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Case No: CO/334/2018
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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/11/2018

Before:

LORD JUSTICE FLAUX
and
MR JUSTICE JEREMY BAKER

- -

Between:

SOLICITORS REGULATION AUTHORITY **Appellant**
- and –

SOVANI RAMONA JAMES

Respondent

SOLICITORS REGULATION AUTHORITY

Appellant

-and-

ESTEDDAR MARIAM MACGREGOR

Respondent

SOLICITORS REGULATION AUTHORITY **Appellant**

-and-

PETER NAYLOR

Respondent

Chloe Carpenter and Heather Emmerson (instructed by **the Legal Department, Solicitors Regulation Authority**) for the **Appellant** in the first and second cases
Chloe Carpenter and Andrew Bullock (instructed by **the Legal Department, Solicitors Regulation Authority**) for the **Appellant** in the third case
Geoffrey Williams QC and Paul Bennett (instructed by **Aaron & Partners LLP**) for the **Respondent** in the first case
Gregory Treverton-Jones QC (instructed by **Murdochs Solicitors**) for the **Respondent** in the second case
Fenella Morris QC (instructed by **Murdochs Solicitors**) for the **Respondent** in the third case

Hearing dates: 31 October and 1 November 2018

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Approved Judgment

Lord Justice Flaux:

Introduction

1. These three appeals under section 49 of the Solicitors Act 1974 by the Solicitors Regulation Authority ("SRA") against decisions of the Solicitors Disciplinary Tribunal ("SDT") have been ordered to be heard together by Supperstone J. In each case, the SDT made findings of dishonesty against the solicitor in question, but went on to find that there were "exceptional circumstances", in part because of issues as to the mental health of the solicitor in question, justifying the imposition of a lesser sanction than striking the solicitor off the Roll. In each case the sanction imposed was one of suspension which was itself suspended. The SRA now appeals each of those decisions essentially on the grounds that there were no "exceptional circumstances" and the sanction imposed was unduly lenient.

The factual background and the judgment of the SDT in *James*

2. The respondent, Ms James, was born in February 1983 and admitted to the Roll as a solicitor in July 2010. From 1 July 2010 until 12 February 2015 she was employed as a solicitor at McMillan Williams ("the firm"), specialising in clinical negligence litigation. She resigned on 5 November 2014 and left after serving her period of notice, joining the Roland Partnership as a solicitor.

3. In 2011, the firm was instructed by G in connection with a claim for treatment she had received from an NHS trust. Proceedings were commenced against the Trust in April 2012 and Ms James had the conduct of the case from May 2012 until she left the firm. Proceedings were served in August 2012 and, by a Consent Order dated 10 July 2013, the Particulars of Claim, Schedule of Loss and medical report were to be served by 29 July 2013. Ms James did not serve those documents by that date.

4. Between August 2013 and January 2015, she made a series of misleading statements on nine separate occasions to the client and to the firm about the current position on the file giving the impression that the proceedings had been stayed, judgment on liability had been obtained in G's favour and extensions of time for service of the Schedule of Loss and medical report had been granted by the NHS Trust. None of this was true.

5. On 11 or 12 November 2014, after her resignation, Ms James created four letters in Word format (one to the Trust, one to the hospital, one to the medical expert and one to the client G) which she back-dated to 25 September 2014 in order to create the impression that they had been sent on that date and thus to further the misleading impression that she had been progressing work on the file when she had not.

6. After Ms James left the firm, the true position emerged and the firm successfully applied to the Court for relief against sanctions under CPR 3.9 enabling the proceedings to continue, on condition that the firm paid the costs of the application.

7. The SDT heard the disciplinary proceedings against Ms James on 27 and 28 November 2017. It held in its judgment dated 4 January 2018 that dishonesty was established against Ms James beyond all reasonable doubt in respect of both the misleading statements and the back-dated letters, applying the objective test of

dishonesty as clarified by the Supreme Court in *Ivey v Genting Casinos Ltd* [2017] UKSC 67; [2018] AC 391. It is not suggested that there was any error of law in the application of that test.

8. The SDT found that the firm was a challenging place to work. It was seeking external investment which would bring time recording and billing under scrutiny. The senior management sought to pass pressure on to junior staff such as Ms James, with monthly publication of league tables to create competition between fee-earners. The SDT was particularly critical of an email from a senior manager in July 2012 complaining about a shortfall of Ms James' billed hours as against her target and a letter from the senior partner to Ms James in April 2013 requiring her to work evenings, weekends and bank holidays to make up chargeable hours. The SDT found this was a "notable example of bad, ineffective and inappropriate management."

9. Ms James had no recollection of receiving the email or letter but the SDT found that she was under pressure at work and in her personal life, due to problems with her partner that it is not necessary to rehearse here. The SDT accepted her evidence of feeling terrified and crying at work and that she had suffered hair loss. It summarised the position at [61]:

> "It was unusual for solicitors appearing before the Tribunal to use words such as "terrified" and "fear" in the context of the workplace. The use of those words gave an indication of the Respondent's vulnerability; small issues such as getting behind on a file had magnified to the extent that the consequences anticipated by the Respondent were dire and, in her own words, she felt as if she had a massive dark cloud hanging over her. The Respondent was vulnerable, isolated, dealing with difficult home circumstances, relatively young in terms of life experience, and in what she viewed as an environment that had become toxic to her. She had lost her confidence and felt that she was no good at a job that she had previously enjoyed. This was, in effect, a 'perfect storm' of circumstances."

10. It appeared that she had not sought any practical or medical assistance at the time. She was seen by a consultant psychiatrist, Dr Frazer, who produced a report dated December 2016 for the purposes of the disciplinary proceedings. His opinion was that, at the time, she was not suffering from an active mental disorder, but a mild depressive disorder with mixed anxiety. The hair loss was a recognised complication of that stress-related condition.

11. So far as relevant to the issues before the Court, the following findings made by the SDT are of significance. At [50] it concluded that Ms James' misconduct arose from actions which were spontaneous to begin with and then planned on an ad hoc basis. The misconduct had continued over a period of some 17 months and the harm it had caused was considerable. At [51] it found that the misconduct was not calculated in the sense that: "one lie led to another with inevitability rather than calculation" but this could not be described as a true "moment of madness" case. At [52] the SDT noted that she did not make good any loss or voluntarily notify the SRA, although it accepted that she had shown genuine insight and remorse.

12. At [57] the SDT said that these were serious matters and that the dishonesty alone justified striking off. The issue was whether "exceptional circumstances" could lead to a lesser sanction. The SDT summarised the legal principles (which I set out in more detail later in this judgment) in a manner which is accepted by the SRA to be a correct self-direction, but it is said that the finding of "exceptional circumstances" was clearly inappropriate because it failed to apply that legal test.

13. The SDT rejected the submission on behalf of the SRA that minimal weight should be given to Dr Frazer's report. It considered that: "[Ms James'] mental health and in particular the conditions of depression and anxiety were a feature of the dishonest conduct and in particular the length of time for which it was perpetuated". At [59], the SDT said:

> "During the last 10 to 15 years, and in particular in the last 5 years or so, awareness and openness concerning mental health issues have developed. Management at law firms and elsewhere should be more alert to the warning signs, which included, amongst other things, decline in performance, physical symptoms of distress, and uncharacteristic behaviour such as a drop in reliability. Management should be able to respond appropriately, for example by providing access to external counselling services. We have all become much more aware of bullying and harassment in the workplace which can have a significant impact on employees, particularly those who might be described as being vulnerable."

14. At [61], immediately before the passage which I quoted at [9] above, the SDT said:

> "The root cause of the Respondent's misconduct, including the allegations of dishonesty, was the combination of the culture of the Firm in terms of pressures placed on junior solicitors and her mental ill-health arising from the pressures of work allied with difficult personal circumstances. It was necessary to look at these overriding features cumulatively. This Respondent had an egg-shell skull personality at the time of these events. The impact of letters such as that written by Mr Smith and the culture of the Firm was greater than it would have been on a fee earner without an 'egg-shell skull'."

15. The SDT referred to the fact that three years had passed since the events in question and Ms James had got her life back on track, continuing to work as a solicitor within a supporting environment. Her current employer had provided a reference. The SDT was convinced she had learned from her mistakes as shown by those three trouble-free years. The level of insight shown and the changes she had made reassured the SDT that a member of the public would conclude that she was well on the way to rehabilitation. The misconduct did not have any lasting impact on the reputation of the wider profession and the public perception of the profession as a whole.

16. The SDT concluded that the circumstances were exceptional and that the appropriate and proportionate sanction was a period of suspension of two years from 28 November 2017, itself to be suspended for three years from the same date, subject to

compliance with a Restriction Order. That Order prohibited her from practice as a sole practitioner and otherwise than under the direct supervision of a partner as well as prohibiting her from being a partner or member of a LLP or a compliance officer, from holding client money or being a signatory on a client account. She could only work as a solicitor in employment approved by the SRA and was required to inform any prospective employer of the existence of these conditions and the reasons for them.

The factual background and the judgment of the SDT in *MacGregor*

17. The respondent, Mrs MacGregor, was born in November 1964 and admitted to the Roll as a solicitor in June 1991. The allegations related to the period between July 2014 and April 2015 during which she was a salaried partner, the Managing Partner and the Compliance Officer for Legal Practice ("COLP") at the solicitors' firm of Ziadies ("the firm") albeit that she only worked part time.

18. As recorded by the SDT at [8] of its judgment it was common ground that by July 2014, Mrs MacGregor was aware that: (i) the firm had been over-claiming for disbursements from the Legal Aid Agency ("LAA") in respect of travel expenses and travel time claimed by interpreters; (ii) Mrs Abeyewardene ("Mrs Abey"), the equity partner and head of immigration work, was seeking to conceal those improper claims and had embarked on a scheme to mislead the LAA as to which interpreters had provided services on given days, including false invoices and (iii) Mrs Abey was thus engaged in serious misconduct.

19. The LAA had made a request in June 2014 for 150 immigration files to be produced for the period 2009 to 2012 for an audit. In July 2014, Mrs Abey informed Mrs MacGregor that the files sent to the LAA did not contain invoices and that new invoices were being prepared to indicate that people other than YF and KM (the two interpreters used by the firm) had acted as interpreters since the LAA could not be told that all interpretation on a given day had been by YF or KM as this would show the firm had over claimed for travel time and there was also a concern that YF acted part time as office manager so that travel time could not be claimed at all or required apportionment. Mrs MacGregor noted that Mrs Abey had a number of calendars on her desk which she was allocating to these other people who had not been interpreters and cross-checking new false invoices against those calendars.

20. Mrs MacGregor was horrified by this discovery and regarded Mrs Abey's conduct as "a lie" and "a fraud covering a fraud". She considered it was wrong and told Mrs Abey so. She appreciated that as COLP she had a duty to report it to the SRA. She did not do so as she feared for the health of Mrs Abey.

21. A few days later in July 2014, Mrs Abey asked Mrs MacGregor to assist in cross-checking the invoices against the calendars. Mrs MacGregor appreciated that the purpose of this exercise was to ensure the dates of false invoices did not clash with what the other people had been doing on those dates. Mrs MacGregor proceeded to assist in cross-checking the invoices. She undertook the same exercise on three or so further occasions over the next few days. She ceased to undertake any cross-checking thereafter on the basis that she felt it was wrong. However, although she was the COLP and had a duty to report such wrongdoing to the SRA, she did not immediately do so and did not make a report for some 8-9 months.

22. The LAA set out its findings following the file review in a letter of 20 March 2015. It concluded there had been systematic gross over-claiming for disbursements and profit costs. Most files did not have invoices for interpreters on them and interpreters had worked on files as fee-earners. The LAA requested repayment of £1,022,952. Mrs Abey subsequently offered to pay £800,000 in full and final settlement, which was accepted by the LAA. Mrs MacGregor made an initial report to the SRA on 1 April 2015 and following the taking of legal advice, her solicitors, Murdochs Solicitors made a detailed report about concerns with the immigration department on 26 April 2015. In those reports she was frank about her own involvement.

23. Mrs Abey was also the subject of disciplinary proceedings and the two cases were originally due to be heard together. Mrs Abey procured an adjournment on the grounds of ill-health and Mrs MacGregor applied successfully for the two cases to be severed. The disciplinary hearing against Mrs MacGregor before the SDT took place on 11 December 2017. The SDT produced a judgment dated 19 January 2018, but this remained embargoed and not made public until the proceedings against Mrs Abey had been concluded. In the event, Mrs Abey admitted professional misconduct including dishonesty and agreed with the SRA that she should be struck off. That course was approved by the SDT in its judgment of 26 July 2018. The judgment against Mrs MacGregor became public thereafter.

24. By its judgment against Mrs MacGregor, the SDT found proved beyond reasonable doubt the allegation that by failing to report the conduct of Mrs Abey to the SRA from July 2014 to April 2015, Mrs MacGregor committed serious misconduct in breach of SRA Principles and Code of Conduct (which allegation was admitted by Mrs MacGregor). The SDT found at [20.14]:

> "The Respondent had not behaved in a way that maintained the trust the public placed in her and in the provision of legal services. The public would not expect a solicitor to take any part in a process that they knew was being done for improper reasons whatever the solicitor's personal motivation for their conduct."

25. In relation to the allegation of dishonesty in assisting Mrs Abey in cross-checking invoices, Mrs MacGregor denied that she had acted dishonestly. However, the SDT found, applying the *Ivey* test, at [21.52]:

> "The Respondent was, in the Tribunal's opinion, in a distressed and pressured state of mind but she had knowledge of the underlying facts as to the improper exercise and had considered what was being done to be wrong. The Tribunal was sure that the Respondent's conduct was dishonest applying the objective standard of ordinary decent people. She had been dishonest. Allegation 2 was proved beyond reasonable doubt."

As in the case of James, it is not suggested that the SDT misapplied the test.

26. The SDT found at [32] of its judgment that the only motivation for Mrs MacGregor's misconduct had been to protect Mrs Abey. She had possibly buried her head in the sand hoping that the LAA would realise what had happened with the invoices, so that

she would not need to report it. Her initial participation in the cross-checking of invoices had been spontaneous. It noted that as COLP she had acted in breach of a position of trust, given her responsibility to report matters once she was aware what was happening. There had potentially been some loss to the LAA. At [33] the SDT found the level of harm caused by her misconduct was low. The public would be quite sympathetic to her position. The harm to the reputation of the profession was therefore limited to a degree, albeit any finding of dishonesty harmed its reputation. At [34], the SDT found the misconduct in failing to report had continued over a period of time and was deliberate. It was an aggravating factor that she knew or ought to have known that she was in material breach of her obligations to protect the public and the reputation of the legal profession.

27. In considering whether there were exceptional circumstances justifying a lesser sanction than striking off for the dishonesty, the SDT said at [37]:

> "At the time of the dishonest misconduct, the Respondent was under a very high level of pressure both at work and at home. The Respondent was clearly an anxious person and there was medical evidence to support the fact that she may react in a particular way to certain triggers, for example around her fear of people dying. The Tribunal could not be certain that the Respondent was suffering from a mental disorder at the time of the cross-checking and the medical evidence was inconclusive. It was clear that all of the circumstances, including the Respondent's concern for Mrs A's health, placed her in a situation where she perceived unbearable pressure and this impacted on her well-being and functioning. She was deeply loyal to Mrs A and allowed her concern for her to affect her ability to conduct herself to the standards of a reasonable solicitor. In the very unusual circumstances of this case the Tribunal found that there were exceptional circumstances and that sanction should be reduced accordingly."

28. At [39] the SDT concluded that the seriousness of the misconduct and the need to protect the public and the reputation of the profession justified the sanction of suspension for two years. However, it concluded that by suspending that suspension and imposing a restriction order; "the risk of harm to the public and the public's confidence in the reputation of the legal profession was proportionately constrained. The combination of such an order with a period of pending suspension provided adequate protection." The period of suspension of the suspension would be three years given that Mrs MacGregor had not admitted her dishonesty and given her vulnerability. The restrictions imposed were essentially the same as in *James*.

The factual background and the judgment of the SDT in *Naylor*

29. The respondent, Mr Naylor, was born in August 1982 and admitted to the Roll as a solicitor in September 2006. From May 2010 until September 2014 he was employed as an associate solicitor in the Corporate Department of TLT LLP ("the firm") having previously been a trainee at the firm from September 2004 to September 2006 and an assistant solicitor at the firm from September 2006 until May 2010.

30. In July 2013, he was instructed by a client of the firm, H, in relation to applications to the FCA to facilitate the restructuring of three companies, the deadline for which was 31 March 2014. At around this time Mr Naylor was under considerable pressure at work. He had seen his doctor in February 2011 and April 2013 with stress-related symptoms and depression. In mid-2013 he decided to forego the opportunity to pursue partnership. From July 2013 to February 2014, his work was more stressful and contentious than usual and in the period to December 2013 he was working almost every weekend. He had little time off over Christmas, only seeing his family on Christmas Day. After New Year he went to see the two partners to whom he reported and explained that he was unable to cope with the pressure he had been under for the previous six months. He was tearful at the meeting and described himself as "broken". He was already aware of an opportunity to be seconded to D and the firm was supportive of his taking this position and agreed to it in principle. It was indicated that he would be given a break to complete as many tasks as possible before taking up the secondment on 1 March 2014, but this did not happen and he was assigned two new pieces of work which meant he worked right up until leaving on the secondment.

31. Mr Naylor took the file on the H matter with him when he went on secondment to D. He had not in fact made the necessary applications to the FCA before the deadline of 31 March 2014. However he sent the client five emails on 6 March, 15 April, 28 April, 12 May and 17 June 2014 giving the misleading impression that the applications had been submitted and a response from the FCA was awaited. None of this was true.

32. The file was returned by Mr Naylor to the firm and handled by another associate solicitor. Ultimately the applications to the FCA could be made after 31 March 2014 and the only loss suffered by H was the cost of preparing a further set of accounts in relation to the three companies.

33. At a meeting with the firm's COLP in December 2014, Mr Naylor admitted that he had taken the file with him to D but had not been able to deal with it and that he had suggested to the client that matters were more advanced than they were. In the light of those admissions, the firm made a report to the SRA in January 2015. Mr Naylor has remained employed by D.

34. He was seen by a consultant psychiatrist, Dr Wilkins, who produced a report dated 25 May 2017 for the purposes of the disciplinary proceedings. That report was considered by the medical expert instructed by the SRA, Dr Garvey, who agreed with the opinions expressed. For present purposes, it is only necessary to refer to their Agreed Statement dated 10 and 16 November 2017. It was agreed that Mr Naylor had no history of serious mental illness but was suffering at the material time from an adjustment disorder as a reaction to severe stress. He had a lifelong history of poor responses to stress and, from an early stage had taken life decisions which recognised his vulnerabilities. When under acute stress at the material time, he had reverted to previous patterns of behaviour of avoidance and denial. It was not possible to say with certainty that he was not capable of being honest in the key period. However, even if he was capable of being honest, his predisposing vulnerabilities would have been difficult to resist and would have been likely to overcome any underlying appreciation of professional and personal obligations.

35. The SDT heard the disciplinary proceedings against Mr Naylor on 16 January 2018. It held in its judgment dated 31 January 2018 that misconduct was established in relation to his failure to progress the applications to the FCA and his misleading of the client. It also found that in relation to the emails he had sent Mr Naylor had acted dishonestly. It held that the medical evidence did not establish that he did not know the difference between acting dishonestly and acting honestly. Accordingly, his actual state of mind was that he knew that the information he provided in the emails was not true and by the objective standards of ordinary decent people this was dishonest. The SDT thereby correctly applied the *Ivey* test.

36. In assessing the seriousness of the misconduct, the SDT made the following findings in [62] of its judgment:

> "The Tribunal had to determine the overall seriousness of the misconduct. In order to do so it considered the Respondent's culpability, the harm caused and aggravating and mitigating factors. In respect of culpability the Tribunal accepted that the Respondent had suffered from mental health issues and this affected what he did. The Respondent was not acting for any particular gain. The Tribunal considered that his actions were spontaneous in that he reacted to the emails he received and the situation he found himself in. Having misled the client once and not ensured what need to happen had happened on the file the Respondent's actions appeared to be neither planned nor spontaneous but reactive to the resulting situation he found himself in. The Respondent had significant post qualification experience at the time of the misconduct. The Respondent had acted in breach of a position of trust. He was client H's solicitor and a client expects and is entitled to expect their solicitor to tell the truth. Client H had had to prepare an extra set of accounts due to the Respondent's actions. The Respondent had direct control of and responsibility for the circumstances giving rise to the misconduct. The Respondent's level of culpability was best described as "mixed". It would have been much higher but for the medical evidence."

37. The SDT went on to find at [63] that there was some harm caused to H and a risk of harm to the reputation of the profession, limited by the impact of Mr Naylor's mental health on his actions. The harm, whilst it might have been reasonably foreseen was not intended by him. In [64] the SDT held that whilst the dishonesty was not deliberate or calculated, it was repeated and continued over a period of time. He concealed his wrongdoing until challenged by the firm. Whilst these were aggravating factors, the SDT considered on the basis of the medical evidence that he did not appreciate that his conduct was a material breach of his obligations to protect the public and the reputation of the profession.

38. At [65] the SDT noted as mitigating factors his previous unblemished career and the references speaking highly of him, that the misconduct related to only one client and that with the benefit of hindsight he had insight into his mental health and its impact on him. He had made open and frank admissions to the firm and had co-operated with the SRA.

39. At [66] the SDT recognised that the misconduct was serious and that a finding of dishonesty would almost invariably lead to striking off the Roll unless there were exceptional circumstances. At [67], the SDT said that:

> "The Tribunal was sure that the misconduct arose at a time when the Respondent was affected by mental ill health that affected his ability to conduct himself to the standards of the reasonable solicitor. The Tribunal had before it the reports from Dr Wilkins and Dr Garvey together with their agreed statement. The Tribunal concluded that the Respondent's mental ill health was an exceptional circumstance."

40. Having found exceptional circumstances, the SDT went on to conclude at [68] that the appropriate sanction was a two year suspension reflecting the seriousness of the misconduct and the fact that public confidence in the legal profession demanded no lesser sanction given the finding of dishonesty. The SDT went on to consider whether Mr Naylor's right to practice needed to be removed for the suspension period and concluded that it did not. It considered that with a restriction order the period of suspension could be suspended for two years. In the same terms as the SDT in *MacGregor* it concluded at [69] that by the imposition of a restriction order: "the risk of harm to the public and the public's confidence in the reputation of the legal profession was proportionately constrained; and that the combination of such an order with a period of pending suspension provided adequate protection". The terms of the restriction order were essentially the same as in the other two cases under appeal, save that there was an additional condition, because of the SDT's concern as to how he reacted to stress and pressure, that Mr Naylor should provide half-yearly medical reports to the SRA on his mental health. The SDT decided that this was a significant safeguard both for him and the protection of the public. The first such report was to be submitted by 16 July 2018. We were informed that the first report was produced on time and raised no concerns about his mental health.

Applicable legal principles

41. The applicable legal principles both as to sanction and as to the approach to be adopted by this Court to an appeal against the decision of the SDT on sanction were in large measure not in issue between the parties on appeal. Where there were differences, I will highlight them. In relation to the following summary, I acknowledge my indebtedness to the lucid exposition of the applicable legal principles set out by Carr J in [60]-[72] of her judgment in *Shaw v Solicitors Regulation Authority* [2017] EWHC 2076 (Admin); [2017] 4 WLR 143.

42. In his classic judgment in this area in *Bolton v Law Society* [1994] 1 WLR 512 at 518B-H, Sir Thomas Bingham MR stated that the almost invariable sanction for dishonesty was striking off the Roll of solicitors. The purpose of the sanction was not just punishment and deterrence but most fundamentally in order to maintain the reputation of the profession:

> "Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal.

> Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors. Only infrequently, particularly in recent years, has it been willing to order the restoration to the Roll of a solicitor against whom serious dishonesty had been established, even after a passage of years, and even where the solicitor had made every effort to re-establish himself and redeem his reputation…
>
> It is important that there should be full understanding of the reasons why the tribunal makes orders which might otherwise seem harsh. There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention. Particularly is this so where a criminal penalty has been imposed and satisfied. The solicitor has paid his debt to society. There is no need, and it would be unjust, to punish him again. In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission."

43. In *Fuglers LLP v Solicitors Regulation Authority* [2014] EWHC 179 (Admin), Popplewell J said at [28] that there were three stages to the correct approach for the SDT to sanction:

> "The first stage is to assess the seriousness of the misconduct. The second stage is to keep in mind the purpose for which sanctions are imposed by such a tribunal. The third stage is to choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question."

44. This analysis is approved in [7] of the SDT Guidance Note on Sanctions (5th edition December 2016). At [47] the Guidance Note states, citing the decision of the

Divisional Court in *Solicitors Regulation Authority v Sharma* [2010] EWHC 2022 (Admin): "The most serious misconduct involves dishonesty, whether or not leading to criminal proceedings and criminal penalties. A finding that an allegation of dishonesty has been proved will almost invariably lead to striking off, save in exceptional circumstances."

45. In [13] of his judgment in that case Coulson J (with whom Laws LJ agreed) summarised the principles to be derived from earlier authorities in considering what amount to "exceptional circumstances":

> "It seems to me, therefore, that looking at the authorities in the round, that the following impartial points of principle can be identified: (a) Save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the Roll, see *Bolton* and *Salsbury*. 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 *Salsbury*. (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 over 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."

46. As Carr J noted in *Shaw* at [63] citing this passage, the courts have studiously and rightly avoided seeking to define what does and what does not amount to "exceptional circumstances", as this is a fact specific exercise in each individual case: see per Dove J in *R (Solicitors Regulation Authority) v Imran* [2015] EWHC 2572 (Admin) at [20].

47. Further guidance in relation to the assessment of whether there are exceptional circumstances in a particular case is provided by Dove J in that case at [19] and [24]:

> "19. Clearly, at the heart of any assessment of exceptional circumstances, and the factor which is bound to carry the most significant weight in that assessment is an understanding of the degree of culpability and the extent of the dishonesty which occurred. That is not only because it is of interest in and of itself in relation to sanction but also because it will have a very important bearing upon the assessment of the impact on the reputation of the profession which Sir Thomas Bingham MR (as he then was) in *Bolton* identified as being the bedrock of the tribunal's jurisdiction.
>
> 24. It is necessary, as the tribunal did, to record and stand back from all of those many factors, putting first and foremost in the assessment of whether or not there are exceptional circumstances the particular conclusions that had been reached about the act of dishonesty itself."

48. It is important to note that both *Sharma* and *Imran* emphasise that in assessing whether a particular case of dishonesty falls into the small residual category where exceptional circumstances can be established so that striking off is not appropriate, the principal focus in determining whether exceptional circumstances exist is on the nature and extent of the dishonesty and the degree of culpability.

49. Although we were referred by counsel to decisions of the Divisional Court or Court of Appeal on appeal from the SDT in other cases, because the assessment is a fact-specific one in each case, like Carr J in *Shaw* I do not consider that there is any benefit in considering the specific findings and conclusions on the facts in other SDT cases. This point was made forcefully by Moses LJ in the Divisional Court in *Solicitors Regulation Authority v Emeana* [2013] EWHC 2130 (Admin) at [25].

50. Ms Fenella Morris QC on behalf of Mr Naylor emphasised that there are degrees of dishonesty and of culpability for it, which is obviously correct. She relied upon the medical disciplinary cases, specifically *Lusinga v Nursing & Midwifery Council* [2017] EWHC 1458 (Admin) to submit that where what is involved is what Kerr J in that case described as "attenuated dishonesty" rather than "heinous criminal dishonesty", the SDT was entitled more readily to conclude that there were "exceptional circumstances". In my judgment some caution must be exercised in seeking to draw parallels between the solicitors' cases and the medical cases. Whilst it is no doubt true that much of what Sir Thomas Bingham MR said in *Bolton* as to the purpose of the sanction, namely the need to protect the reputation of the profession, is equally applicable to the medical profession (see *Bawa-Garba v General Medical Council* [2018] EWCA Civ 1879 at [76]), it is important to have in mind that the discretion of the Medical Practitioners Tribunal as to restoring a doctor to the register is a wide one unfettered by any gloss or limitation of "exceptional circumstances": see *General Medical Council v Chandra* [2018] EWCA Civ 1898 at [49]-[51] per Eleanor King LJ.

51. In the context of the solicitors' cases, striking off is the almost invariable sanction for any dishonesty and whilst dishonesty at the lowest end of the scale may mean that the case falls within the small residual category of cases justifying a lesser sanction, it will not do so unless the overall assessment is that there are "exceptional circumstances". There is thus a limitation on the discretion of the SDT which is absent for the Medical Practitioners Tribunal Service in medical cases. Likewise, it is no answer to striking off being the almost inevitable sanction for dishonesty for a solicitor to point to other more serious cases of dishonesty where the solicitor had been struck off and suggest that because his dishonesty was less serious, he should not be struck off. This point was made by Moses LJ in *Emeana* at [26]:

> "The principle identified in *Bolton* means that in cases where there has been a lapse of standards of integrity, probity and trustworthiness a solicitor should expect to be struck off. Such cases will vary in severity. It is commonplace, in mitigation, either at first instance or on appeal, whether the forum is a criminal court or a disciplinary body, for the defendant to contend that his case is not as serious as others. That may well be true. But the submission is of little assistance. If a solicitor has shown lack of integrity, probity or trustworthiness, he cannot resist striking off by pointing out that there are others

> who have been struck off, who were guilty of far more serious offences. The very fact that an absence of integrity, probity or trustworthiness may well result in striking off, even though dishonesty is not proved, explains why the range of those who should be struck off will be wide. Their offences will vary in gravity. Striking off is the most serious sanction but it is not reserved for offences of dishonesty."

52. Furthermore, as Carr J said in *Shaw*, whilst personal mitigation may be relevant to the overall assessment of whether there are "exceptional circumstances", caution should be exercised in placing reliance on it for the reasons given by Sir Thomas Bingham MR in *Bolton* at 519B-E (as set out at [53] of the Guidance Note):

> "Because orders made by the Tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking-off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again … All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness … The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price."

53. Turning to the approach to be adopted by this Court to an appeal from the SDT, the appeal is by way of review not rehearing: CPR 52.21(1) so that the Court will only allow an appeal where the decision is shown to be "wrong": CPR 52.21(3)(a). The SDT is an expert tribunal particularly well-placed to assess what sanction is required in the interest of the profession and it is well-established that the Court will pay considerable respect to the decision of the SDT on sanction and only interfere if the sanction passed was "in error of law or clearly inappropriate": see the authorities cited by Carr J at [69] and [70] in *Shaw*. Furthermore, given that the assessment by the SDT of whether "exceptional circumstances" justified departure from the almost invariable sanction for dishonesty of striking off is an evaluative multi-factorial decision, there is limited scope for an appellate court to overturn such a decision, as has recently been emphasised by the Court of Appeal (Lord Burnett of Maldon CJ, Sir Terence Etherton MR and Rafferty LJ) in the judgment of the Court in *Bawa-Garba* at [61] and following, citing the jurisprudence on this issue.

54. At [67] in *Bawa-Garba* the Court of Appeal emphasised the need for particular caution in relation to decisions of specialist tribunals, there the Medical Practitioners Tribunal Service:

> "That general caution applies with particular force in the case of a specialist adjudicative body, such as the Tribunal in the present case, which (depending on the matter in issue) usually has greater experience in the field in which it operates than the courts: see *Smech* at [30]; *Khan v General Pharmaceutical Council* [2016] UKSC 64, [2017] 1 WLR 169 at [36]; *Meadow* at [197]; and *Raschid v General Medical Council* [2007] EWCA Civ 46, [2007] 1 WLR 1460 at [18]-[20]. An appeal court should only interfere with such an evaluative decision if (1) there was an error of principle in carrying out the evaluation, or (2) for any other reason, the evaluation was wrong, that is to say it was an evaluative decision which fell outside the bounds of what the adjudicative body could properly and reasonably decide: *Biogen* at 45; *Todd* at [129]; *Designers Guild Ltd v Russell Williams (Textiles) Ltd (trading as Washington DC)* [2001] FSR 11 (HL) at [29]; *Buchanan v Alba Diagnostics Ltd* [2004] UKHL 5, [2004] RPC 34 at [31]. As the authorities show, the addition of "plainly" or "clearly" to the word "wrong" adds nothing in this context."

55. The Court of Appeal returned to this point at [94] of its judgment:

> "As we said earlier in this judgment, the Tribunal was, in relation to all those matters and the carrying out of an evaluative judgement as to the appropriate sanction for maintaining public confidence in the profession, an expert panel, familiar with this type of adjudication and comprising a medical practitioner and two lay members, one of whom was legally qualified, all of whom were assisted by a legal assessor. As Lord Hope said in *Marinovich v General Medical Council* [2002] UKPC 36:
>
> > "28. ... In the appellant's case the effect of the Committee's order is that his erasure is for life. But it has been said many times that the Professional Conduct Committee is the body which is best equipped to determine questions as to the sanction that should be imposed in the public interest for serious professional misconduct. This is because the assessment of the seriousness of the misconduct is essentially a matter for the Committee in the light of its experience. It is the body which is best qualified to judge what measures are required to maintain the standards and reputation of the profession.""

56. Applying those principles to the present appeals, this Court should only interfere with the decision of the SDT to impose a lesser sanction than striking off because of the existence of "exceptional circumstances" if satisfied that in reaching the particular decision the SDT committed an error of principle or its evaluation was wrong in the sense of falling outside the bounds of what the SDT could properly and reasonably decide. I do not consider that the earlier appellate decisions such as *Shaw* which have only interfered with the sanction imposed by an expert disciplinary tribunal where that

sanction was "in error of law or clearly inappropriate" were applying any different test to that confirmed by *Baba-Garba*. This is clear from [72] of *Shaw* where Carr J said:

> "When considering a decision made in the exercise of a discretion at first instance, the appellate court will only interfere if the first instance tribunal has exceeded the generous ambit within which a reasonable disagreement is possible (see for example *Tanfern Ltd v Cameron-MacDonald (Practice Note)* [2000] 1 WLR 1311."

Submissions of the parties

57. The principal ground of appeal in all three appeals was that the SDT had erred in principle or made an evaluation which was wrong in that *Baba-Garba* sense in concluding that there were "exceptional circumstances" justifying the imposition of a lesser sanction than striking off. Ms Chloe Carpenter for the SRA submitted that the lesser sanction of suspension (let alone the suspension of that suspension) was clearly inappropriate and that the Court should allow the appeals and substitute the sanction of striking off the respondents. She submitted that, in each of the three cases, in making an assessment of whether exceptional circumstances existed the SDT had failed to focus on the critical factors identified in *Sharma* and *Imran*, namely the nature, scope and extent of the culpability and dishonesty and whether it was momentary or over a period of time.

58. She submitted that in each case the SDT had focused on other matters than these in reaching its conclusion that there were exceptional circumstances, specifically issues such as pressure of work and mental health issues, stress and depression. These were effectively matters of personal mitigation which could not be equated with exceptional circumstances. She also submitted that it was important in cases of dishonesty not to allow issues of sympathy for the respondent or his or her personal mitigation to lead to too lenient a sanction. This would have the effect of lowering the tariff and making it difficult to strike off the Roll for dishonesty, a point made by Kennedy LJ in *Bultitude v The Law Society* [2004] EWCA Civ 1853 at [46]:

> "I appreciate that for Mr Bultitude the proceedings have been lengthy and the penalty is devastating. It is now 15 months since he was before the Solicitors' Disciplinary Tribunal. But in my judgment, even on the facts as found in the Divisional Court, there was in this case no room for any finding other than that he be struck off. As Mr Treverton-Jones submitted, if leniency were to be extended in this case, that would lower the tariff so that it would in practice become difficult to strike off anyone not shown to be dishonest however gross his breach of the rules, and it would even become difficult to strike off anyone guilty of dishonesty not amounting to theft. That is at variance with the authorities and would be perceived by the profession and by the public as detrimental. That is why, in my judgment, it was necessary to set aside the lesser penalty imposed with some hesitation by the Divisional Court."

59. In each of the cases, there was an alternative ground of appeal (if the Court was against the SRA on its primary case) that the sanction imposed should have been suspension and that such suspension should not have been suspended. Ms Carpenter accepted that, because of the wide wording of section 47(2) of the Solicitors Act 1974, the SDT had power to suspend a suspension, just as it had power to impose conditions on a practising certificate, as held by the Divisional Court in *Camacho v The Law Society* [2004] EWHC 1675 (Admin); [2004] 1 WLR 3037. She pointed out that it was a relatively new form of sanction: apart from these cases there had only been four cases of suspension of suspension (one of which had been approved by the SRA) since 2016.

60. The SDT Guidance Note dealt with the availability of this form of sanction at [38]:

> "Where the Tribunal concludes that the seriousness of the misconduct justifies suspension from the Roll, but it is satisfied that:
>
> • by imposing a Restriction Order, the risk of harm to the public and the public's confidence in the reputation of the legal profession is proportionately constrained; and
>
> • the combination of such an Order with a period of pending Suspension provides adequate protection
>
> the Tribunal may suspend that period of suspension for so long as the Restriction Order remains in force."

61. [34] of the Guidance Note sets out examples of restrictions which could be imposed by a Restriction Order. Ms Carpenter submitted that, in the present cases, the SDT had done no more than find that the risk of harm to the public and the public's confidence in the reputation of the legal profession would be proportionately constrained by a Restriction Order without explaining how and why. The SDT had then essentially cut and pasted the restrictions set out in [34] (with the exception of the additional requirement of regular medical reports in the case of Mr Naylor) without considering how those restrictions would constrain the risk of harm to the public or public confidence in the reputation of the profession. Ms Carpenter invited the Court to give guidance as to when, if at all, suspension of suspension would be appropriate and what restrictions would be appropriate in cases of dishonesty.

62. Even if suspension of suspension was the appropriate sanction in these cases, Ms Carpenter had specific criticisms of the form of Order in each case, in particular that the Order should have made clear (as would a suspended sentence Order in the Crown Court) that the suspension would be activated if further misconduct was committed and that the restrictions imposed did not relate to the misconduct found, as they should have done.

63. Turning to the specific appeals, in *James*, Ms Carpenter submitted that whilst the SDT had directed itself correctly as to the law in [57] of the judgment, it had then failed to apply that at all, but in [58] to [63] had not focused on the nature and extent of the dishonesty as it should have done but on personal factors affecting Ms James, particularly (i) the considerable pressure she was under at work because of the culture

of the firm and her personal circumstances and (ii) her mental health issue, namely the stress related disorder. She took issue with the suggestion on behalf of Ms James that her situation was unique, making the point that many professionals suffer stress. Solicitors are highly trained and given great responsibility so they must be able to conduct themselves honestly even when under stress. No amount of stress or depression because of pressure at work can justify dishonesty, a point made by Rupert Jackson LJ in *Solicitors Regulation Authority v Wingate and Evans; Malins v Solicitors Regulation Authority* [2018] EWCA Civ 366; [2018] 1 WLR 3969 at [164].

64. Ms Carpenter was also critical of what she described as a number of errors in the reasoning process of the SDT, although she emphasised that she did not need these criticisms for the appeal to succeed. I have considered the various matters set out at [14] of her Skeleton Argument. I do not consider that they exhibit anything significant by way of error in the reasoning process, but equally it does not follow that the SDT may not have been wrong in its evaluation of the appropriate sanction. I do not propose to say anything more about those matters.

65. In response, Mr Geoffrey Williams QC emphasised the role of the SDT as an expert tribunal with whose evaluations the Court should be reluctant to interfere unless the evaluation was outside the range of possible outcomes, relying on *Baba-Garba* at [67] and [94]. He also relied upon [60] of the judgment of Treacy LJ in the Divisional Court in *Solicitors Regulation Authority v Andersons Solicitors* [2013] EWHC 4021 (Admin) to submit that the Court should only interfere if there was an error of law, a failure to take account of relevant evidence or a failure to provide proper reasons, none of which was applicable here. With respect to Mr Williams QC, this is a false point. In that paragraph, Treacy LJ is dealing with the test in relation to an appeal against conviction or acquittal, not an appeal against sanction i.e. sentence. He deals with the test for an appeal against sanction in the next paragraph, [61], where he cites the well-known passage from the judgment of Rupert Jackson LJ in *The Law Society v Salsbury* [2008] EWCA Civ 1285; [2009] 1 WLR 1286 at [30] that the Court will interfere if the sanction is in error of law or clearly inappropriate. He reiterates at [64] that this is the test and, therefore, is not adumbrating some different test from the other cases to which I have already referred.

66. Mr Williams QC submitted that the need for caution before interfering was all the greater here because the SDT overlooked nothing and took everything into account. In relation to sanction at [50], the SDT had concluded that having made an inadvertent mistake, Ms James then told a lie to the client which then led to further lies. The SDT had made adverse findings that she had acted in breach of a duty of trust and caused considerable harm to a vulnerable client and at [52] that she had not taken steps to make good any loss arising.

67. Mr Williams QC emphasised the findings of the SDT about the toxic and abominable culture of the firm and its effect on Ms James' physical and mental health, supported by statements of other ex-employees of the firm. He also relied upon the expert evidence of Dr Frazer (not challenged by the SRA) that it was personal pressures at home and at work and her fear and anxiety which had led to her misleading the firm and not telling them the true position.

68. He submitted that [61] of the judgment (much of which I quoted at [9] and [14] above), culminating in the finding that there was a "perfect storm" of circumstances,

was the operative paragraph so far as exceptional circumstances were concerned. There and at [63] where the SDT had found that a member of the public would realise that the events were fact-specific and likely to be extremely rare, so that the misconduct would not have a lasting impact on the reputation of the profession and the public perception of it, the SDT had set out cogent reasoning with which the Court should not interfere.

69. Mr Williams QC acknowledged, in relation to the sanction of suspended suspension, that the restrictions imposed were essentially cut and pasted from the Guidance Note and had nothing to do with the particular problem of the respondent's misconduct. However, the sanction was justified since the key to her misconduct was a lack of fortitude mentally, set against the background of a vile working environment.

70. In *MacGregor*, Ms Carpenter emphasised that Mrs Abey was fabricating false invoices and false names of interpreters and allocating calendars to those other people. As COLP, the respondent had a duty to report this dishonest misconduct to the SRA which she did not for 8 months, hence the allegation of lack of independence which was admitted. Mrs MacGregor had then participated in the cross-checking on four occasions, knowing that she was doing so to enable Mrs Abey to create false invoices. Ms Carpenter submitted that the submission on behalf of Mrs MacGregor that by this involvement Mrs MacGregor was not giving false information to third parties, was incorrect. Even though she did not send the false invoices herself, she was aware Mrs Abey was doing so, the information she was cross-checking was not accurate and the whole exercise in which she participated was designed to prevent the LAA discovering the truth.

71. Ms Carpenter was critical of a number of passages in the judgment which she submitted were erroneous. The finding on culpability at [32] underestimated the degree of Mrs MacGregor's culpability. The only proper conclusion would have been that it was high. Ms Carpenter submitted that the passage on harm at [33]: "The Tribunal considered that the public, if they were aware of the misconduct, would be quite sympathetic to the Respondent's situation. The harm to the reputation of the legal profession was therefore limited to a degree albeit any finding of dishonesty harmed the reputation of the profession" also underestimated the extent of harm and was wrong as a matter of law. It was inconsistent with [20.14] (quoted at [24] above) and any dishonesty caused harm. Likewise [34] of the judgment underplayed the aggravating factors, specifically that Mrs MacGregor had engaged in dishonest conduct on four occasions and then concealed the wrongdoing. In relation to mitigation, the SDT said at [35]: "The Respondent did have genuine insight and had made open and frank admissions, except in relation to dishonesty." Ms Carpenter challenged this, pointing out that Mrs MacGregor had not notified the SRA promptly, indicating a lack of insight.

72. Ms Carpenter was particularly critical of the finding on the seriousness of the misconduct at [36]: "The overall level of misconduct was quite serious but would not have been considered to be at the most serious end of the spectrum of misconduct that the Tribunal has to consider but for the allegation of dishonesty that had been found proved." This underplayed the seriousness of the misconduct which was more than "quite serious". She submitted that this erroneous finding infected the finding on exceptional circumstances at [37] which I quoted at [27] above.

73. Ms Carpenter submitted that [37] did not focus on the key issue of the nature and extent of the dishonesty, but focused instead on mitigating factors, in particular (i) the pressure which Mrs MacGregor was under and (ii) her loyalty to Mrs Abey. If the SDT had focused on the most significant issue of the nature and extent of the dishonesty, it should have concluded that the overall misconduct was very serious: Mrs MacGregor had failed as COLP to report her partner's fraud, then became embroiled in it, then not reported the overall misconduct including her own for another eight to nine months. Misconduct this serious was such that striking off was required to protect the public and the reputation of the profession. The public would expect a solicitor not to condone dishonest schemes, whatever the circumstances. It was no answer to say Mrs MacGregor had acted as she did out of loyalty, when in a sense that loyalty had been found by the SDT to breach Principles 2 and 6.

74. Mr Gregory Treverton-Jones QC began his submissions on behalf of Mrs MacGregor by submitting that, because she and Mrs Abey were not dealt with together by the SDT and the hearing and judgment in the case of Mrs MacGregor preceded any hearing in the case of Mrs Abey, the SDT was not able explicitly to take account of the huge gulf in culpability between the two of them. Mrs Abey was the author, perpetrator and beneficiary of the fraud. They should have been tried together and had they been it would have been entirely unremarkable if Mrs Abey had been struck off the Roll and Mrs MacGregor suspended.

75. I can deal with this point straight away. In my judgment it is a false point. Mrs MacGregor applied for severance so that it was her own choice that she and Mrs Abey were not tried together. Also, as I have said, the judgment against Mrs MacGregor was embargoed and not made public until the proceedings against Mrs Abey had concluded. Accordingly, there is no question of the SDT having to make limited findings lest anyone think it was prejudging the case against Mrs Abey, nor does one have any sense, reading the judgment, that the SDT felt itself under any restraint. In any event, merely because Mrs Abey's misconduct and dishonesty was much more serious, so that she would inevitably be struck off, does not mean that Mrs MacGregor's misconduct and dishonesty, whilst at a lower level of culpability, were not still sufficiently serious for striking off to be the correct sanction. This is the point Moses LJ was making in *Emeana* at [26].

76. In relation to "exceptional circumstances" Mr Treverton-Jones QC emphasised what he said were five unusual features. First Mrs MacGregor was not the prime mover in the dishonesty but, in effect, an aider and abetter. Second, she was extremely reluctant to become involved in the fraud. Third she had made no personal benefit. She was paid an hourly rate for 24 hours a week and she did not work on immigration cases, so that she did not derive her income from this work. Fourth there was the unusual motivation for her involvement. Her relationship with Mrs Abey was one of employer and employee. Whilst the SDT found that she was not frightened of Mrs Abey and could stand up to her, the fact remained that Mrs Abey was the equity partner, in control of the firm, describing herself as a benevolent dictator. Superimposed on the employer/employee relationship was the fact that they were close friends and she had a deep loyalty towards Mrs Abey. They were both very committed Christians and prayed together every morning.

77. In addition, Mrs MacGregor feared for Mrs Abey's health, which was poor, if she did not help her or if she reported her. This fear was borne out by the fact that when Mrs

MacGregor did report Mrs Abey to the SRA, she did collapse. In addition to those features of her involvement, Mrs MacGregor was personally vulnerable and suffered from sleep deprivation and depression. Mr Treverton-Jones QC referred us to the reports of a psychotherapist who was familiar with the family situation and of a psychiatrist who said she suffered from an adjustment disorder with mixed anxiety.

78. The fifth feature Mr Treverton-Jones QC identified was that Mrs MacGregor had only a short period of involvement in the fraud, that her participation was "spontaneous" (as the SDT found at [32]), that after only two or three days she stopped voluntarily and refused to have anything more to do with the cross-checking.

79. Mr Treverton-Jones QC submitted that Ms Carpenter's criticism of the SDT finding at [35] that Mrs MacGregor had insight on the basis that she had not admitted dishonesty was misplaced. At the time of her witness statement and until shortly before the hearing, the law on dishonesty had been thought to require both subjective and objective dishonesty as per the second limb of the test in *R v Ghosh* [1982] QB 1053, so that she had been entitled to say that she did not think she was being dishonest. The law had changed or been clarified by the Supreme Court in *Ivey* which disapproved the second limb of the *Ghosh* test (see per Lord Hughes JSC at [74]-75]), but that judgment was only given on 25 October 2017. I can see the force of this submission and would not regard Mrs MacGregor's defence of herself in her witness statement as indicating a lack of insight. As Mr Treverton-Jones QC pointed out, when Mrs MacGregor did eventually report to the SRA in April 2015, her report included her own involvement.

80. He submitted that, although, as he accepted, [37] of the judgment was slightly opaque reasoning, the SDT did refer there to "all of the circumstances" so that the Court should conclude that the SDT did have in mind all the factors, including the nature and extent of the dishonesty.

81. On the sanction of suspended suspension, Mr Treverton-Jones QC suggested that this form of sanction was being used by the SDT because in the modern era, the practical effect on a solicitor of suspension was the same as striking off. A suspension would have to be reported to professional indemnity insurers and even if they were prepared to provide cover going forward, the premium would be prohibitive. He referred the Court to the submissions to the same effect he had made in *Bryant v Solicitors Regulation Authority* [2012] EWHC 1475 (Admin) at [16]-[17].

82. In *Naylor*, Ms Carpenter's first ground of appeal was that the SDT had committed an error law in its finding of "exceptional circumstances" because, unlike in the other two cases, it had failed to direct itself on *Sharma* at all. Although the SDT had mentioned *Sharma* in [66] of the judgment when stating the overall principle that: "A finding that an allegation of dishonesty has been proved will almost invariably lead to striking off, save in exceptional circumstances (*Sharma*)", it had not, in dealing with exceptional circumstances at [67] (quoted at [39] above), directed itself as to the relevant factors derived from *Sharma*. This was an error of law. The SDT had only identified Mr Naylor's mental health as the exceptional circumstance in [67]. Ms Carpenter disputed the submission by Ms Morris QC that the SDT's other findings in [62] to [66] could be read into [67].

83. The second ground of appeal was the same ground as in the other cases, that in finding exceptional circumstances and concluding that the appropriate sanction was suspended suspension rather than striking off, the SDT had reached a decision on sanction which was clearly inappropriate. Even if Ms Morris QC was right that the earlier findings could be read into [67], the SDT had failed to engage in the balancing exercise required in an assessment of whether exceptional circumstances exist. It had failed to focus on the nature and extent of the dishonesty and the degree of culpability. This was sustained and repeated misleading of the client in five emails over a period of three months in relation to the progress of a case where he had in truth failed to progress the file at all.

84. Ms Carpenter submitted that what the SDT did focus on, the mental ill health of the respondent, could not itself amount to exceptional circumstances. She submitted that the reasoning in the first sentence of [67] was not clear. It seemed that the SDT was saying that but for the stress and depression from which he was suffering, Mr Naylor would not have done what he did. However, that did not impinge on his dishonesty, since the medical evidence was not to the effect that he did not understand what he was doing. The SDT had found that, despite the depressive disorder from which Mr Naylor was suffering, he did know the difference between acting honestly and acting dishonestly so that, for the purposes of the *Ivey* test, he knew that the information he had provided the client in the emails was untrue.

85. Ms Carpenter relied upon the decision of the Divisional Court in *Solicitors Regulation Authority v Farrimond* [2018] EWHC 321 (Admin). The facts of that case were far removed from the present. It concerned a solicitor who pleaded guilty to attempted murder of his wife. Psychiatric evidence was found to reduce his culpability substantially by the judge in the Crown Court, but not completely and he was sentenced to 6 years imprisonment. The allegations of professional misconduct subsequently made against him by the SRA were admitted. The SDT found that the appropriate sanction was indefinite suspension. The SRA appealed on the ground that the sanction should have been striking off. The appeal was allowed by the Divisional Court. Ms Carpenter relied on two passages in the judgments.

86. At [28] Garnham J said:

> "It must be emphasised that Mr Farrimond pleaded guilty to a very serious offence. Powerful mitigation was advanced on his behalf but that did not alter the character of the offence itself: there was no question of his suffering a defect of reason due to disease of the mind such that he did not know the nature or quality of his act or that it was wrong. His illness did not therefore provide a defence to the charge; he recognised this fact by his plea of guilty and he acknowledged it before this court. The sentencing judge felt able substantially to reduce the sentence to reflect the powerful mitigation but nonetheless, recognising the seriousness of the criminality involved, imposed a significant punishment. In my view, the commission of an offence of attempted murder, on facts such as these, is wholly incompatible with remaining on the Roll of Solicitors or remaining an officer of the Court."

87. Sir Brian Leveson P said at [35]:

> "Furthermore, the work of a solicitor, in whatever field he or she practises, inevitably involves a degree of stress and the public must be able to expect that those whom they consult are not so susceptible to mental ill health that they are at risk of behaving as Mr Farrimond did, however difficult the work might become."

88. Ms Carpenter relied upon these passages in support of her submission that where there was dishonesty (or in that case serious criminal conduct) and the respondent was suffering from mental ill health, but the medical evidence did not establish that the respondent did not know what he was doing, the mental ill health could not amount to exceptional circumstances justifying a lesser sanction than the almost invariable one of striking off. It did not protect the public or the reputation of the profession to impose a lesser sanction where even though suffering from stress and depression, the respondent had understood that what he was doing was wrong.

89. Ms Carpenter had a further ground of appeal that the SDT had wrongly stated at [64] that the misconduct was not "deliberate". She submitted that this must infect its reasoning since, by definition dishonesty is deliberate. I can deal with this point shortly straight away. In my judgment this is an example of the SDT expressing itself in infelicitous terms. I agree with Ms Morris QC that what the SDT meant was that the dishonesty was not planned or otherwise premeditated. It is clear from their finding of dishonesty at [45.23] and [45.24] that they appreciated that to be dishonest conduct had to be deliberate.

90. In relation to the sanction of suspended suspension, Ms Carpenter accepted that by including in the restrictions imposed the requirement of regular psychiatric reports the SDT had provided some link with the misconduct proved. However, she challenged the requirement that the reports should give an opinion on Mr Naylor's fitness to practice, as this was an abdication by the SDT of its function.

91. In her helpful and cogent submissions on the applicable legal principles, Ms Morris QC emphasised that the evaluation by the SDT of whether there are exceptional circumstances, whilst it included the nature, scope and extent of the dishonesty and the other matters identified in *Sharma* and *Imran*, was not limited to those factors. As a matter of principle nothing was excluded as being relevant to the evaluation, which could therefore include personal mitigation including mental health. Merely because a tribunal had concluded that the mental health issue did not preclude or excuse misconduct, it did not mean that that issue could not "come in again" when the appropriate sanction was being considered.

92. She relied in this context on a passage in the judgment of the Court of Appeal (Judge, Longmore and Jacob LJJ) in *Campbell v General Medical Council* [2005] EWCA Civ 250; [2005] 1 WLR 3488 at [19]:

> "In a different context, the error under consideration may need to be examined in the context of a dedicated practitioner working in isolation and under huge pressure of, say, an epidemic. Such circumstances may be relevant to the question

> whether he should be found guilty of serious professional misconduct. It may indeed provide mitigation of circumstances, unrelated to penalty. If notwithstanding this evidence the case is proved, then precisely the same circumstances may also be relevant to mitigation of penalty."

93. This point was also made by the Court of Appeal in *Bawa-Garba* at [77] in discussing the fact that there can be different degrees of culpability for particular misconduct, there gross negligence manslaughter:

> "The Tribunal was just as much entitled to take into account, in determining the appropriate sanction, systemic failings on the part of the Trust, as part of the context for Jack's tragic death and Dr Bawa-Garba's role in it, as well as matters of personal mitigation, as Nicol J was entitled to do in determining the appropriate sentence for her crime: *R (Campbell) v Council v General Medical Council* [2005] EWCA Civ 250; [2005] 1 WLR 3488 at [19]."

94. She submitted that these passages demonstrated that, in considering culpability for the purposes of determining the appropriate sanction, the tribunal could take account not just of any mental health issues, but of the combination of those issues with a high pressure workplace for an individual who was unable to cope.

95. Ms Morris QC placed particular emphasis on the passages from *Bawa-Garba*, some of which I quoted in setting out the applicable legal principles, in submitting that, as this was a multi-factorial evaluation by a specialist expert tribunal, the Court should be particularly reluctant to interfere. She relied in particular on the passage from Lord Hoffmann's speech in *Biogen Inc v Medeva Plc* [1997] RPC 1 at 45 quoted at [61] of *Bawa-Garba*:

> "…specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (*as Renan said, la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

96. In seeking to uphold the judgment of the SDT, Ms Morris QC drew attention to passages in the judgment setting out the respondent's case that the working environment was an unforgiving one, where there was a reduction in support and the enormous and pressurised workload which he faced in the relevant period. She referred to the meeting he had had with his superiors in January 2014 where he was tearful and described himself as broken and how they had been understanding and promised a reduction in work before he went on secondment, but he had been loaded with further work right up till the moment that he went on secondment.

97. She referred to the medical evidence in the case that Mr Naylor knew what he was supposed to do but was so affected by the adjustment disorder that he reverted to

avoidance and denial and that what he had done was entirely out of character and aberrant. She submitted that whilst there was dishonesty, it was at the lower end of the scale which was material in determining whether there were exceptional circumstances. His mind set was relevant because of the medical evidence that he would not have acted as he did but for his mental health problems. Those mental health problems were caused by workplace stress which he had sought to address with his superiors. There was thus a combination of factors in this case which was a critical feature.

98. Ms Morris QC took issue with Ms Carpenter's submission that, because the SDT had only specifically mentioned Mr Naylor's mental health issues in [67] of its judgment, it had failed to consider the most important factors of the nature and extent of the dishonesty and the degree of culpability. She submitted that the SDT was considering all the factors and taking the view that mental health was an exceptional circumstance in the context of the case as a whole and coloured by the totality of the circumstances.

99. If that submission was not accepted, Ms Morris QC relied upon the matters set out in the respondent's notice which contended that the Court should determine that this was a case where there were exceptional circumstances, on the basis that, even though the SDT had not set out in [67] all the factors which made the case exceptional, they were to be found elsewhere in the judgment.

Analysis and conclusions

100. Notwithstanding the careful and attractively presented submissions made on behalf of all three respondents, I am firmly of the view that, in all these cases, in concluding that there were "exceptional circumstances" justifying a lesser sanction than striking off the Roll, the SDT both erred in principle and was wrong, in the sense that it made evaluative decisions which were outside the bounds of what it could properly and reasonably decide. Put another way, the sanction imposed was, in each case, unduly lenient and clearly inappropriate. My reasons for reaching that conclusion are as follows as regards the cases in general.

101. First, although it is well-established that what may amount to exceptional circumstances is in no sense prescribed and depends upon the various factors and circumstances of each individual case, it is clear from the decisions in *Sharma, Imran* and *Shaw*, that the most significant factor carrying most weight and which must therefore be the primary focus in the evaluation is the nature and extent of the dishonesty, in other words the exceptional circumstances must relate in some way to the dishonesty. This point was made very clearly by Dove J at [29] of *Imran*, where he said:

> "…in my view it is not possible when assessing exceptional circumstances simply to pick off the individual features of the case. It is necessary, as the tribunal did, to record and stand back from all of those many factors, putting first and foremost in the assessment of whether or not there are exceptional circumstances the particular conclusions that had been reached about the act of dishonesty itself. The fact that many solicitors may be able to produce testimonials and may immediately confess the dishonest behaviour is certainly relevant to the

> determination of whether or not it is an exceptional case, but is not a factor that is likely to attract very substantial weight. Of far greater weight would be the extent of the dishonesty and the impact of that dishonesty both on the character of the particular solicitor concerned but, most importantly, on the wider reputation of the profession and how it impinges on the public's perception of the profession as a whole."

102. Of course, Ms Morris QC is right that what can be considered in an evaluation of whether exceptional circumstances exist is not limited to the matters emphasised in *Sharma* and *Imran* but can and will include matters of personal mitigation including mental health issues and workplace pressures. What was said by the Court of Appeal in *Campbell* and *Bawa-Garba* is applicable to solicitors' cases as well, subject to the caveat I mentioned earlier, that the broad discretion as to sanction afforded to the Medical Practitioners Tribunal Service is not circumscribed by the limitation of "exceptional circumstances" in determining whether a lesser sanction than striking off is appropriate.

103. Inevitably, an assessment of the nature and extent of the dishonesty and the degree of culpability will involve an examination of what Ms Morris QC termed the "mind set" of the respondent, including whether the respondent is suffering from mental health issues and the workplace environment, as part of the overall balancing exercise. However, where the SDT has concluded that, notwithstanding any mental health issues or work or workplace related pressures, the respondent's misconduct was dishonest, the weight to be attached to those mental health and working environment issues in assessing the appropriate sanction will inevitably be less than is to be attached to other aspects of the dishonesty found, such as the length of time for which it was perpetrated, whether it was repeated and the harm which it caused, all of which must be of more significance. Certainly, it is difficult to see how in a case of dishonesty, as opposed to some lesser professional misconduct, the fact that the respondent suffered from stress and depression (whether alone or in combination with extreme pressure from the working environment) could without more amount to exceptional circumstances, a matter to which I return below.

104. Therefore, whilst the mental health and workplace environment issues in any given case will not be a "trump card" in assessing whether there are exceptional circumstances, they can and should be considered as part of the balancing exercise required in the assessment or evaluation. The problem in the present cases is that the SDT has not engaged in that balancing exercise. Whilst it is correct that in all three judgments the SDT made findings as to the length of time of the dishonesty, its seriousness and the harm caused in earlier passages of the judgments, when the SDT came in each case to its evaluation of whether there were exceptional circumstances justifying a lesser sanction, it did not focus on those critical questions of the nature and extent of the dishonesty and degree of culpability and engage in the balancing exercise which the evaluation requires between those critical questions on the one hand and matters such as personal mitigation, health issues and working conditions on the other. Had it done so, it should have concluded that in none of these cases could the dishonesty be said to be momentary. In *James* the dishonest conduct extended over 17 months and in *Naylor* over some 3 months. True it is that in *MacGregor*, the dishonesty was only for a period of 2-3 days, but that has to be seen in the context of

the other misconduct found, the failure of Mrs MacGregor as COLP of the firm to report the fraud and misconduct for another 8 months. Furthermore, in each case the dishonesty was not isolated but was repeated on a number of occasions. In each case, the dishonesty caused harm, in two of the cases to the client (who in one case was vulnerable) and in the other to the LAA.

105. In my judgment, if the SDT had focused on the nature and extent of the dishonesty in determining whether there were exceptional circumstances in each of these three cases, they could not have concluded that a lesser sanction than striking off was appropriate for serious repeated misconduct of this kind, in two of the cases misleading the client and the firm and in the other assisting in the commission of a fraud and then, in effect, in its concealment. I do not consider that, in cases of repeated dishonesty and misconduct of this kind, the lesser sanction of suspension (let alone suspended suspension) addresses the risk of harm to the public or the need to maintain the reputation of the profession which, as all the case law since *Bolton* demonstrates, is the principal purpose of the sanction.

106. It is striking that, as Ms Carpenter pointed out, the only two reported cases where the Courts have considered striking off not to be the appropriate sanction for dishonesty are cases of isolated dishonesty. In *Burrowes v The Law Society* [2002] EWHC 2900 (Admin) the appellant had prepared wills for a married couple. When he met them at the office there was no-one else there. He explained that two witnesses would be required but the clients instructed him that they wanted to execute the wills there and then without witnesses. He explained the wills would be invalid but they were insistent. They each signed their own will and the appellant, in what he described later as "a moment of madness", added details as witnesses of two employees of his firm. He wrote this out in his handwriting without any attempt to disguise it. One of the employees saw the will the following day and realised she had not witnessed it. She reported this to a partner who raised it with the appellant, who then prepared new wills which were duly executed. The matter was reported promptly to the Law Society, which did not at that stage require it to be reported to the Office for the Supervision of Solicitors ("OSS", the predecessor of the SRA). It was only reported to the OSS 12 months later, when the partner to whom the matter had been reported left the firm in some acrimony.

107. In that case, the SDT ordered the appellant to be struck off the Roll. The Divisional Court (Rose LJ and Fulford J) considered that an "obviously excessive and disproportionate penalty" in the unusual circumstances of the case. In his judgment at [17] and [18], Rose LJ placed particular emphasis on the fact that the misconduct was isolated and out of character and that the Law Society had not required the matter to be reported to the OSS, so that it would not have come to light had the partner not left the firm on acrimonious terms.

108. In *Imran* the respondent had been caught speeding by a speed camera. He completed the section 172 notice with completely false details of the driver of the car given to him by someone at a garage. Some 18 months later he was contacted by the police who were investigating how false details had come to be given. He promptly wrote to them accepting he had given incorrect details. He was prosecuted for perjury, pleaded guilty and was sentenced to two months imprisonment. He was then charged by the SRA. Because of the narrow way in which the charge was drawn, the SDT only permitted the allegation of dishonesty to be pursued by the SRA in respect of the day

he had filled in the details on the section 172 notice. In its judgment, the SDT accepted the respondent's evidence that this was not a carefully planned piece of dishonesty but something which occurred on the spur of the moment and within a very short period of time (see the citation from the SDT judgment at [14] of the judgment of Dove J and [25] of his judgment).

109. The SDT considered that there were exceptional circumstances in that case so that suspension for a period of two years was a sufficiently severe sanction to maintain the reputation of the profession. This decision was upheld by Dove J on the basis that, in considering whether there were exceptional circumstances, the SDT had had at the heart of its decision the culpability of the respondent and the effect of his dishonesty on the reputation of the profession: see [30] of his judgment, to be contrasted with the way in which the SDT conducted its evaluations in the present cases. On analysis both *Burrowes* and *Imran* were thus cases of "a moment of madness", to be contrasted with the dishonesty and misconduct in each of the present cases, which was repeated and over a period of time. It is no doubt correct, as Ms Morris QC in particular submitted, that the dishonesty here was not heinous criminal dishonesty, but it was more serious than the attenuated dishonesty of which Kerr J spoke in *Lusinga*.

110. The second reason for my conclusion is that I do not consider that mental health issues, specifically stress and depression suffered by the solicitor as a consequence of work conditions or other matters can, without more, amount to "exceptional circumstances", justifying a lesser sanction than striking off where the SDT has found dishonesty. By definition, in applying the *Ivey* test, the SDT in these cases made findings as to the actual state of mind of the respondents, specifically that, despite any mental health issues, each of them knew the difference between honesty and dishonesty and knew that what he or she was doing was dishonest. In each case, the SDT went on to conclude that, applying the objective standard of ordinary decent people, the conduct was dishonest (see [23.12] of the judgment in *James*, [21.52] of the judgment in *MacGregor* and [45.24] of the judgment in *Naylor*).

111. In the light of submissions by Ms Morris QC to the effect that in *Naylor* the SDT had said that ordinary decent people would be likely to be sympathetic to Mr Naylor in the light of his mental health issues, it is important to put that point in context. What the SDT concluded at [45.24] was this:

> "Whilst ordinary decent people were likely to be sympathetic to the Respondent, particularly in light of his mental-health issues, they would not expect the Respondent to provide his client with information he knew to be untrue. Ordinary decent people would consider this a dishonest thing to do. Allegation 2 was proved beyond reasonable doubt."

112. The SDT having concluded that, notwithstanding mental health issues, each of the respondents was dishonest, I consider that it was contrary to principle for it then to conclude that those mental health issues could amount to exceptional circumstances. I agree with Ms Carpenter that, whilst in no sense belittling the stress and depression from which the respondents suffered, it was in no sense exceptional. It is sadly only too common for professionals to suffer such conditions because of pressure of work or the workplace or other, personal, circumstances. It is of course correct that issues of stress and depression (or other mental health issues) should be taken into account

by the SDT in assessing whether there are exceptional circumstances (as is clear from one of the "exceptional circumstances" cases, *Burrowes*, at [17]). However, the presence of such mental health issues cannot, without more, amount to such "exceptional circumstances". The effect of the contrary approach would be that exceptional circumstances would no longer be a narrow residual category of case, but much more the norm. This would entail precisely the sort of lowering of the tariff which Kennedy LJ deprecated at [46] of *Bultitude*.

113. The third reason for my conclusion is that, in my judgment, pressure of work or extreme working conditions whilst obviously relevant, by way of mitigation, to the assessment which the SDT has to make in determining the appropriate sanction, cannot either alone or in conjunction with stress or depression, amount to exceptional circumstances. Pressure of work or of working conditions cannot ever justify dishonesty by a solicitor, the point being made by Rupert Jackson LJ in *Wingate and Evans/Malins* at [164]. The same point was being made in *Farrimond*, particularly by Sir Brian Leveson P, albeit in a case of serious criminal misconduct rather than dishonesty. It may be that pressure of work or an aggressive, uncaring workplace could excuse carelessness by a solicitor or a lapse of concentration or making a mistake, but dishonesty of any kind is a completely different and more serious matter, involving conscious and deliberate wrongdoing, whether it is stealing from the client account or telling lies to the client (as in two of these cases) or assisting some else in a fraud (as in *MacGregor*). It does not seem to me that this point is altered by the fact that, in at least one of these cases, *James*, the pressure on the respondent was caused in large part by a culture in the firm which was toxic and uncaring. That may provide an explanation for her dishonesty having occurred, but it cannot excuse it and, therefore, cannot amount to exceptional circumstances justifying a lesser sanction.

114. Turning to the individual cases, in *James*, despite Mr Williams QC's submissions as to the cogency of the analysis and reasoning of the SDT, I consider that the problem with its conclusion that the circumstances in Ms James' case were exceptional is that it focuses on issues of personal mitigation such as the stress Ms James was under given the toxic working environment and fails to focus on the most significant factor which is the nature and extent of the dishonesty and the degree of culpability. Had the SDT focused on that factor, it would have concluded, in line with its findings of dishonesty, that she had dishonestly misled the client and the firm as to progress on the case over a 17 month period and that she had deliberately back-dated four letters to cover up that what she had said to the client and the firm was misleading and that she had not made the progress on the case which she had claimed (see 23.12 of the judgment). This was not isolated dishonesty or a moment of madness but repeated dishonesty over a sustained period of time. It caused harm to the client. As I have said, the toxicity of her working environment may go some way towards explaining the dishonesty although it cannot excuse it, so that it may be said to reduce her culpability, but the difficulty is that the SDT has not engaged in the balancing exercise which the case law requires. Had it done so, it should have concluded that this was not a case within the narrow category of "exceptional circumstances" justifying a lesser sanction, so that striking Ms James off the Roll was the appropriate sanction and only that would properly and adequately protect the public and the reputation of the profession.

115. In *MacGregor* I agree with many of Ms Carpenter's criticisms of the SDT's findings and analysis at [32] to [37]. It is no doubt true, as the SDT said at [38] that Mrs MacGregor had put personal loyalty before professional responsibility but, as with the paragraphs preceding it, this underplays the seriousness of her misconduct. As COLP, she had a duty to report Mrs Abey's misconduct to the SRA and given that what was entailed was fraud, personal considerations of loyalty or concern for Mrs Abey's health and wellbeing could not excuse her failure to do so. She then became involved in the fraud herself, albeit for a relatively short period of time. Personal loyalty to Mrs Abey could not possibly condone crossing the line into dishonesty and there is no question of her having been overborne by Mrs Abey into doing so, since her own evidence was that she was able to stand up to Mrs Abey. Having participated in the fraud she then failed to report it to the SRA for another eight to nine months, effectively concealing it and enabling Mrs Abey to continue trying to deceive the LAA.

116. Mr Treverton-Jones QC's reliance on the medical evidence has to be viewed with considerable circumspection since twice in the judgment the SDT found that the medical evidence was inconclusive. At [21.50] in its decision on dishonesty the SDT said: "The medical evidence before the Tribunal was inconclusive but there was no medical evidence that the Respondent was suffering from a medical disorder at the time that meant that she did not know right from wrong." The same conclusion was repeated at [37]: "The Tribunal could not be certain that the Respondent was suffering from a mental disorder at the time of the cross-checking and the medical evidence was inconclusive." Accordingly, in this case it cannot be said that the respondent's mental health caused her to act as she did. The highest it can be put is, as the SDT said at [21.52] quoted at [27] above, that she was in a "distressed and pressured state of mind".

117. Of course, in the balancing exercise involved in assessing whether there were "exceptional circumstances", those aspects of personal mitigation including her state of mind, her misplaced loyalty and concern for Mrs Abey's health have to be considered, but those cannot be given as much weight as the SDT appears to have given them. In all such cases, the most important factor to be accorded most weight is the nature and extent of the dishonesty and the degree of culpability. The problem with the SDT's reasoning on "exceptional circumstances" and, specifically, [37], is that it has not focused on that factor at all but only on the pressure Mrs MacGregor was under and her loyalty to Mrs Abey and therefore has not engaged in the balancing exercise. I do not regard the passing reference to "all the circumstances" as even beginning to demonstrate that the SDT did engage in the balancing exercise.

118. Had it done so, it should have concluded that the dishonesty here was extremely serious. Mrs MacGregor knew that what she was being asked to do on the three or four occasions she assisted in the cross-checking was assisting Mrs Abey in committing a fraud on the LAA, what Mrs MacGregor had already criticised herself as being a "fraud on a fraud". However "spontaneous" Mrs MacGregor's participation in the fraud was, there is no question of her not appreciating that what she was being asked to do and then did was dishonest. As the SDT found at [21.52] she knew the underlying facts about the improper exercise and considered it to be wrong.

119. Whilst it is correct that Mrs MacGregor's dishonesty was only committed over a short period of time, over a 2-3 day period, it was repeated, the cross-checking having been

on 3-4 occasions and the dishonesty has to be seen in the context of her overall misconduct: her failure to report Mrs Abey to the SRA straight away when she discovered the fraud in accordance with her duty as COLP and her continuing failure to report the fraud and her own participation in it for another eight to nine months, effectively concealing the wrongdoing and assisting the potential misleading of the LAA. The sanction imposed by the SDT was not just for the short period of dishonesty but for Mrs MacGregor's overall misconduct. When the dishonesty is put in the context of her failure to report, the overall misconduct is extremely serious. The position might be different if, having participated in the fraud and then decided not to continue to do so, Mrs MacGregor had then reported Mrs Abey and herself to the SRA immediately, but she did not do so.

120. In my judgment if the SDT had focused on the most important issues of the nature and extent of the dishonesty (including its interposition in the overall misconduct of failure to report) and the degree of culpability of Mrs MacGregor, it should have concluded that whatever personal sympathy there might be for her predicament, this was not a case of "exceptional circumstances" justifying a lesser sanction, but misconduct so serious that striking Mrs MacGregor off the Roll was the appropriate sanction and only that would properly and adequately protect the public and the reputation of the profession.

121. In *Naylor*, I agree with Ms Carpenter's criticism of the SDT's approach. Whilst I do not consider that one can go so far as to say that it misdirected itself as to the law (given that it referred to *Sharma* at [66]), when it came to consider "exceptional circumstances" the SDT only referred to the mental health issue at [67] and neither referred to the most significant factor of the nature and extent of the dishonesty and the degree of culpability, nor engaged at all in the balancing exercise which is required. The absence of appropriate analysis cannot be saved in the manner suggested in the respondent's notice by some form of reading into [67] of other factors not identified and analysed in that paragraph. The proper analysis should have led the SDT to conclude that this was not a case of exceptional circumstances at all.

122. Ms Morris QC placed great emphasis on the medical evidence about how the adjustment disorder affected Mr Naylor's behaviour and impaired his functioning, which no doubt explains his failure over many months to complete a relatively straightforward piece of work. However, the critical point about the medical evidence was that the psychiatrists were not able to say that the adjustment disorder prevented Mr Naylor from appreciating the difference between honesty and dishonesty and, on that basis, the SDT concluded that he was dishonest. Of course this was not heinous dishonesty but equally it was not a moment of madness. He had lied to his client repeatedly in emails sent over some three months, serious dishonest conduct which could not be excused by his mental health issues.

123. In my judgment, despite the submissions of Ms Morris QC, this was not a case where the SDT was justified in concluding that there were exceptional circumstances. Had the SDT engaged in the correct analysis and considered the nature and extent of the dishonesty and the degree of culpability, it should have concluded that the only appropriate sanction was striking off the Roll.

124. It follows that, in my judgment, the appeals must be allowed in all three cases and the sanction imposed of suspended suspension must be quashed and substituted by striking off the Roll.

125. Given that conclusion, it is not necessary to consider the alternative grounds of appeal in relation to suspended suspension and in what circumstances that might be an appropriate sanction, since it was clearly inappropriate in these cases. There is a certain illogicality in the concept of suspension of a penalty that is itself a suspension. Suspension of striking off is easier to comprehend, since that is akin to a suspended sentence of imprisonment in criminal proceedings. However, suspended suspension is one of the range of possible sanctions available to the SDT and Ms Carpenter did not suggest otherwise.

126. As regards the criticism levelled by the SRA against the form of Order imposed, it is no doubt correct that, in each case, the Order should have made clear (as would a suspended sentence Order in the Crown Court) that the suspension would be activated if further misconduct was committed. That criticism was essentially accepted on behalf of the respondents. However, in circumstances where this Court has concluded that it was not an appropriate sanction in these cases, I am reluctant to embark on any further guidance as to the terms of such a sanction or the circumstances in which it would be appropriate, which would inevitably be an abstract exercise.

Mr Justice Jeremy Baker

127. I agree.