The Bar Tribunals & Adjudication Service

The Council of the Inns of Court

Report of Finding and Sanction

Case references: PC 2017/0088/D3 and PC 2017/0089/D3

Mr Robert Alun Jones QC

The Director-General of the Bar Standards Board

The Chair of the Bar Standards Board

Disciplinary Tribunal

Robert Alun Jones QC

1. In accordance with an appointment made by the President of the Council of the Inns of Court contained in a Convening Order dated 13 August 2020, I sat as Chairman of a Disciplinary Tribunal on 7-9 September 2020 and 16-18 November 2020 to hear and determine three charges of professional misconduct contrary to the Code of Conduct of the Bar of England and Wales against Robert Alun Jones QC, barrister of the Honourable Society of Gray's Inn.

Panel Members

2. The other members of the Disciplinary Tribunal were:

   Tracy Stephenson (Lay Member)

   Darren Snow (Barrister Member)

Charges

3. The three charges against the Respondent as set out below. All charges were dismissed.

Charge 1

Statement of Offence

Professional misconduct contrary to Core Duty 1 and rule rC 9.2 and/or rule rC7.3 of the Code of Conduct of the Bar of England and Wales (9th Edition).

Particulars of Offence

[R] a barrister, failed to observe his duty to the court in the administration of justice in that he made an allegation of fraud when he did not have reasonably credible material which established an arguable case of fraud, and/or he made a serious allegation of dishonesty against a person where he did not have reasonable grounds for the allegation, by, in a skeleton argument dated 13 September 2016 and at a hearing before the Administrative Court on 12 October 2016, making allegations of dishonesty/fraud against a Solicitor, Mr Robert Dougans and against Mr Dougans' client, in respect of the preparation and submission of a bill of costs for an assessment of such costs by Westminster Magistrates Court, without having reasonably credible material to establish an arguable case of fraud or reasonable grounds for the allegation of dishonesty/fraud.

Charge 2

Statement of Offence

Professional misconduct contrary to Core Duty 3 and rule rC 9.2 and/or rule rC7.3 of the Code of Conduct of the Bar of England and Wales (9th Edition).

Particulars of Offence

[R] a barrister, failed to act with integrity in that he made an allegation of fraud when he did not have reasonably credible material which established an arguable case of fraud, and/or he made a serious allegation of dishonesty conduct against a person where he did not have reasonable grounds for the allegation, by, in a skeleton argument dated 13 September 2016 and at a hearing before the Administrative Court on 12 October 2016, making allegations of dishonesty/fraud against a Solicitor, Mr Robert Dougans and against Mr Dougans' client, in respect of the preparation and submission of a bill of costs for an assessment of such costs by Westminster Magistrates Court, without having reasonably

credible material to establish an arguable case of fraud or reasonable grounds for the allegation of dishonesty/fraud.

Charge 3

Statement of Offence

Professional misconduct contrary to Core Duty 1 of the Code of Conduct of the Bar of England and Wales (9th Edition).

Particulars of Offence

[R] a barrister, failed to observe his duty to the court in the administration of justice in that he disclosed to the Court without prejudice correspondence where he did not have reasonable grounds for doing so, by, in a skeleton argument dated 13 September 2016 and at a hearing before the Administrative Court on 12 October 2016, disclosing to the Administrative Court the content of a without prejudice offer letter without any proper justification.

Parties present and representation

4. The Respondent was present and was represented by Roger Stewart QC (and also Anthony Jones on 7-9 September 2020). The Bar Standards Board ("BSB") was represented by James Stuart.

Applications

5. On 8-9 September 2020, at the close of the BSB's case, we heard the Respondent's submission that there was no case to answer in respect of the charges and the BSB's response. Following careful deliberation, we indicated on 9 September 2020 that the Respondent's submission was not upheld, and our written reasons were provided on 14 September 2020.

6. On 9 September 2020, after it became apparent that the matter would not conclude within the initial listing, we were invited by the Respondent to decline to adjourn, and instead to dismiss, the case. We declined to dismiss the case and instead adjourned the case part heard to 16-18 November 2020.

Evidence

7. We read the documents contained in the bundles provided by the BSB and the Respondent, and the skeleton arguments provided on behalf of the respondent.

8. We heard live evidence from the complainant, Mr Dougans, for the BSB and the Respondent.

9. We also had the benefit of oral submissions from counsel, for which we are grateful.

Background

10. The Respondent represented a client bringing a private prosecution that was ultimately dismissed by consent. The proposed defendants to that prosecution then applied for their costs and the District Judge sitting in the Magistrates' Court made a substantial award for the full amount of costs sought in their favour.

11. The Respondent then represented his client on an application for judicial review of that decision, alleging (amongst other points) that the evidence of costs incurred submitted by the proposed defendants' solicitor were *'fictitious'* in the sense that they did not show costs actually and properly incurred in the private prosecution. That submission was made in a skeleton argument dated 13 September 2016 and at a hearing before the Administrative Court on 12 October 2016. In support, the Respondent relied on correspondence marked *'without prejudice save as to costs'* in which the proposed defendants offered to accept a small amount in settlement of their costs.

12. The Administrative Court ultimately made a modest reduction to the costs awarded to the defendants but did not accept the submissions to the effect that they were *'fictitious'*.

Judgment

13. On 18.11.20, at the conclusion of the hearing, the Tribunal announced that it had found the Respondent not guilty of all the charges against him. This is the judgment of the Tribunal, giving the reasons for its findings, which has been approved by all its members.

14. The case was heard over a total of 6 days, from 7-9.9.20 and from 16-18.11.20. It related to allegations of fraud made by the Respondent both in writing and orally in judicial review

proceedings which came before the Administrative Court on 12.10.16, and to his reliance in those proceedings on without prejudice correspondence.

15. In September the Tribunal heard evidence from Mr Dougans, the BSB's only witness, who was the complainant and the solicitor against whom the relevant allegations of fraud had been made. At the conclusion of the BSB's case Mr Stewart QC, counsel for the Respondent, made a submission of no case to answer in respect of all the charges. On 9.9.20 the Tribunal announced that it had not upheld that submission and written reasons for its decision were provided on 14.9.20. When the hearing resumed in November the Tribunal heard from Mr Jones QC. The Respondent relied in addition on a signed witness statement of the Respondent's instructing solicitor dated 12.8.20 whose contents were not challenged by the BSB. He was the Respondent's instructing solicitor in the relevant litigation from early summer 2016.

16. The Tribunal was provided with a large quantity of documentary material which included, but was not limited to: witness statements prepared for the purposes of these disciplinary proceedings by all those who gave oral evidence; witness statements prepared by Mr Dougans and Mr Jones QC for the purposes of earlier proceedings; records, judgments and in some instances transcripts of earlier proceedings; preparatory notes and skeleton arguments prepared for the purposes of those proceedings; and documents and correspondence consisting of, or relating to, the bill of costs which the Respondent alleged was fraudulent.

17. The Tribunal had regard to the documentary material in so far as it was relevant and admissible in the proceedings. In its reasons for not upholding the submission of no case to answer (at para 8) the Tribunal noted that it was common ground between the parties that the conclusion of Gross LJ in the judgment of the Administrative Court at [2017] EWHC 232 (Admin) that there were no reasonable grounds for making the allegation of fraud was not admissible in these disciplinary proceedings. It was for the Tribunal to reach its own conclusion on that, and all related, issues on the relevant and admissible evidence before it.

<u>The context</u>

18. In the Administrative Court proceedings, the Respondent's lay client challenged a decision on costs made by DJ Ikram in the Westminster Magistrates Court on 30.9.15. The costs decision could only be challenged by way of judicial review. DJ Ikram had ordered the lay client to pay £121,500 in respect of the costs of the two proposed defendants in private criminal proceedings which the lay client had sought to bring against them, but which had subsequently been dismissed by consent. Mr Dougans was a partner in the legal firm instructed to act for those two proposed defendants. The Respondent's lay client had also sought to bring a private prosecution against a third defendant. The proceedings against him had also been dismissed, and DJ Ikram had made an order for costs in the third proposed defendant's favour in the sum of £108,946.14. The third proposed defendant was represented by a different firm of solicitors.

19. The first two proposed defendants were officers of a company, by which the Respondents' lay client himself had been employed in a senior role. In May 2014 the company brought civil proceedings in the Dubai courts against the Respondents' lay client, in which it was alleged that he had been guilty of a substantial fraud. It was the lay client's evidence that in May 2014 he was lured to Dubai by the first two proposed defendants under false pretences. On his arrival there he was arrested and detained. At an early stage he was subject to freezing and search orders. He remained a detainee in Dubai when the attempted private prosecution, in which it was alleged that the first two proposed defendants had been guilty of conspiracy to defraud and human trafficking, came before Westminster Magistrates Court in 2015.

20. Mr Jones QC was first instructed on behalf of the lay client in connection with the civil proceedings in December 2014. He visited the client in prison in Dubai at that time. Mr Jones QC advised that the private prosecution should be brought in the English courts. No criticism is made of that advice in these disciplinary proceedings.

21. In January 2015 preliminary steps were taken in London in connection with the proposed private prosecution. There was an application for summonses against the first two proposed defendants. The court adjourned consideration of the application to give them the opportunity to make submissions on notice. Mr Dougans' firm were instructed in about February 2015 and instructed Mr Jones QC. Mr Jones visited the client in Dubai in March

2015. Following that visit an updated application for summonses was made naming a solicitor as an additional potential defendant.

22. The application was heard by DJ Ikram on 9.4.15. It was not concluded on that day, but the judge expressed a preliminary view that he was not minded to grant the summonses. Following that hearing the lay client's legal representatives, including the Respondents, considered whether it was appropriate to continue with the private prosecution. They took into account inter alia the limitations on the client's financial resources, and what they considered to be the impact, or potential impact, of a continuing private prosecution on the conditions in which the client was being held in Dubai. The representatives of the proposed defendants were notified on 20.4.15 that the private prosecution would not be pursued at the adjourned hearing on 12.6.15. On that date the application for summonses was formally dismissed by consent.

23. The proposed defendants subsequently applied for costs. In support of his clients' application Mr Dougans made a witness statement dated 26.6.15 in which he claimed a total of £121,500, of which £20,000 consisted of counsel's fees. There was no detailed breakdown of the costs. The Respondents' response to this application, and to that on behalf of the third proposed defendant in a similar amount, stated that the amounts claimed were preposterous and shocking, and that it was not accepted that the proposed defendants had paid, or were liable to pay, the amounts in question to their lawyers.

24. On 26.8.15 DJ Ikram requested that the solicitors for the proposed defendants provide a breakdown of their costs. In response, on 11.9.15, Mr Dougans provided two documents which are central to the present proceedings. The first was described by Mr Dougans as *"raw and relevant"* time entries up to the date of the costs application; the second was a summary document which set out, on a single page: timekeeper; standard hourly rates; average hourly rate charged; total hours per timekeeper; total hours value; amounts billed; and disbursements and expenses, including counsel's fees. The grand total was £138,167.02, which in a covering letter Mr Dougans stated had been reduced to £121,500 *"in the spirit of reasonableness"*. As noted above DJ Ikram ordered the Respondent's lay client to pay the full amount claimed.

25. The judicial review was considered by Blake J on the papers on 8.2.16. He granted permission on one point only, namely whether the district judge had erred in concluding that the amount of the costs awarded to the three proposed defendants was reasonable in all the circumstances. He ordered a stay of the judicial review proceedings for 28 days to provide an opportunity for a negotiated settlement of the costs issue. In his observations he stated that *"as a starting point I would probably have been contemplating orders in sums 50% less than those ordered by the DJ in what I presently understand to be the circumstances of the case"*.

26. On 3.3.16 the solicitors for the first two proposed defendants wrote to the Respondent's client's solicitors offering to accept £72,900, 60% of the sum ordered by DJ Ikram, in settlement of the claim for costs. This was an open offer.

27. The application for permission to apply for judicial review was renewed orally before Lord Thomas LCJ and Singh J on 12.7.16. As a result of that hearing permission was granted on further and wider grounds. The skeleton argument prepared by the Respondent for the purposes of this hearing stated, under the proportionality ground, that it was not accepted that the costs awarded had been incurred or paid. At the hearing the Lord Chief Justice expressed a general concern, based on the recent experience of the court, about very large costs claims in criminal matters, and emphasized the need for them to be justified by proper bills of costs. Fraud was however not alleged in terms at this point, whether as independent ground for judicial review or otherwise.

28. On 10.8.16, in a letter marked *"without prejudice save as to costs"* the solicitors for the first two proposed defendants wrote to the Respondent's client's solicitors offering to settle the judicial review proceedings on the basis of a payment of £10,000 in respect of costs incurred in the Magistrates' Court proceedings and no order as to the costs of the judicial review.

29. On 15.8.16 the solicitor instructed on behalf of the Respondent's lay client, wrote to the firm representing the first two proposed defendants. He stated that *"the offer is so low in comparison to the sums previously claimed that it supports our argument that the claims in the lower court were fictitious"*. He went on to say that " *(i)f you do not refer to this offer in your submissions, we shall refer to it in our skeleton argument for the full hearing and*

seek to adduce it in evidence, unless you can demonstrate to us convincingly by reference to authority that we should not do so." It was at this point, the Tribunal finds, that it became plain that it was being alleged on behalf of the Respondent's lay client that there had been dishonesty in the claim for costs in the Magistrates' Court. It was plain from their solicitor's uncontested written evidence and the evidence of the Respondent that his solicitor was not acting alone in making that allegation. It was the result of consideration and discussion by and between him and the Respondent.

30. On 15.8.16 and unsurprisingly the solicitors representing the first two proposed defendants stated in correspondence that the allegation that the fees claimed were fictitious was serious, and that if it was being alleged that they had knowingly sent fictitious bills either to their clients or the court that would be an allegation of the commission of a criminal offence as well as professional misconduct. They asked for the allegation to be withdrawn or further explained. They stated that it was *"utterly inappropriate"* for the without prejudice offer to be put before the court, and drew the reader's attention to the case of *Unilever plc v Proctor & Gamble Co* [2000] 1 WLR 2436 (see below).

31. The Respondent's skeleton argument dated 13.9.16 for the hearing before the Administrative Court (Gross LJ and Nicol J) on 12.10.16 runs to 36 pages and 123 paragraphs. The critique of the costs documentation submitted by Mr Dougans is section 4, under the proportionality ground. The critique is detailed and, in its terms, reflects preparatory notes drafted by counsel which were before the Tribunal. At para 106 it is stated that *"the Claimant (i.e the Respondent's lay client) did not accept, and does not accept, that these bills reflect work actually and reasonably done"*. At para 107 it is stated that:

    "The reality is plain. The Defendant (i.e. the Westminster Magistrates' Court) should have recognised the bills as fictitious, put forward by the interested parties in the belief that the criminal conduct and bullying disclosed by the interested parties, would force him to abandon his attempts to defend himself in the Dubai proceedings by making a comprehensive settlement taking into account any costs awarded by the Defendant."

32. The skeleton argument referred to the without prejudice offer to settle the costs claim for £10,000. It sought to justify deploying that letter by reference to the exception in Unilever

(at 2444) that *"one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety" "*. This section of the skeleton argument described the billing documents submitted by the solicitors representing the first two proposed defendants as *"an exercise in creative fiction"* and stated that to attempt to hide the offer of £10,000 under the cloak of privilege was contrary to the principles in Unilever because the offer demonstrated the fictitious nature of the original bills.

33. In his judgment following the hearing Gross LJ was critical of the Respondent's decision to pursue allegations of fraud in respect of the billing documentation, and to deploy the without prejudice offer. As the Tribunal has noted above the judge's criticisms, and the reasoning behind them, are not admissible in these disciplinary proceedings. As a result of the judicial review the level of the costs order in favour of the first two proposed defendants was reduced from £121,500 to £100,000.

Relevant law

34. The burden of proof rests on the BSB. As the alleged misconduct took place before 1.4.19 the standard of proof is the criminal standard. Central to this case is an allegation of fraud, itself admitted. Mr Stuart for the BSB expressly and properly accepted that that the burden rested on the BSB to prove, to the relevant standard, that the Respondent did not have reasonably credible material to establish an arguable case of fraud, in the terms of the charge.

35. In its decision declining to uphold the submission of no case to answer the Tribunal referred expressly to *Medcalf v Mardell* [2003] 1 AC 120. The opinion of Lord Steyn in that case identified the potential difficulties for barristers who on the one hand may be under a professional duty to allege fraud, but on the other may risk a finding of professional misconduct for so doing. His Lordship stated that the decision on whether or not to allege dishonesty may be finely balanced and that the correct decision may be *"a difficult matter of judgment on which reasonable minds may differ"*.

36. The Tribunal has previously concluded that in the case of the Respondent the BSB has to show that no barrister in the position of the Respondent when the allegations of fraud were

made, exercising an objective judgment, could reasonably have concluded that there were sufficient grounds for making the allegations. For the avoidance of doubt the matter has to be judged on the basis of the knowledge, analysis and state of mind of the Respondent at the time. The Tribunal is permitted, indeed bound, to look not only at the billing documentation itself, but also at the context in which it was submitted, so far as relevant.

37. Mr Stewart QC referred in his closing submissions to a decision of a 3-person Tribunal chaired by HH Peter Rook QC in the case of *BSB v Kamlish*. The written reasons for the Tribunal's decision are dated 21.8.20 but were not published until after the first 3 days of the hearing in this case in early September. The case did not concern an allegation of fraud. It did concern allegations of bad faith made by the respondent as defence counsel in criminal proceedings against various members of successive prosecution teams in a series of criminal trials. There were alleged breaches of Core Duties 1 and 3 and of rC7.3 of the Code of Conduct, which are alleged to have been breached in the present case.

38. At paras 62 to 77 of the decision the Tribunal reviewed the relevant law. It stated that the use of the expression *"reasonable grounds"* in rC7.3 must mean objectively reasonable, but this in itself does not answer the question as to how the Tribunal should approach reasonable grounds in the context of an allegation of professional misconduct against a barrister. It referred to the decision of the Supreme Court of Canada in *Groia v Law Society of Upper Canada* [2018] SCR 772, which emphasised that fearless and resolute advocacy and criticism, even of a distasteful kind, should not be blunted or chilled. In the context of its review of *Groia* the Tribunal in *Kamlish* noted and concluded that it would not be any factual foundation for the allegation which surmounted the threshold of reasonable grounds. The standard was not exacting, but there must be a sufficient or proper evidentiary foundation for the allegation. It held that *"context, which includes all the information available to the Respondent at the time, will be important in evaluating whether there was a reasonable basis"*. This Tribunal agrees with the propositions of law set in this paragraph.

39. This case and *Kamlish* involved allegations made in criminal proceedings, or civil process arising out of criminal proceedings, by barristers whose predominant or exclusive area of practice was the criminal law. It was not suggested by any party that the threshold for the making of an allegation of fraud should differ depending on the field of practice of the

practitioner or the nature of the proceedings in which the allegation is made, and the Tribunal agrees that it does not. It may be however that the analysis and approach of a barrister to the question of whether the threshold has been met will differ, depending on his or her own experience in practice.

40. With one very minor difference the Particulars of Charge 2 against the Respondent are identical to those of Charge 1, save that the Particulars of Charge 1 allege a failure to observe the barrister's duty to the court in the administration of justice, while those of Charge 2 allege a failure to act with integrity. This difference is of course the difference between Core Duties 1 and 3. In the circumstances it was common ground between the parties that if Charge 1 was not proved, Charge 2 would *ipso facto* fall away. Charge 2 would require all the elements of Charge 1 to be proved, and the additional element of lack of integrity. Similarly if Charge 1 were not proved, Charge 3 would not be sustainable, because the BSB could not in the circumstances show that it was not reasonable for the Respondent to conclude that the exception to the rule against the deployment of without prejudice correspondence set out at para 32 above applied.

41. In so far as the Tribunal were required to consider whether the Respondent failed to act with integrity, the relevant principles are set out in the leading case of *Wingate v Solicitors Regulation Authority* [2018] 1 WLR 3969 (CA).

42. The allegations against the Respondent was of professional misconduct. The law is clear that breach of the Code of Conduct, if so found, does not per se amount to professional misconduct. There is a threshold of seriousness which must be reached before it can properly be concluded that an allegation of professional misconduct is made out: *Khan v Bar Standards Board* [2018] EWHC 1284 (Admin) per Warby J. In *Kamlish* it was agreed that gross negligence could be sufficiently serious to amount to professional negligence in this context. This Tribunal is, with respect, not convinced that gross negligence is a useful concept in this area, but in the event, it was not an issue which it was required to determine.

Decision on the charges

43. At the outset the Tribunal makes clear that neither Mr Dougans nor his firm were on trial in these proceedings, and nothing in this judgment can or should be taken as a finding that

they were guilty of any malpractice. The Tribunal was concerned, and concerned only, with the position and perspective of the Respondent. As for Mr Dougans himself the Tribunal did not consider that his credibility was damaged in any significant way despite detailed and sustained cross-examination.

44. Mr Stewart QC invited the Tribunal to consider, first, whether it considered that there were reasonable grounds for the allegation of fraud. If it did, the case would stop there. If the Tribunal itself considered that there were not such reasonable grounds, it should then decide whether it was satisfied, to the relevant standard, that no reasonable barrister in the position of the Respondent could have reached the view that there were. Unless so satisfied, there would be no breach of the Code of Conduct, still less an instance of professional misconduct.

45. The Respondent has at all times taken responsibility for the allegation of fraud, and for the deployment of the without prejudice correspondence. The Tribunal does not accept that the Respondent's solicitor was as central to the discussions leading to the formulation and advancement of the allegation of fraud as some of the Respondent's evidence suggested, but it does accept that the Respondent's solicitor, in accordance with his own professional responsibilities, carefully considered the contents of the skeleton argument of 13.9.16 and satisfied himself that there were reasonable grounds for pursuing an allegation of fraud before the Administrative Court.

46. Under rC9.2c it is a necessary, but not a sufficient, condition for the making of an allegation of fraud in a document that the barrister has clear instructions to make that allegation. The Tribunal finds that at all material times the Respondent's solicitor's instructions were to make the allegation.

47. It is also clear on the evidence that the allegation of fraud was not made on a whim or without sufficient thought. It followed a detailed analysis of the contents of the billing information in the context in which was submitted. Mr Jones approached that analysis from his perspective as a practitioner predominantly or exclusively in the field of the criminal law. Mr Jones QC's experience was vast. He assessed the material before him in part by reference to the constituent elements of criminal offences involving dishonesty, such as that of false accounting under section 17 of the Theft Act 1968 and to the evidence

which in his experience would be regarded as sufficient by prosecuting counsel or the judge in criminal proceedings to justify the institution or continuation of a prosecution for such an offence.

48. The evidence raised a question as to the status of the billing information provided by Mr Dougans in September 2015. It is described in the Charges as a bill of costs, but it was not a bill of costs in the formal and conventional sense. The first of the two documents consisted of what was described by Mr Dougans as raw and relevant time entries extracted from his firm's system. It became clear in cross-examination that there had been some editing of that material before it was submitted to the court, but the Tribunal did not consider such editing to have been either substantial or sinister. The document did set out a detailed, chronological account of each item of work said to have been carried out on the case, identifying who had done the work and the amount of time which he or she had spent on it. The second document identified inter alia that amounts that had been billed at the time that the document was generated, and expenses under various categories, which, with the exception of counsel's fees, were in relatively small amounts. Ultimately the Tribunal concluded that while account needed to be taken of the fact that the billing documentation did not constitute a formal bill of costs, it was being submitted to the Magistrates' Court as the foundation for a claim for payment of costs in a substantial sum, and therefore needed to be as accurate and reliable as possible. There was an implied assertion that the costs in it had been reasonably and properly incurred in connection with the Magistrates' Court proceedings.

49. At para 76 of the skeleton argument dated 13.9.16 Mr Jones QC summarised the basis of his submission that the billing information bore little to no relation to what work had actually been done in the following way:

"(i) The hours billed are vastly inflated in the light of the work actually done for the case;

(ii) Items are billed which bear no relevance to the issues before the court;

(iii) Items are billed which appear to relate to the civil proceedings, both in Dubai and in London;

(iv) Expenses are billed which are either so opaque as to defy sensible analysis or for items which are clearly unrelated to the case;

(v) Both bills contain significant amounts of time which have been written off, without any explanation as to why, other than the clearest implication that the time was not properly charged in the first place."

50. The Respondent made it clear to the Tribunal in evidence, and the Tribunal accepts, that his judgment that there was a sufficient foundation for an allegation of fraud was based primarily on the billing information itself and correspondence connected with it. In addition to his critique of the documentation he attached weight to the fact that by the date of preparation of the skeleton argument of 13.9.16 and the hearing before the Administrative Court on 12.10.16 Mr Dougans had had an opportunity to respond in detail to the specific points which they had raised about the billing information, but had not done so. The Respondent stressed that his judgment was based on the totality, or cumulative effect, of the points which he considered to be relevant.

51. There is clearly an important dividing line between a bill which is inflated, even vastly inflated, and one which is fraudulent. The Tribunal accepts that if a bill is reasonably considered to be vastly inflated, that may be a factor, in conjunction with others, which could lead to a conclusion that it is fraudulent.

52. Among the factors raised by the Respondent in support of his allegation of fraud were: that very little of the time said to have been spent had involved liaison with the first two proposed defendants personally, in contrast with the significant communications with an employee of their company; that very substantial amounts of time had apparently been billed in the preparation of witness statements the contents of which did not justify the time spent; and that there appeared to be no basis at all for some items, including the sum of £194.48 for colour copying charges when it was not apparent that any colour copying had been undertaken. There was an over-arching concern about the total size of the bill given the limited time during which the solicitors had been involved with the case at the time at which it had been prepared, and that early notification had been given that the attempted criminal prosecution was not to be pursued.

53. The Tribunal considers that some of the Respondent's concerns carried, or should have carried, little weight. When assessing the overall size of the bill, regard needed to be had to the firm as an international, City-based law firm, the hourly rates of whose fee earners

would be of a completely different order from those of most solicitors practising in the field of criminal law. Nor should it have carried significant weight that some of the time spent had been written off. But there were matters which called for an explanation, such as the extensive involvement of a company employee and whether the time spent had indeed been incurred in connection with the private prosecution or in connection with the civil litigation, or otherwise for the company rather than for the first two proposed defendants in the criminal proceedings. It became clear in the course of Mr Dougans' evidence before the Tribunal that the invoices in respect of the work on the private prosecution had been sent to the company, although the first two proposed defendants had a contingent liability for the sums in question.

54. An attempt has been made above to summarise the context in which the bill of costs was submitted, which was of complex, bitterly contested litigation in the course of which the Respondent's lay client had been detained in a foreign prison in conditions which from their perspective were wholly unsatisfactory, if not dangerous. It is of course important that however much there may be distrust of the motives, or criticism of the actions, of an opposing party to litigation, a distinction must be drawn between that party and their legal representatives when considering whether there is sufficient material to justify an allegation of fraud against the latter. But the Respondent regarded the submission of very substantial cost bills as part of a pattern of behaviour designed to cause maximum discomfiture to his lay client and to put pressure on him in relation to his wider disputes with the company. It was not, in the Tribunal's view, unreasonable for him to do so.

55. All the above having been said, there is a distinction in kind, not merely one of degree, between on the one hand bills which can be described as inflated and open to question in various respects, and on the other those which are prima facie fraudulent. In the Tribunal's own judgment, there was not sufficient material before the Respondent to allow him to move from the first class of case to the second, and to conclude that there was an arguable case of fraud. The case did not therefore fall at Mr Stewart QC's first hurdle; it did however fall at the second, in that the Tribunal could not be satisfied to the relevant standard that no reasonable barrister in the position of the Respondent could have concluded that there was an arguable case of fraud. There was accordingly no breach of the provisions of the Code of Conduct identified in the Statement of Offence under Charge 1 in the case of the Respondent and that Charge was not proved.

56. On the basis of the analysis at para 40 above it is therefore strictly unnecessary for the Tribunal to go further in explaining why Charges 2 and 3 against the Respondent also fall away. But the Tribunal wishes to record that, having heard their evidence, it found no reason to doubt the integrity of the Respondent. The Respondent has had an unblemished career at the Bar, a career which has extended over some 48 years. The Tribunal was satisfied, on the facts of this case, that the Respondent worked hard and with tenacity in the interests of his lay client, and pursued a course which in his genuine opinion was not only in his interests but right, proper and in accordance his professional duties as a member of the Bar. The commitment which he showed to a lay client who in his opinion was being treated unjustly was itself in the best traditions of the Bar. In the circumstances no question of lack of integrity can arise.

57. The entirety of the hearing, including the Tribunal's in camera discussions, was conducted remotely due to the pandemic. This judgment reflects the unanimous view of the Tribunal following its discussion on 18.11.20.

58. If there are any ancillary matters, we will deal with them at a hearing on a date to be fixed.

Dated: 2 December 2020

Jonathan Holl-Allen QC
Chairman of the Tribunal