Neutral Citation Number: [2023] EWHC 2981 (Admin)

Case No: AC-2023-LON-001028

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Appeal under Section 49 of the Solicitors Act 1974

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 November 2023

Before :

Neil Cameron KC
sitting as a Deputy High Court Judge

Between :

SOLICITORS REGULATION AUTHORITY LIMITED — **Appellant**

- and –

DANIEL WHITTINGHAM — **Respondent**

Benjamin Tankel (instructed by **Capsticks Solicitors LLP**) for the **Appellant**

The Respondent did not appear and was not represented

Hearing date: 9th November 2023

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JUDGMENT

The Deputy Judge (Neil Cameron KC):

Introduction

1. In this case the Appellant appeals to this court against the judgment of the Solicitors Disciplinary Tribunal ("SDT") dated 20th February 2023.

2. This appeal is made under the provisions of section 49 of the Solicitors Act 1949.

3. The appeal relates to the costs order made by the SDT. The SDT ordered that the Respondent pay the Appellant costs in the sum of £5,000. In this appeal the Appellant contends that the SDT erred when it ordered that costs should be assessed in the sum of £5,000, and submits that costs should have been awarded in the sum of £22,200.

4. At the hearing which took place on 9th November 2023 the Respondent did not appear. The court was informed by Mr Tankel (for the Appellant) that:

   i) On 14th March 2023, the Appellant's notice of appeal was sent to the Respondent by email and post.

   ii) On 28th March 2023 the Appellant sent its skeleton argument to the Respondent by post and email.

5. At the hearing which took place on the 9th November 2023 the court was provided with copies of a chain of emails passing between the Appellant's solicitors and the Respondent. Those emails include the following correspondence:

   i) On 15th August 2023 the Appellant's solicitors wrote to the Respondent stating:

   > "Further to my emails of 14 March and 28 March 2023, the SRA have filed an appeal with the Administrative Court which is now ready to be listed for hearing. As you will note from the attached skeleton argument, the SRA's appeal is solely in relation to the costs awarded to the SRA by the Solicitors Disciplinary Tribunal following the hearing in January 2023.
   >
   > For convenience, I have attached further copies of my emails attaching these documents. Hard copies of the documents were also sent to your Grove View Apartments address by post. Please do let me know if you would like me to arrange for further hard copies to be sent to you."

   ii) On 23rd October 2023 the Appellant's solicitors wrote to the Respondent stating:

   > "Ahead of the hearing listed for 9 November 2023, please find attached the following two bundles, attaching using Mimecast:
   >
   > 1. Draft Core Bundle;
   >
   > 2. Substantive Hearing Bundle."

iii) The Respondent replied on 23rd October 2023. In that reply he stated that he was confused as to the purpose of the proceedings.

iv) Later on the 23rd October 2023, by email, the Appellant's solicitors sent the Respondent copies of emails attaching the documents filed in these proceedings. In that email the Appellant's solicitors stated that the case had been listed for hearing on 9th November 2023.

v) A further reminder of the time, place and date of the hearing was given in an email from the Appellant's solicitors to the Respondent sent on 8th November 2023.

6. At the hearing I decided to exercise my discretion to allow the appeal to proceed in the absence of the Respondent. I approached my decision on the basis that the court must proceed with care when considering whether to allow an appeal to proceed in the absence of a party. I gave my reasons for that decision at the hearing and do not repeat them in full. In essence I relied on the following reasons:

i) The Respondent had been given notice of the proceedings and of the hearing date.

ii) The Respondent replied to an email which included a reference to the hearing date. From that reply I infer that the Respondent was aware of the hearing date.

iii) The Respondent did not indicate whether he intended to attend the hearing.

iv) The Respondent had not engaged with the regulator.

v) There was no good reason not to proceed, and it was right that the hearing should proceed (see paragraphs 19 and 20 of ***General Medical Council v. Adeogba*** [2016] EWCA Civ 162).

The Background Facts

7. The Appellant's application to refer the Respondent's conduct to the Tribunal was issued on 28 September 2022 and served by the Tribunal on the Respondent on 3 October 2022.

8. The allegations made against the Respondent were:

"1.1 On 7 September 2018, in response to a request by Person S for "*proof of*

employment", the Respondent wrote to Person S stating:

"I have attached two pictures of my business card for the law firm I work at. You will also see from my LinkedIn I have worked there since earlier this year"

and attaching two pictures of a business card from Blake Morgan LLP (the "Firm") bearing the Respondent's name, when he knew he was not, at the material time, in

employment as a solicitor either at the Firm or at all. In doing so, he breached Principles 2 and 6 of the SRA Principles 2011, and Outcome 11.1 of the SRA Code of Conduct.

1.2 In September 2018, he misled Person M in a WhatsApp message when he stated that "*the return would be funded from a number of sources. Partly from my monthly salary as a lawyer*" when he knew he did not have a salary as a lawyer. He thereby breached Principles 2 and 6 of the SRA Principles 2011.

1.3 On 14 November 2018, he told the SRA that:

"...anyone would have my full name and would, in theory, be able to look me up on LinkedIn, which is what I assume happened. At this point, in theory, and in practice, it seems, it was viewed and interpreted that I worked at Blake Morgan. However...that is only because I do not use LinkedIn often and never have"

when he knew he had expressly drawn Person S's attention to his LinkedIn profile as per Allegation 1.1. In doing so, he breached Principles 2, 6 and 7 of the SRA Principles 2011."

9. On 3 October 2022, the Tribunal made directions. Those directions included the following:

"2. The Respondent shall file at the Tribunal and serve on every other party an Answer to the Applicant's Rule 12 Statement by 4.30 p.m. on Monday 31 October 2022. The Answer must state which of the allegations (if any) are admitted and which (if any) are denied. In respect of any which are denied, the Answer must set out the reasons for the denial.

…

6. If at the substantive hearing the Respondent wishes their means to be taken into consideration by the Tribunal in relation to possible sanctions and/or costs, they shall, in accordance with Rule 43(5) SDPR by no later than 4:30 P.M. on Wednesday 28 December 2022 file at the Tribunal and serve on every other party a Statement of Means including full details of assets (including, but not limited to, property) (sic) /income/outgoings supported by documentary evidence. Any failure to comply with this requirement may result in the Tribunal drawing such inference as it considers appropriate, and the Tribunal will be entitled to determine the sanction and/or costs without regard to the Respondent's means. A failure to comply may also cause the consideration of the Respondent's means to be adjourned by the Tribunal to a later date which may result in an increase in costs."

10. The Respondent failed to serve an Answer within the time specified, and as a result the matter was listed for a 'non-compliance hearing' before a clerk of the Tribunal.

11. On 8th November 2022 the Appellant's solicitors sent the Respondent an email to which they attached a template Answer.

12. The Memorandum of the Non-Compliance Hearing which took place on 10th November 2022:

    i) Records that the Respondent attended the hearing and represented himself.

    ii) Records that the Respondent stated that he had not seen the statement and exhibit which had been served pursuant to Rule 12 of the Solicitors (Disciplinary Proceedings) Rules 2019 ("the 2019 Rules" and "the Rule 12 Statement").

    iii) States at paragraphs 4 and 5

    "Applicant's Submissions

    4. Mr Collis acknowledged the stated position of Mr Whittingham and the fact that he did not appear to have accessed the Rule 12 Statement. Given the circumstances Mr Collis suggested that Capsticks re-serve the proceedings papers by way of attachment to an email by the close of business. Mr Collis further suggested varied Standard Directions in order to provide Mr Whittingham with an opportunity to file an Answer.

    Deputy Clerk Decision

    5. Miss Baljit noted the proposed approach advanced by Mr Collis which Mr Whittingham had expressed agreement to. The varied directions advanced did not prejudice the Substantive Hearing date and represented a sensible way forward."

    iv) Varied the standard directions, providing that the Appellant was to re-serve the proceedings papers on the Respondent, and that the time for taking the other steps set out in the directions be adjusted accordingly.

    v) The revised directions provided that the Respondent was to file at the Tribunal and serve on every other party an Answer to the Appellant's Rule 12 Statement by 4.30pm on 24th November 2022.

13. On 10th November 2022 the Appellant's solicitors sent the Respondent the hearing bundle for the SDT hearing using the Mimecast system. An electronic message sent from Mimecast to the Appellant's solicitors on 17th November 2022 showed that a person using the Respondent's email address had accessed the files that had been sent to him using Mimecast.

14. On 22nd November 2022 the Respondent sent an email to the Appellant's solicitors in which he set out a response to some of the allegations. This email makes express reference to allegation paragraph 1.1.

15. In an email dated 6th December 2022 the Respondent stated:

    "I also wasn't able to access the previous link. I tried again a few times thinking access was forthcoming, but was never able to get access to the new documents."

16. On 19th December 2022 the Appellant submitted a Certificate of Readiness and Hearing Timetable. The timetable assumed that the Appellant would call two witnesses, and that the Respondent would appear and give evidence. The time estimate was 2 days.

17. The SDT hearing was listed for the 23rd and 24th January 2023.

18. On 19th January 2023 the Respondent emailed the Appellant's solicitors and stated:

> "Though I have to say, as I mentioned before, I do not know what I am supposed to be doing here, or what I need to prepare or submit.
>
> I also have work during the day so I wouldn't be able to attend a tribunal unless I miss work, which would come with negative consequences of course.
>
> In relation to the hearing, what will be done or decided at the hearing? As I say, I am quite lost as to what is going on here."

19. The hearing before the SDT took place on 23rd January 2023. The Respondent did not appear and the hearing took place in his absence. The SDT approached the allegations on the basis that they were denied by the Respondent.

20. The SDT's judgment ("the Judgment") included the following:

> "43.5 The Tribunal found that Mr Whittingham had abused his status as a solicitor in order to gain the trust of Mr Mondini and Sobun, so that he could dupe and take advantage of them.
>
> ..
>
> 43.6.11 The Tribunal found Allegations 1.1 and 1.2 proved to the requisite standard of proof, namely on the balance of probabilities and that Mr Whittingham had breached Principles 2 and 6 of the Principles 2011 and had failed to attain Outcome 11.1.
>
> …
>
> 43.7.5 The Tribunal found Allegation 1.3 proved to the requisite standard of proof, namely on the balance of probabilities and that Mr Whittingham had breached Principles 2, 6 and 7 of the Principles 2011.
>
> …
>
> 43.8.7 Dishonesty in relation to Allegations 1.1, 1.2 and 1.3. were proved on the balance of probabilities.
>
> 51. Overall, the Tribunal assessed the Respondent's culpability as very high.
>
> …

56. The Tribunal assessed the harm caused as very high.

…

61. There was no evidence of any genuine insight, no open or frank admissions and no meaningful co-operation with his regulator – quite the converse as Mr Whittingham had sought to mislead his regulator.

…

64. The only appropriate sanction was for Mr Whittingham to be Struck Off the Roll."

21. The Appellant made an application for costs. That application was supported by a schedule of costs. The costs claimed were £600 for the Appellant's costs of investigation, and £18,500 plus VAT for legal costs. The total claimed was £22,800.

22. The Appellant's solicitors charged a fixed fee (including disbursements) of £18,500 plus VAT (£22,200). The hours spent by solicitors working for Capsticks Solicitors LLP were specified in the schedule; the total number of hours spent, as set out in the schedule, is 65.4. Three lawyers at Capsticks worked on the case. 59.6 of the 65.4 hours were attributable to work undertaken by Ms Lines, an associate solicitor who qualified in Australia in 2016. The remaining hours were attributable to work undertaken by a partner (admitted in 2006) and a barrister (called in 2004). Both the 65.4 hours and the 59.6 hours include six hours for the second day of the hearing. The hearing lasted for one day. Therefore the total number of hours worked was 59.4 hours, of which 53.6 hours were undertaken by Ms Lines.

23. The disbursements shown on the schedule were as follows:

i) Mr Tankel: drafting the Rule 12 Statement £3,275 excluding VAT.

ii) Mr Tankel: brief fee £4,000 excluding VAT.

iii) Mr Tankel: refresher £2,000 excluding VAT.

24. The Respondent did not serve a Statement of Means pursuant to paragraph 6 of the directions given by the SDT on 3rd October 2022.

25. The SDT's findings on costs, as set out in the Judgment, were as follows:

"66. Mr Tankel said the quantum of costs claimed by the Applicant was in the sum of £22,800.00.

67. He submitted that the proceedings had been correctly brought by Applicant and it was right that it should recover its costs in doing so. The hours claimed by the Applicant were not excessive and were reasonable and proportionate in the circumstances of the case and that the Applicant was entitled to its costs.

The Tribunal's Decision on Costs

68. Having listened with care to the submissions made by Mr Tankel with respect to costs the Tribunal considered that it was able to assess costs summarily.

69. The Tribunal noted the following factors:

• the facts were straightforward and there were no complex legal issues;

• the substantive hearing had taken less time than anticipated: less than a day instead of two days;

• Mr Whittingham had not attended the hearing;

• there had been no witnesses;

• it did not require counsel of Mr Tankel's call to draft the Rule 12 Statement.

70. The Tribunal assessed the costs payable by the Respondent in the sum of £5,000.00."

The Grounds of Appeal

26. The Appellant relies upon the following two grounds of appeal:

i) The SDT failed to take account of the fact that the Respondent's unreasonable conduct required the Appellant to prepare unnecessarily for a fully contested two day hearing.

ii) The SDT failed to take account, or adequate account, of the mandatory factors at Rule 43(4) of the Solicitors (Disciplinary Proceedings) Rules 2019.

27. The Appellant requests that if the appeal is upheld, that the Court should not remit the questions of costs to the SDT, but should make its own determination.

The Legal Framework

28. Section 49 of the Solicitors Act 1974 ("the 1974 Act") provides:

"49.— **Appeals from Tribunal**.

(1) An appeal from the Tribunal shall [lie to the High Court] (a)-(b)

(2) Subject to subsection (3) [and to section 43(5) of the Administration of Justice Act 1985], an appeal shall lie at the instance of the applicant or complainant or of the person with respect to whom the application or complaint was made.

(3) …

(4) The High Court shall have power to make such order on an appeal under this section as [it] may think fit."

29. Civil Procedure Rules ("CPR") 52.21 provides:

"(1) Every appeal will be limited to a review of the decision of the lower court unless—

(a) a practice direction makes different provision for a particular category of appeal; or

(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

…

(3) The appeal court will allow an appeal where the decision of the lower court was—

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."

30. Rule 43 of The Solicitors (Disciplinary Proceedings) Rules 2019 ("the 2019 Rules") provides:

"43.—(1) At any stage of the proceedings, the Tribunal may make such order as to costs as it thinks fit, which may include an order for wasted costs.

(2) The amount of costs to be paid may either be decided and fixed by the Tribunal following summary assessment or directed by the Tribunal to be subject to detailed assessment by a taxing Master of the Senior Courts.

(3) …

(4) The Tribunal will first decide whether to make an order for costs and will identify the paying party. When deciding whether to make an order for costs, against which party, and for what amount, the Tribunal will consider all relevant matters including the following—

(a) the conduct of the parties and whether any or all of the allegations were pursued or defended reasonably;

(b) whether the Tribunal's directions and time limits imposed were complied with;

(c) whether the amount of time spent on the matter was proportionate and reasonable;

(d) whether any hourly rate and the amount of disbursements claimed is proportionate and reasonable;

(e) the paying party's means.

(5) If the respondent makes representations about the respondent's means, the representations must be supported by a Statement which includes details of the respondent's assets, income and expenditure (including but not limited to property, savings, income and outgoings) which must be supported by documentary evidence."

31. In ***Zulfiqar Ali v. Solicitors Regulation Authority Limited*** [2021] EWHC 2709, Morris J (at paragraphs 91-94), summarised the legal framework which governs appeals made under section 49 of the 1974 Act:

"91. As regards the relevant principles which apply to appeals to this Court under s.49, first, the SRA bears the burden of proof and the relevant standard of proof is the criminal standard.

92. Secondly, CPR 52.10 and 52.11 apply to an appeal under s.49 of the 1974 Act. It is an appeal by way of review and not by way of rehearing: see special provision for a s.49 appeal is not made in CPR Practice Direction 52D. However where the appeal court is being asked to reverse findings of fact based on oral evidence, there is little, if any difference, between "review" and "rehearing": see *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642 §§13, 15 and 23.

93. Thirdly, the Court will only allow the appeal if the decision of the Tribunal was "wrong" or "unjust because of a serious procedural or other irregularity in the proceedings in the lower court" (CPR 52.21(3)(a) and (b)).

94. Fourthly, as regards the approach of the Court when considering whether the Tribunal was "wrong", I refer in particular to *Solicitors Regulation Authority v Day* [2018] EWHC 2726 (Admin) at §§61-78, *Solicitors Regulation Authority v Good* [2019] EWHC 817 (Admin) at §§28-32, the *Naqvi* Judgment at §83, citing *Solicitors Regulation Authority v Siaw* [2019] EWHC 2737 (Admin) at §§32-35, and most recently, *Martin v Solicitors Regulation Authority* [2020] EWHC 3525 (Admin) at §§30-33. From these authorities, the following propositions can be stated:

(1) A decision is wrong where there is an error of law, error of fact or an error in the exercise of discretion.

(2) The Court should exercise particular caution and restraint before interfering with either the findings of fact or evaluative judgment of a first instance and specialist tribunal, such as the Tribunal, particularly where the findings have been reached after seeing and evaluating witnesses.

(3) It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge would have reached. That is a high threshold. That means it must either be possible to identify a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence. If there is no such identifiable error and the question is one of judgment about the weight to be given to the relevant evidence, the Court must be satisfied that the judge's conclusion cannot reasonably be explained or justified.

(4) Therefore the Court will only interfere with the findings of fact and a finding of dishonesty if it is satisfied that that the Tribunal committed an error of principle or its evaluation was wrong in the sense of falling outside the bounds of what the Tribunal could properly and reasonably decide.

(5) The Tribunal is a specialist tribunal particularly equipped to appraise what is required of a solicitor in terms of professional judgment, and an appellate court will be cautious in interfering with such an appraisal.

Finally, as regards reasons, decisions of specialist tribunals are not expected to be the product of elaborate legal drafting. Their judgments should be read as a whole; and in assessing the reasons given, unless there is a compelling reason to the contrary, it is appropriate to take it that the Tribunal has fully taken into account all the evidence and submissions: *Martin*, supra, §33."

32. In ***Law Society v. Adcock*** [2006] EWHC 3212 (Admin) the Divisional Court considered the circumstances in which the High Court should disturb an order for costs made by the SDT. At paragraph 41 Waller LJ said:

"This court should only disturb an order for costs in rare circumstances and only if, in the exercise of its discretion, the tribunal has misdirected itself or reached a conclusion which this court would not have reached, and where the solution preferred by the tribunal has exceeded the general ambit within which a reasonable disagreement is possible."

33. In ***Barnes v. Solicitors Regulation Authority Ltd*** [2022] EWHC 677 (Admin) Cotter J considered an appeal under section 49 of the 1974 Act in which, as in this case, the SDT's decision on costs was the subject of the appeal. In that case the court held that the SDT had erred in the exercise of its discretion by making an order that the registrant could never realistically pay (paragraph 52). The court then exercised its discretion, and made no order as to costs.

The Submissions made on behalf of the Appellant

34. In relation to Ground 1, Mr Tankel:

i) Submitted that there is a burden on all professionals subject to a regulatory regime to engage with the regulator in relation to the ultimate resolution of allegations made against them (***GMC v Adeogba*** [2016] 1 WLR 3867 per Leveson P at [20]).

ii) Submitted that the Respondent neither fully engaged nor fully disengaged from the proceedings. He engaged in the process just enough for there to be a possibility that he would actively defend the allegations at trial, but not enough to achieve any practical cooperation between the parties. When he did engage, the Respondent was evasive and equivocal.

iii) Drew particular attention to the email sent by the Respondent on 19th January 2023 (being the Thursday before the SDT hearing opened on Monday 23rd

January 2023). Mr Tankel submitted that the email is an example of the Respondent's equivocation; the Respondent does not say whether or not he was planning to attend the hearing, although he does say that he would not be able to attend the hearing unless he missed work.

iv) Submitted that, as a result of the Respondent's unreasonable conduct the Appellant had no option other than to prepare for a two day contested hearing before the SDT.

35. In relation to Ground 2, Mr Tankel submitted that the SDT failed to take account, or adequate account, of the matters to which it was required to have regard by Rule 43(4)(a) to (d) of the 2019 Rules:

i) The SDT failed to consider whether the Respondent's conduct was unreasonable. The Appellant relies upon the conduct referred to in support of Ground 1. Further the Appellant relies upon the Respondent's failure to file an Answer stating which of the allegations (if any) are admitted and which (if any) are denied.

ii) The SDT failed to take account of the fact that the Respondent did not comply with the SDT's directions and time limits. The Appellant relies in particular, on the Respondent's failures to comply with the directions relating to the filing of an Answer.

iii) The SDT did not consider whether the time spent on the matter was proportionate and reasonable given that the Appellant had no choice but to prepare for a fully contested hearing.

iv) The SDT had no regard to the hourly rates of the Appellant's solicitors. The total time the Appellant's solicitors spent working on the matter was 59.4 hours. The SDT awarded the sum of £5,000 including VAT. If the £600 for investigatory costs is deducted, £4,400 remains. Accounting for VAT at 20%, £3,666.66 remains to pay the solicitors and counsel (£3,666.66 +20% = £4,400). Ignoring disbursements the effective hourly rate for the Appellant's solicitors is £61.72 per hour. The Ministry of Justice's guideline hourly rates for an outer London firm is £185 per hour for a newly qualified solicitor. Although that calculation ignores disbursements, those costs cannot be left out of account. Although the SDT expressed the view that it did not require counsel of Mr Tankel's call to draft the Rule 12 Statement, the SDT expressed no view on the appropriateness or otherwise of counsel of his call being instructed to attend the hearing.

v) The SDT was unable to take account of the Respondent's means as he did not comply with the direction to provide a Statement of Means.

Conclusions

36. I will deal with both grounds together

37. The issue to be considered is whether the SDT's decision on costs was wrong.

38. The SDT was empowered to make such order as to costs as it thought fit (rule 43(1) of the 2019 Rules).

39. A decision can be wrong where there is an error of law, or an error in the exercise of discretion.

40. I approach this issue with particular caution and restraint. It would only be appropriate to making a finding that there had been an error in the exercise of discretion if the decision is one which no reasonable tribunal could have reached. In order to come to that conclusion, it would be necessary to find that there was an error of law such as a failure to take into account matters which the legal framework provided should be taken into account, a demonstrable misunderstanding of relevant evidence, a demonstrable failure to consider relevant evidence, or a demonstrable failure in the chain of logic.

41. The SDT's decision on costs is set out at paragraphs 67 to 70 in the Judgment. The factors 'noted' by the SDT are set out at paragraph 69 of the Judgment.

42. Rule 43(4) states that the SDT will consider all relevant matters including those set out in that sub-rule. In my judgment it is clear that the following matters set out at rule 43(4) were relevant in this case:

    i) the conduct of the Respondent, in particular in providing equivocal responses to the allegations made against him, and in failing to state whether he planned to attend the substantive hearing fixed for the 23rd January 2023;

    ii) whether the Tribunal's directions and time limits imposed were complied with, in particular those relating to the filing and serving of an Answer;

    iii) whether the amount of time spent on the matter was proportionate and reasonable; and

    iv) whether any hourly rate and the amount of disbursements claimed is proportionate.

43. It is not necessary for a Tribunal to make express reference to rule 43(4). In order for a Tribunal to comply with the provisions of rule 43(4) it is necessary for a Tribunal to consider the substance of the matters specified if they are relevant to the determination of costs which they are undertaking.

44. Despite the fact that rule 43(4) states that the Tribunal will consider all relevant matters including those set out above, it is clear that, in its judgment, the SDT did not consider the matters set out at rule 43(4)(a) to (d) and referred to at paragraph [42] above.

45. In my judgment, by failing to consider those matters, the SDT erred in the exercise of its discretion, and fell into an error of law. The SDT failed to take into account matters which the legal framework provided should be taken into account. For both those reasons the decision made by the SDT on costs can properly be categorised as being wrong.

46. The appeal is made on two grounds. The facts relied upon in relation to Ground 1 are also relied upon in relation to Ground 2 (when addressing rule 43(4)(a) of the 2019 Rules).

i) As the conduct of the Respondent was relevant, and as the SDT did not consider whether the conduct of the Respondent required the Appellant to prepare unnecessarily for a fully contested hearing, the appeal succeeds on Ground 1.

ii) As the matters set out at rule 43(4)(a) to (d) were relevant, and were not considered by the SDT when exercising its discretion on costs, the appeal also succeeds on Ground 2.

47. For those reasons this appeal is allowed, and I quash the order in relation to costs.

48. I am asked by the Appellant to re-exercise the discretion afresh, and not to remit the matter to the SDT.

49. As noted by Cotter J in ***Barnes*** (at paragraph 54) the appellate court is in a very difficult position when it has to exercise a discretion relating to costs incurred in proceedings before a specialist disciplinary tribunal. I also have to take account of the fact that the Respondent did not appear and was not represented before me (and did not appear and was not represented before the SDT).

50. I have been provided with the full bundle of documents that was before the SDT. No witnesses were called before the Tribunal (Judgment paragraph 10.) In the circumstances, and as I have before me all the documents that were before the SDT, I do not consider that it would be proportionate to remit the issue of costs to the SDT for their consideration.

51. Mr Tankel submitted that the Appellant should be awarded costs in the sum claimed, being £22,800. Mr Tankel advanced the following submissions:

i) The full fixed fee of £18,500 plus VAT, and the £600 investigation costs should be awarded on the basis that:

a) If disbursements are deducted (£3,275 for drafting the Rule 12 Statement and £4,000 for the brief fee) the solicitors are left with £11,225. At 65.4 hours the blended hourly rate would be £171.64. That rate is below the £185 Ministry of Justice guideline rate for outer London newly qualified solicitors and is reasonable and proportionate; or

b) If disbursements are deducted (£3,275 for drafting the Rule 12 Statement and £4,000 for the brief fee) the solicitors are left with £11,225. At 59.4 hours (deducting the six hours allowed for the booked attendance of Ms Lines for the second day of the hearing) the blended hourly rate would be £189. That rate is close to the £185 Ministry of Justice guideline rate for outer London newly qualified solicitors and is reasonable and proportionate;

ii) As an alternative, if it is right to make a deduction to take account of the fact that the hearing lasted for one day, not two, the appropriate deduction is the refresher (at £2,000) and the six hours for the attendance of the solicitor at the hearing.

52. In assessing costs it is necessary to consider all relevant matters including those set out in rule 43(4) of the 2019 Rules.

53. It is also necessary to bear in mind the guidance set out at paragraph 65 of the SDT's Guidance Note on Sanctions (10th Edition June 2022) ("the Guidance Note"):

"The Tribunal, in considering the respondent's liability for the costs of the applicant, will have regard to the following principles, drawn from *R v Northallerton Magistrates Court, ex parte Dove* (1999) 163 JP 894:

• it is not the purpose of an order for costs to serve as an additional punishment for the respondent, but to compensate the applicant for the costs incurred by it in bringing the proceedings and

• any order imposed must never exceed the costs actually and reasonably incurred by the applicant."

54. A professional subject to a regulatory regime is under an obligation to engage with the regulator. That obligation applies to the investigation and to the formal disciplinary procedures. The Respondent failed to meet that obligation. The Respondent's failure to file and serve an Answer, as directed meant that the Appellant did not know whether the Respondent admitted the allegations made or denied them, or the basis upon which he denied them. The Respondent also failed to indicate whether he intended to attend the hearing fixed for 23rd January 2023. As a result of those failures on the part of the Respondent, the Appellant's only reasonable option was to prepare for a two day hearing on the assumption that the Respondent would attend, would wish to question the Appellant's witnesses, and would give evidence. As a result of the Respondent's conduct in failing to engage with the Appellant, the Appellant incurred the cost of preparing for a fully contested hearing.

55. The Respondent failed to comply with the SDT's directions, and in particular failed to file and serve an Answer as directed. As a consequence the Appellant incurred the cost of preparing for a hearing without knowing the Respondent's case. As a result it was reasonable for the Appellant to prepare for the hearing on the basis that it would last for two days, witnesses would have to be called, and that the Respondent would give evidence and be open to cross-examination.

56. The amount of time spent on the matter by the solicitors was 59.4 hours. Although, as found by the SDT (at paragraph 69 of the Judgment) the facts were straightforward and there were no complex legal issues, additional time had to be spent by the solicitors in providing the Respondent with documents, preparing for and attending a non-compliance hearing, preparing witness statements and preparing for the substantive hearing on the assumption that it would be contested, without knowing the basis on which it would be contested. I note that 9.9 hours was spent corresponding with and preparing witness statements for the two witnesses the Appellant intended to call to give evidence. I also note that 12 hours was spent preparing for the substantive hearing. In those circumstances, in my judgment, the number of hours spent was proportionate and reasonable.

57. Most of the work undertaken on the case was carried out by Ms Lines. Ms Lines was admitted in 2016 and is therefore more senior and experienced than a newly qualified solicitor. The other two lawyers who worked on the case were more experienced that Ms Lines, being, respectively, admitted in 2006, and called in 2004. The 'blended' rate for the 59.4 hours work undertaken was £189. On the basis that the Ministry of Justice guideline rate for newly qualified solicitors working in Outer London is £185, I consider the blended rate for lawyers who had various degrees of experience, and none of whom fell into the 'newly qualified' category, was proportionate and reasonable. The disbursements were to pay counsel's fees. Mr Tankel was called in 2009. The SDT did not indicate that it was unreasonable for the Appellants to instruct a barrister of Mr Tankel's seniority to represent them at the substantive hearing. In my judgment it was reasonable for the Appellant to instruct a barrister of Mr Tankel's call to represent it at the hearing before the SDT. The SDT did consider that it did not require counsel of Mr Tankel's call to draft the Rule 12 Statement. In my judgment it was reasonable for the Appellant to instruct the same barrister to draft the pleadings and to appear at the substantive hearing. If a more junior barrister had been instructed to draft the pleadings and a more senior barrister instructed to appear at the substantive hearing, it is likely that additional time would have been spent by the more senior barrister in preparing for the hearing. In my judgment it was reasonable and proportionate to incur the cost of instructing Mr Tankel to draft the Rule 12 statement and to appear at the substantive hearing. On the basis I conclude that the disbursements in the form of the brief fee and the fee for drafting the Rule 12 statement were reasonable and proportionate.

58. One factor taken into account by the SDT (at paragraph 69 second bullet point) in the Judgment was that the substantive hearing had taken less time than anticipated, being less than one day, as opposed to two days.

59. I agree with the SDT that the fact that the hearing lasted for one day not two days was a relevant factor to take into account when assessing costs.

60. If the hearing had lasted for two days the total sum claimed by the Appellant would have been £22,800. In my judgment it is appropriate to make some adjustment to reflect the fact that the substantive hearing lasted for one day not two.

61. On a summary assessment of costs the court has to exercise a judgment and to do the best it can on the information available. Taking that approach in my judgment the appropriate deduction to allow for the fact that the hearing went short is to deduct £2,000 which would have been spent on the refresher, and to deduct the fee for the six hours attendance by Ms Lines. I assess the fee for Ms Lines' attendance on the second day of the hearing at the Ministry of Justice Guideline rate for a newly qualified solicitor at £185 per hour, being £1,110 plus VAT (£1,332). Taking an overall approach I assess the costs at £19,468 (being the £22,800 claimed less £3,332).

62. For those reasons:

    i) The appeal is allowed;

    ii) The order made by the SDT in relation to costs is quashed; and

    iii) In the exercise of my discretion I assess the costs payable by the Respondent to the Appellant in respect of proceedings before the SDT at £19,468.