claimed were all properly attributable to the defendant's conduct.

76.7 The Tribunal also noted that, as well as the client informing the Respondent of the position on 8 January 2016, he had had a subsequent telephone conversation with Counsel on 15 June 2016 when the discrepancy in the evidence had been raised with him. He had assured Counsel that the client would confirm the rear passenger damage was not related to the accident so it was clearly in his mind. Counsel had mentioned the possibility of the Court finding it was a "fundamental dishonesty claim" and the Respondent had subsequently raised this issue of possible dishonesty in an email that same day to the principal solicitor at his firm. In that email the Respondent had stated:

> "Counsel thinks we may go down for the whole shooting match ie Lose, indemnity costs and Fundamental Dishonesty finding being upheld".

76.8 The Tribunal concluded that the Respondent could not have had a clearer indication that this case needed very careful attention. It was in his mind that the issue of dishonesty was hanging over the case and yet he took no steps to ensure that the damages being claimed were properly arguable and properly recoverable, despite having numerous opportunities to do so. Whilst the Respondent may have been under pressure at work, this was not an excuse to fail to give proper scrutiny to cases he was dealing with.

76.9 The Tribunal was therefore satisfied that the Respondent had breached Principle 1 of the Principles as he had failed to uphold the rule of law and the proper administration of justice by allowing a claim to proceed with no proper arguable basis. He had also breached Principles 4 and 5 of the Principles as he had not acted in the client's best interests or provided a proper standard of service to the client in failing to conduct her case with competence, skill and diligence. Indeed, it was clear from the transcript of the Court hearing provided that the Deputy District Judge had been extremely critical of the quality of the work that had led up to the case being presented at the trial.

76.10 The Tribunal was also satisfied that the Respondent had breached Principle 2 of the Principles and had acted with a lack of integrity. Allowing a claim to continue to be pursued when it had no properly arguable basis was a failure to act with a steady adherence to an ethical code. By failing to present accurate information to the Court, the Respondent had not complied with his duties to the Court and he had knowingly or recklessly misled the court. The Respondent had thereby breached Outcomes O (5.1) and O (5.6).

76.11 The Tribunal was also satisfied the Respondent had breached Principle 6 of the Principles as he had failed to maintain the trust the public had placed in him and in the provision of legal services. Members of the public expected solicitors to only pursue properly quantifiable and recoverable claims and failing to do so did not maintain that trust.

76.12 The Tribunal found Allegation 1.2 proved.

77. **Allegation 1.3: The Respondent sent a witness statement dated 1 September 2016 to the Court and the defendant containing a "statement of truth" bearing his client's signature, which gave the misleading impression that his client had seen and approved the statement, when she had not done so. In doing so, he breached**

any or all of Principles 1, 2, 4 and 6 of the SRA Principles 2011 and he failed to achieve Outcomes O(5.1) and O(5.6). It was alleged the Respondent had acted dishonestly.

77.1 Ms Bruce submitted that the client's signature was quite distinctive. She submitted that the client had amended the draft witness statement on 1 September 2016 and had signed that statement. She submitted that that signature had been inserted into a second witness statement without her knowledge. Ms Bruce submitted that a signature was a sacred thing especially when it was used with a statement of truth. She submitted that any solicitor, under any circumstances, could not use a client's signature by cutting and pasting it from one document into another. Ms Bruce submitted such an action could never be justified. Furthermore, Ms Bruce submitted that there had been a number of differences between the client's first amended witness statement and the client's second witness statement as it had not included a number of the amendments and additions that had been made by the client.

77.2 Ms Bruce accepted that the Respondent had been required to chase the client for this statement but she submitted that it had not reflected what the client had told him. Furthermore, when on 15 September 2016, the client did reply by email to the Respondent's various communications chasing her response, she had stated in her e-mail:

> "I have personally sent back the witness statement and if it hasn't arrived tomorrow please let me know and I will write something and send it to you as, to be honest I'm not sure where some of the information on it was gathered from?!"

Ms Bruce submitted that this had been a clear red flag to the Respondent to find out what was going on and check the matter carefully. She submitted the Respondent should not have cut and pasted the client's signature and used it on a witness statement which was subsequently sent to the Court, without the client's permission.

77.3 Whilst Ms Bruce accepted the Respondent's position that the client had seen and signed a version of the statement, it was also correct that the client had amended that version and her amendments had not been incorporated in the final version. Ms Bruce submitted that the Respondent had acted dishonestly as he knew that the witness statement was likely to stand as his client's evidence at the trial, and he also knew that the client had not seen or approved the statement which was sent to the Court and to the defendant's solicitors containing her signature.

77.4 The Tribunal then heard from the Respondent. He stated that, although the client said she had not seen the final version of her witness statement before trial, she had been sent a copy of this on 6 May 2016. The Respondent submitted that, if the statement had not been accurate, then it was the client's duty to do something about it. He reminded the Tribunal that the trial was in October 2016 and there had therefore been plenty of time for the witness statement to be properly finalised. The Respondent stated that the sole purpose of the amended statement had been to deal with the mechanism of injury and the non-accident related damage to the client's vehicle. He had not intended to regurgitate all of the client's previous statements, and in fact, the final statement had only contained one error which related to the damage to the

bumper of the client's vehicle, which the Respondent accepted he should have removed. He stated that it may have been the case that, whilst he was amending the client's statement he had been interrupted, and then when he returned to amending the statement, he thought he had removed this reference and had amended the statement properly.

77.5 The Respondent stated that the client had failed to engage with him for three months at a very critical time prior to trial. He stated that he had attempted to contact the client "200-300 times" and urged her to return the statement. Despite chasing her, he was still waiting for a reply on 15 September 2016 when the first trial was taken out of the list. The Respondent stated that he tried and tried to obtain instructions from the client but she was "hell bent on doing things her own way".

77.6 The Respondent stated that the defendant's solicitors refused permission to allow the statements to be adduced late and he was therefore forced to make an application to the Court. The Respondent stated he had been placed in an invidious position and, having believed he had made the requisite amendments, he thought the quickest way to drive the case forward would be to use the client's signature from an earlier statement of truth she had signed. The Respondent stated that he would have asked the client if he could use her previous signature and he believed she would have agreed, but he had no evidence of this.

77.7 The Respondent stated that he had made an application to the Court to admit the client's witness statement late in order to give her the best chance at trial. The Respondent stated that dishonesty had never entered his mind and it was simply a case of time running out.

77.8 The Respondent stated that, immediately before the trial, the client's barrister would have taken her through all the evidence, including her two witness statements, line by line. The Respondent referred the Tribunal to the note from the barrister about what had happened at the trial. In this note the barrister had set out what the client had said to him about various aspects of the case and that she had only corrected one sentence in her second witness statement. The Respondent stated that he wondered if the client had not read the statements properly before the trial, and then during the course of the trial when issues became apparent, she saw an opportunity to turn 'volte face' and place all the blame on her solicitor, in order to blur the vision of the trial judge and avoid continuing with cross-examination. The Respondent stated that if the client had engaged with him when she had initially been asked to do so, this could all have been avoided. He submitted that the client was not the one at risk of being struck off even though she was at fault too.

77.9 The Respondent referred again to the test of dishonesty set out in the case of Ivey v Genting Casinos (UK) Ltd t/a Crockfords. He submitted that he had been trying to help the client and with hindsight realised he should have given up on her. He stated that it was clear from the full facts that the client had "strung him up" and many other litigators would be unhappy at the outcome of these disciplinary proceedings. He stated that he was not, and never had been, dishonest.

77.10 It was clear from the Respondent's submissions, and indeed from his Answer, that he had admitted the facts of Allegation 1.3. This allegation was based on the client's signature being used on a second witness statement dated 1 September 2016 which she had not approved. The allegation was not based on the actual content of the statement.

77.11 Whilst the Tribunal had some sympathy for the Respondent dealing with a client who may been difficult to contact and was not responding to correspondence, this did not mean that he could use the client's earlier signature on the second witness statement, which he had been waiting for her to sign and return. The correct way to proceed would have been either to try even harder to contact the client, or alternatively to have come off the record as acting for her. In any event it should have been made clear to the Court and the defendant's solicitors that the client had not actually signed or approved that statement.

77.12 Although the Respondent had said he believed he had asked the client if he could use her earlier signature and statement of truth on the second witness statement, and he believed she had agreed to this, he had also accepted that he had no evidence to confirm this. The Tribunal would have expected some evidence to have been obtained to ensure the Respondent could confirm the instructions he had been given. It was regrettable that this had not been done.

77.13 The Tribunal was satisfied that the Respondent had breached Principle 1 of the Principles. By sending a witness statement dated 1 September 2016 to the Court containing a statement of truth bearing his client's signature when she had not signed that document, the Respondent had given the misleading impression that his client had seen and approved that statement. In doing so, he had failed to uphold the rule of law and the proper administration of justice. The Court and the defendant's solicitors would have expected that a signed statement of truth would have been signed by the person whose signature was given, and that person had approved that document. The Respondent had thereby failed to comply with his duties to the Court and had knowingly or recklessly misled the Court. He had therefore breached Outcomes O (5.1) and O (5.6) of the Outcomes.

77.14 The Respondent had also breached Principle 2 of the Principles as he had failed to act with integrity. Copying a client's signature from one document and using it on another document without the client's permission or knowledge did not show a steady adherence to an ethical code or acting with moral soundness.

77.15 The Respondent had failed to act in the best interests of his client and had thereby breached Principle 4 of the Principles. The statement dated 1 September 2016 had not been signed by the client but, in addition, it had still contained inaccuracies that the client had earlier amended, which were material to the case and had led to the Court and the defendant doubting the voracity of the claimant's claim. This had ultimately led to the claim being withdrawn. It had not therefore been in the client's best interests to allow a statement she had not signed to be submitted in litigation.

77.16 The Respondent had also breached Principle 6 of the Principles as he had failed to maintain the trust the public had placed in him and in the provision of legal services. Members of the public did not expect solicitors to submit statements in court

proceedings which bore the client's signature but had not been signed by the client. Nor did members of the public expect solicitors to give a misleading impression that a statement had been signed by a client when it had not.

77.17 The Tribunal then considered the issue of dishonesty. Although the Respondent had not believed he had acted dishonestly, he accepted that he knew the client had not signed the witness statement dated 1 September 2016 and he knew that her signature from an earlier document had been used on that second witness statement. In doing so he had given the misleading impression that the client had signed the witness statement dated 1 September 2016.

77.18 The Tribunal accepted the Respondent had been trying to move the case forward under the pressure of a rapidly approaching trial, but the manner in which he had dealt with this had not been transparent. He knew that that statement could be used as the client's evidence in chief during the trial, and as an experienced litigation solicitor, he must have known the importance and significance of a statement of truth on that document. The Tribunal was satisfied that members of the public would not expect a solicitor to put a client's signature on a document without that client's knowledge and then allow that statement to be submitted to the Court. The Tribunal was satisfied that by the standards of ordinary decent people, the Respondent's conduct would be regarded as dishonest.

77.19 The Tribunal found Allegation 1.3 proved including the allegation of dishonesty.

Previous Disciplinary Matters

78. None.

Mitigation

79. The Respondent stated that the collateral damage from these proceedings had been colossal. He stated that this client had turned against him to get herself out of a difficult position and had left him facing the loss of his career. He believed the client had been less than honest and had tried to portray herself as a paragon of virtue and perfection, pointing the finger at her solicitors as an easy way out.

80. The Respondent accepted that he had acted improperly but submitted he had been trying to progress the claim as best he could. He stated that he had lost his job, his profession and explained the catastrophic impact this had had on his personal life. He stated that all he had left to hold onto was a semblance of self- respect and a ray of hope that he could find his way through this whole affair and make some sense of it.

81. The Respondent stated this had been another disastrous day for him. This had been a horrible time in his life and all he now wanted to do was to try and hold onto his self-esteem as he left the profession. He wished to bow out with his head held high.

Sanction

82. The Tribunal had considered carefully the Respondent's submissions. The Tribunal referred to its Guidance Note on Sanctions when considering sanction. The Tribunal also considered the aggravating and mitigating factors in this case.

83. The Tribunal firstly considered the Respondent's culpability. The motivation for the Respondent's conduct was to try and meet Court deadlines and progress the client's case. He had had no personal motivation or gain from his conduct but had made very grave errors of judgement simply in an attempt to keep the case moving in accordance with the Court timetable. The Tribunal accepted the Respondent's assertions that he had never intended to act dishonestly or even thought about dishonesty, indeed this was borne out by the fact that he had not gained anything personally from his conduct.

84. The Respondent did have direct control over his conduct. He was an experienced solicitor and the only fee earner dealing with this file. The Tribunal concluded that his culpability was high.

85. The Tribunal then considered the harm caused by the Respondent's conduct. Some harm had been caused to the client who had amended documents and pointed out mistakes on numerous occasions which had not been corrected. She had been cross-examined in court at length over these errors and her case was eventually withdrawn. The Tribunal took into account that there had been some issues raised by the defendant's solicitors around the nature and impact of the accident, as well as about the client's credibility, so it was not known whether her claim would have ultimately failed in any event.

86. Harm had also been caused to the reputation of the profession as solicitors were expected to file accurate documents which had been properly signed or approved by their client. The Deputy District Judge had been scathing about the Respondent's conduct of this case during the trial. It was clear that the Respondent had foreseen potential issues with this case as he had sent an email to a partner at his firm to highlight them and had referred to "fundamental dishonesty" in that email. The extent of harm caused by his conduct could have been reasonably foreseen. The Tribunal concluded that the level of harm caused was moderate.

87. The Tribunal then considered the aggravating factors in this case and identified those as follows:

- The Respondent had acted dishonestly on two occasions when he had inserted the client's signature on documents during the course of litigation when he should not have done.

- His conduct had been deliberate and repeated. He was aware that there was an issue around the client's honesty after his conversation with Counsel and should have been even more alert to the need for accuracy.

- The conduct had continued over a number of months as the matter was not rectified quickly. The List of Documents had been sent to the defendant's solicitors on 3 December 2015 and the Respondent had been notified that the

claim for repairs was incorrect on 8 January 2016. However, he had not amended this then or before the trial took place in October 2016 allowing that incorrect document to be submitted to Court.

- The Respondent ought reasonably to have known that his conduct was in material breach of his obligations to protect the public and the reputation of the legal profession.

88. The Tribunal then considered the mitigating factors and identified those as follows:

- This had been a single episode involving one file in an otherwise long unblemished career of some 23 years.

- The Respondent had cooperated with both his regulator and these proceedings.

- He had accepted the facts of the case and had shown some insight into what had happened, accepting that he should not have acted as he had.

- The Respondent had made early and open admissions on all matters save the issue of dishonesty.

89. The Tribunal then considered each of the sanctions in turn. As the Respondent had been found to have acted dishonestly on two occasions, the Tribunal concluded that to make no Order, or to order a Reprimand, a Fine or a Restriction Order would not be sufficient to mark the seriousness of the conduct in this case. The Respondent's culpability had been high and it was difficult to formulate conditions that could address dishonest conduct.

90. The Respondent, albeit without any intention to act dishonestly, had allowed two documents, which purported to contain the client's signature and approval when they had not been signed or approved by her, to be sent to the Court and the defendant in litigation. In his submissions, the Respondent had focused on criticising the client and appeared not to fully appreciate his own responsibilities as a solicitor to ensure the case was presented properly. It may well have been the case that this was a difficult client but nevertheless, that did not detract from the Respondent's own duties of honesty to the Court and other parties in the litigation. The Tribunal had already accepted the Respondent's submissions that he had not set out, or even thought about acting dishonestly, but regrettably that had been the end result.

91. The Tribunal took into account the case of SRA v Sharma [2010] EWHC 2022 (Admin) in which Coulson J stated:

> "(a) Save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the roll, see Bolton and Salisbury. That is the normal and necessary penalty in cases of dishonesty, see Bultitude. (b) There will be a small residual category where striking off will be a disproportionate sentence in all the circumstances, see Salisbury. (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, such as Burrowes, or other a lengthy period of time, such as Bultitude; whether it was

a benefit to the solicitor (Burrowes), and whether it had an adverse effect on others."

92. Although the Respondent had made reference to his health in his witness statements and had stated he had returned to work after a week when he should have remained off sick for three months as there was nobody else to deal with his heavy workload, there was no medical evidence before the Tribunal to indicate that his health had had an adverse impact on the conduct complained of.

93. The Tribunal concluded that this was a sad case where the Respondent had made very grave errors of judgement on one particular file that had been challenging. He had lost his focus on the key issues and had succumbed to acting inappropriately under pressure. He had had a previously long career with no blemishes but, as a very experienced solicitor, the Respondent should have known that this was not the way to deal with a problem file. It was absolutely sacrosanct that solicitors did not mislead the Court in any way. The Respondent had become careless on two occasions and had acted stupidly. This had eventually had a catastrophic effect on all aspects of his life.

94. The Tribunal was satisfied that the risk of repetition was low and the Respondent was unlikely to act in this way again. He had clearly realised that no matter what pressures a solicitor may be under, there were always other alternatives available which would not involve misleading the Court.

95. Taking into account the guidance set out in SRA v Sharma, the Tribunal was satisfied that there were no exceptional circumstances in this case. Accordingly, the appropriate sanction in this case was to strike the Respondent off the Roll of Solicitors.

Costs

96. Ms Bruce requested an Order for the Applicant's costs in the total sum of £14,239.50. She provided the Tribunal with a Statement of Costs which contained a breakdown of those costs. She stated that she anticipated the Respondent would state that it was difficult for him to pay the costs and she confirmed that the regulator would be willing to discuss payment terms.

97. The Respondent advised the Tribunal that he was now working as a delivery driver and also as a groundsman/cleaner earning a minimum wage. He anticipated one of those jobs was likely to end when the furlough scheme finished and at his age, he believed he would find it very difficult to get another job given his limited experience beyond office work. He had not worked as a solicitor for nearly two years.

98. The Respondent stated that the claim for costs, which included refresher fees, was almost as much as his entire current salary for the year and was double his previous salary. He stated that, although he had a few savings, he could not pay all of those costs and had no idea how he would be able to do so.

99. The Respondent stated that he had been very concerned about the Applicant's costs spiralling out of control and he had complained to the regulator about this. He informed the Tribunal that there had been very little pre-action disclosure and he had received the bundle in early October 2019 when the Rule 5 Statement had been issued. He had filed his Answer in November 2019 confirming that the facts were agreed and therefore only the issue of dishonesty remained outstanding. The Respondent submitted, that if disclosure had been made earlier, it would not have taken three years for this case to be resolved and the costs would have been much lower.

100. The Respondent submitted that too many fee earners had been involved with the case and there had been little contact between him and the case handlers. He stated that the case could have been resolved much earlier and indeed, he had expressed a desire to seek an early settlement through other alternatives.

101. On questioning from the Tribunal, the Respondent confirmed that he did own a share in a property which was yet to be sold, and he was also due to receive a pension at some point but he did not know when. He was currently living in the property that was being financed by a relative.

102. The Respondent had also made various submissions about the costs in his witness statements dated 21 January 2020 and 26 February 2020 which the Tribunal took into account.

103. The Tribunal considered the issue of costs very carefully. The Applicant's claim for costs included refresher fees. The first refresher fee was for a hearing which had been due to take place on 23 March 2020 but was adjourned due to the Covid-19 pandemic. Whilst this was through no fault of either party, it would not be fair to expect the Respondent to pay this given the exceptional circumstances that had led to the adjournment.

104. The second refresher fee was for the second day of this hearing which had gone part heard on 17 June 2020. Again, that had been through no fault of either party, but had arisen due to other cases in the list which had not concluded as quickly as had been anticipated. The Tribunal noted that the Applicant's Statement of Costs stated that a "Fixed fee" of £2,405 had been charged for preparing and attending the hearing. The Tribunal took the view that a fixed fee was exactly that and decided that the additional refresher fees of £1,910 plus VAT would not be allowed.

105. The Tribunal also concluded that there had been some duplication of work as two separate fee earners had dealt with this matter. Furthermore, the amount of time claimed for reviewing documents prior to the issue of the Rule 5 Statement together with the amount of time spent drafting the Rule 5 Statement and exhibits was over 40 hours. The Tribunal considered this to be extremely high and reduced this amount to 20 hours in total and allowed £2,600 for this part of the costs claim.

106. The Tribunal took into account that the second day of the hearing had not taken a full day and therefore made a reduction to allow for the actual time spent in hearing. Having made all of these deductions, the Tribunal assessed the Applicant's total costs in the sum of £9,000 and Ordered the Respondent to pay this amount.

107. The Tribunal took into account the case of SRA v Davis and McGlinchey [2011] EWHC 232 (Admin) in which Mr Justice Mitting had stated:

> "If a solicitor wishes to contend that he is impecunious and cannot meet an order for costs, or that its size should be confined, it will be up to him to put before the Tribunal sufficient information to persuade the Tribunal that he lacks the means to meet an order for costs in the sum at which they would otherwise arrive."

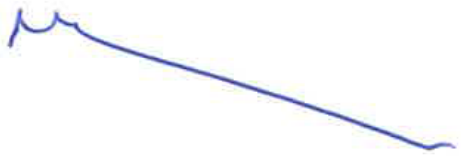
108. In relation to enforcement of those costs, the Tribunal noted the Respondent had provided a witness statement dated 21 January 2020 which set out his income and expenditure. He had also filed documentary evidence in support of his income. The Tribunal accepted the Respondent's submissions about the level of his current income but noted that he did appear to have an interest in a property.

109. The Tribunal was also mindful of the cases of William Arthur Merrick v The Law Society [2007] EWHC 2997 (Admin) and Frank Emilian D'Souza v The Law Society [2009] EWHC 2193 (Admin) in relation to the Respondent's ability to pay those costs. As the Respondent had an interest in a property and was in current employment, the Tribunal did not consider this was a case where there should be any deferment of the costs order. However, the Tribunal had been assured that the regulator would allow the Respondent the opportunity to pay the costs by way of instalments and would only seek to enforce the Order for costs where there was some prospect of recovery. The Tribunal expected the regulator to act proportionately in this regard.

Statement of Full Order

110. The Tribunal Ordered that the Respondent, ALASTAIR JAMES MCGREGOR GILFILLAN, solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £9,000.00.

Dated this 14th day of August 2020
On behalf of the Tribunal



R. Nicholas
Chair