IN THE MATTER OF THE SOLICITORS ACT 1974
AND IN THE MATTER OF THE SRA CODE OF CONDUCT 2011
BETWEEN:

SOLICITORS REGULATION AUTHORITY LTD
AND
CARTER RUCK (A firm)
CLAIRE GILL

OPINION

1. I am asked to advise Carter Ruck and Claire Gill, a partner in the firm ("**CR**", "**CG**" and collectively "**the firm**") on two questions of principle:

(i) The existence and scope of any obligation to conduct due diligence into the subject matter of the firm's instructions and in particular whether it was at the time of the relevant retainers part of the firm's duty under Principles 2 and 6 of the SRA Principles 2011 to investigate the truth or otherwise of its instructions, and if so, how far did that duty extend.

(ii) Whether, if the firm's instructions were that the client did not wish to pursue a claim to trial but might issue a claim, was it proper or improper (having regard to Principles 2 and 6 of the SRA Principles 2011 and Outcome 11.1 of the SRA Code of Conduct 2011) to assert the client's rights, based on their instructions.

Background Facts

2. By notices (the "**notices**") dated 8th February 2024 the SRA gave notice to the firm that it intended to refer CR and CG to the Solicitors Disciplinary Tribunal in respect of three allegations made in the notices. The SRA seeks representations from the firm in respect of the notices which must be

provided by 17 May 2024. It is in this context that the request for my opinion arises. I set out below a summary of the essential facts.

3. The matter was introduced to the firm in May 2016 by Frank Schneider of Sandstone SA. He then acted as agent for the firm's principal client, Dr Ruja Ignatova, and various corporate entities associated with OneCoin and OneLife on whose behalf the firm was instructed, including initially One Network Services Limited (incorporated in Bulgaria) and later OneCoin Limited (incorporated in the UAE) and OneLifeNetwork Limited (incorporated in Belize). The firm obtained KYC information and documents for Dr Ignatova and for each of the corporate clients as necessary.

4. The initial parameters of the instruction were set out in a letter to Mr Schneider on 3 June 2016. Among other things, it stated the need to meet and receive information from OneCoin personnel "to understand the company and its product, and the criticisms made of them, so that we can begin rebutting the attacks".

5. Information and documents were then duly provided by the clients and others. This included advice from German lawyers on the legitimacy of the clients' business under German law, and various other documents provided on the clients' behalf in particular by Patrick Maloy and Ally Kehoe of Prime Strategies LLC. Specialist Counsel Godwin Busutill was instructed to advise and revise draft initial letters of complaint which were then sent out, including to the Coin Telegraph (with whom the firm then corresponded), and the firm also responded to an enquiry from the Evening Standard. This correspondence provided a detailed rebuttal of the allegations that had been made against OneCoin.

6. Further information was obtained during this period, including opinions from several lawyers on the legitimacy of the clients' business in their respective jurisdictions, and various press kits and links to respond to the Evening Standard's queries.

7. In September 2016, the Financial Conduct Authority (**'the FCA'**) published a warning notice about OneCoin, which also referred to an investigation by the City of London Police (**'CoLP'**). The firm wrote a letter of representations to the FCA about the warning notice, and responded to enquiries

from the Daily Mirror. The firm also then provided a set of briefing documents to the lawyer instructed on the criminal investigation being conducted in this jurisdiction by CoLP. The briefing note provides evidence of the firm's understanding, at that point, of the allegations made against its clients, and the responses to each of them. The PR firm Chelgate was retained by the firm's clients in November 2016.

8. The changed parameters of the instructions, taking into account the fact of the CoLP enquiry, were set out in letters to Dr Ignatova, Mr Schneider and Irina Dilkinska, head of One Coin's legal and compliance department. In broad terms, as can be seen from the letters, the fact of the CoLP enquiry raised the risk of taking action against defamatory statements and prompted further enquiries by the firm into the nature of the business, including its corporate structure.

9. Further information was obtained in this period, including advice from Hogan Lovells on the legitimacy of the clients' business under English law. Other firms were also engaged by the clients including DLA Piper and K&L Gates.

10. Initial letters of complaint were then sent to various parties in January, February, and April 2017. Law firms were instructed in Norway (Per Danielsen) and Sweden (Helene Miksche) to address issues arising with the press and authorities in those jurisdictions.

11. Further information was obtained from the clients, who were also asked by the firm for more information to help tackle the allegations being made. In an email to Dr Ignatova on 7 April 2017, after she had urged a more aggressive stance, the firm stated that it was 'ready to take action if we have the information and ammunition we can use to deal effectively with criticism'.

12. The final letters sent in this period were on 26 April 2017 to Janet McAdam, a former Independent Marketing Associate (**'IMA'**) for OneLife, who had republished
allegations made by a Bjorn Bjercke, and referenced a conversation she had with the CoLP which she said she had recorded, and a letter of the same date to Talon Media Group, see para 70 of the CG notice.

13. Schillings were also instructed at this stage, and a briefing was sent to them by the firm on 27 April 2017. That briefing provides a summary of the firm's understanding at that point of the allegations made against its clients and the responses to each of them.

14. After discussion with the clients and counsel, Matthew Nicklin QC, and as set out in an email to Ms Dilkinska on 28 April 2017, the firm began to take steps to prepare a claim against Ms McAdam, including an application to obtain the recording of her call with the police (under the *Norwich Pharmacal* jurisdiction). Following advice from Mr Nicklin QC, the strategy was set out in a letter to Dr Ignatova on 22 May 2017.

15. As can be seen from the emails and the letter to the client, the McAdam claim ultimately contemplated was not for a claim for damages for libel, but a *Norwich Pharmacal* application aimed at obtaining from Ms McAdam the recording of the call with CoLP which she had referenced in her article, which was believed to be relevant to the complaint to CoLP about the manner of the conduct of its investigation. A recent summary of the *Norwich Pharmacal* jurisdiction can be found in the judgment of a Robin Knowles J in *Hulley Enterprises Ltd v White and Case* [2023] EWHC 1436 (Comm) at paras 14 et seq. The jurisdiction is essentially one which permits a party to obtain information, documentation or other materials from a person who may be in possession of the materials, and who may have been innocently caught up in the wrongdoing of another party. Where a claimant seeks *Norwich Pharmacal* relief the claimant may well offer, or be bound, to indemnify the respondent for the costs of obtaining the relief. Applications for *Norwich Pharmacal* relief may, as in the case of *Hulley Enterprises Ltd*, be made to the court sitting in private. The open justice principle is likely to lead to such applications coming into the public domain once any risk of loss or destruction of relevant materials has been assessed, and if necessary, prevented.

16. Further information was obtained during this period, including a 'White Paper' about the blockchain that aimed to address Mr Bjercke's allegations. Pursuant to the contemplated claim, witness statements were obtained from a Lynn McDonald, who, like Ms McAdam, had been an IMA for OneLife, and Nigel Chinnock, who had been a recruitment agent for OneCoin, confirming that Mr Bjercke had never had access to OneCoin's system. A Scottish firm, Levy and McRae,

were instructed (as Ms McAdam resided there) on 7 July 2017. The firm was aware that Hogan Lovells were advising in connection with the legitimacy of the clients' business during this time.

17. Internally, meanwhile, on reviewing the file the firm revised the firm's internal risk status of the matter on 25 May 2017. Although the firm had been given some information about the corporate structure of the business, it had concerns about the clients' desire to keep that information secret.

18. In June 2017 counsel Saima Hanif gave advice relating to a substantive challenge to the FCA notice. Following that advice a letter was sent to the FCA on 29 June 2017 concerning further developments since the publication of the warning notice. On 19 July 2017, the FCA notified the firm of its decision to remove the warning notice from its website.

19. On 24 August 2017 Ms Dilkinska indicated that the claim against Ms McAdam should not proceed, in part due to a decision against One Life by the Italian Anti-Trust Commission. The rationale was that a public application against Ms McAdam would risk raising the profile of the Italian decision, and would likely cause more harm than good to the clients' interests. The firm was informed that an appeal of the Italian decision was being prepared.

20. A further letter was sent to the client on 4 October 2017, the firm sent an email to Liveline RTE on 11 October 2017, and an initial letter of complaint to Publika TV in Moldova on 20 October 2017.

21. On 1 November 2017 Mr Schneider advised the firm that Dr Ignatova had disappeared, and all substantive work for the clients was then put on hold. The firm made attempts to establish a proper contact to continue to instruct it on behalf of the corporate clients, but ultimately ceased to act for them as well. It seems to be common ground between the SRA and the firm that the firm ceased acting on or by 5th November 2017.

22. On 15 December 2019, the Times newspaper published an article which was critical of the firm in respect of its conduct towards Ms McAdam. The SRA commenced an investigation it seems as a result of this article (see paragraph 6 of the CG notice although that paragraph leaves out reference to the date of the Times article and the commencement of the SRA investigation). In May 2020, the SRA served a notice under section 44B of the Solicitors Act 1974 on CR. The firm responded

to the notice by the provision of all of its electronic files, and a detailed letter of 15 June 2020 referenced to the documents produced pursuant to the S44B notice. I have taken the essential facts as set out above from the 15 June 2020 letter and the documents to which it refers. I do not understand the SRA to dispute these facts, although I have noted that in the notices the SRA produces its own interpretation upon facts and matters set out in the documents provided by the firm.

23. After the firm provided the documentation pursuant to the S44B notice and its letter of 15 June 2020 the SRA investigation appears to have gone quiet for a period of three years or more. On 12 July 2023 Dr Sam Jones (the investigation officer) wrote to the firm stating: "I have made a recommendation on the outcome of this investigation which is currently being considered by senior colleagues. I hope to be able to provide a further update within the next month to bring this matter to a conclusion." No doubt the SRA will explain in due course why it did not progress the investigation, and why it appears to have disagreed with Dr Jones' recommendation (which I infer was to take no further action). The investigation was revived following an article by Mr Dan Neidle of which the SRA received notice on 18 December 2023. The delay in the conduct of the SRA investigation is relevant to the matters upon which I am asked to advise for the following reasons:

(i) In November 2019, the SRA introduced a new Code of Conduct. The relevant Code for the purposes of this opinion is the SRA Code of Conduct 2011, and any relevant Guidance issued under it and applicable in 2016-2017.

(ii) In November 2022, the SRA produced a warning notice in respect of SLAPPs. There is extensive reference in the notices to this warning. The retainers which fall under scrutiny occurred six years before this warning notice was issued.

24. I have noted that in the notices the SRA states that the November 2022 warning notice does not, and implicitly cannot, alter the duties which were owed by CR and CG in the period when they were acting for their clients between 2016 and 2017. The SRA are correct that the November 2022 warning notice cannot affect the duties which were owed by the firm between 2016 and 2017 as a

matter of their contractual, common law, constitutional or regulatory duties in this period. Furthermore, the warning notice cannot create duties in the absence of there being contractual, common law, or regulatory requirements which impose such duties.

25. It follows from what I have said in paragraph 24 that the SRA appears, correctly, to be content to proceed on the basis that the duties which applied to the firm are to be determined by reference to the contractual, common law, and regulatory duties which applied to the firm in 2016 – 2017. I would however point out that the SRA in paragraphs 8 – 12 of the notices recite extensively from the November 2022 warning notice. Further, they do so by reference to the acronym "SLAPP". Their use of this acronym (which stands for Strategic Lawsuit Against Public Participation), in circumstances where the SRA appears to accept that the warning notice creates no new obligations, risks confusion. On the one hand the SRA is stating, correctly, that the warning notice creates no new obligations, whilst on the other hand the SRA appears to be calibrating its allegations against CR and CG by reference to the acronym "SLAPP", and the warning notice of November 2022.

26. In the paragraphs below I have been careful to set out the relevant duties without resort to the use of the acronym "SLAPP". I also have been careful to set out the relevant substantive duties owed by the firm in contract, at common law, and under the SRA Code of Conduct 2011. Whilst I have noted that the SRA contends that the November 2022 warning notice does not affect or alter the duties which hitherto apply, I regret to say that it appears to me that the use of the November 2022 warning notice in the notices served upon the firm on 8 February 2024 is adding an impermissible gloss upon the relevant duties actually owed by the firm.

The Allegations In The Notices

27. Allegation 1 is:

> "In or around June 2016, CG [and CR] accepted instructions from OneCoin in circumstances where she: (a) did not conduct adequate due diligence into OneCoin and/or establish its corporate structure and/or who she and the Firm were acting for; (b) did not conduct due diligence into and/or understand the subject matter of its (sic) instructions including crypto-currency and/or blockchains adequately or at all; (c) did not at that point or subsequently take adequate steps to review whether the blockchains existed and/or the merits of the case despite being put on notice of risk which increased over time." (My emphasis).

28. The way in which the SRA puts its case against the firm in the notices is set out in the paragraphs in respect of each allegation. In relation to allegation 1, this opinion primarily concerns limbs 1(b) and (c) of the allegation[1]. The SRA's position in respect of allegations 1 (b) and (c), can be gleaned in particular from paras 23, 25, 26 to 32 of the Notice, which state:

> "23. Although the clients continued to be the subject of hostile reporting to the effect that there was no blockchain before 1 October 2016 and that the blockchain thereafter could not properly be described as such, Ms Gill did not satisfy herself of the correctness of either of these allegations. This is demonstrated by the following examples:
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> (a) In an email dated 7 March 2017 Ms Gill stated:
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> *"I think the "gaps" in our instruction are…*
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> …
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> *(2) We need a technical statement we can use about the blockchain technology; in particular to respond to the claim that OneCoin used "SQL script to generate coin"' and that there was no existing blockchain . I have looked at materials we have been sent in the past concerning the mining process, and, as Ruja suggested, the audit reports, but the latest report I have was from April 2016….*
> *The issue with the recruitment process [of Bjorn Bjercke] helps to undermine the legitimacy of his claims but does not deal with the substance of the allegations, which concerns the blockchain technology, and I would not have thought we should make any public statements about that whilst this full technology report is being prepared."*
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> (b) In a further email to OneCoin dated 7 March 2017 Ms Gill stated that *"The primary purpose of this statement is to reassure members, but I am concerned that it focusses on undermining the maker of the claims, as opposed to the claims themselves (that there is no blockchain). If there is a strong feeling that you have to put something out to members now I suggest the amendments below (including something similar to that suggested by Per)."*
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> (c) In a draft letter to cryptocoinnews.com dated 7 March 2017 Ms Gill complained of a *"highly defamatory claim that OneCoin is a "serious scam that has no public-facing" blockchain and that "it is not a cryptocurrency at all".* The draft included the following comment:

[1] I note that para 1 (a) of allegation 1 concerns an alleged failure to conduct due diligence enquiries into or understand the corporate structure of OneCoin. However, the SRA does not allege that the firm was not acting on the instructions and with the authority of each of the relevant corporate entities which it represented.

"*We are instructed that it is absolutely false to state that OneCoin does not have a blockchain.* ***[We need here a short statement from a technology officer within OneCoin addressing the technical claims made about the blockchain in the article, and in particular the claim that OneCoin uses an SQL1 script to generate coins].***" [Original emphasis]

(d) In an email from Ms Gill to OneCoin dated 14 March 2017 and in response to reporting at the time, Ms Gill stated:

"Dear Irina
I think it would assist us if, rather than try and turn the technical information into a PR statement, or incorporate part of my draft letter, the technical team could simply produce a factual statement about the technology used. Then we can adapt it to suit our purpose; either to draft the public statement in response to the claims or to draft legal letters.
The technical statement needs to be clear on the central claim: how are the coins mined?
Mr Bjercke claims that OneCoin uses a MS SQL database which it has scripted to mine coins. We say at the moment that this is "preposterous", but I am afraid I do not find the explanation very clear.
We need to explain why this is false; in other words to start with the blockchain technology first and stating clearly (assuming this is correct) that OneCoins are produced by a cryptocurrency algorithm.
I am not clear at the moment if we use MS SQL at all, and if so, for what purpose. I think we need to make that clear. Also, when was the last audit and who performed it?
Can the team adapt what they have prepared? I attach a version showing the sort of thing I have in mind, but obviously it has to be absolutely correct and stand up to technical scrutiny (otherwise Mr Bjercke will just have more opportunity to attack it)."

(e) OneCoin's SQL statement dated 10 March 2017 forwarded by Ms Gill on 14 March 2017 from the client did not address whether a blockchain existed before October 2016.

(f) Ms Gill contacted a PR specialist in an email dated 12 April 2017 stating:

"We did start to prepare a complaint to the site publishing his original claims (see working draft letter that was circulated internally but not sent). The focus at that time was on his claims attacking the blockchain, which [Mr Bjercke] *repeats in his YouTube video apparently uploaded on 7 April. The complaint stalled as we did not have information from the IT team about the blockchain and I gather we cannot expect to get more information at this point, pending the report that I understand Pitt has commissioned. I agree with you that we should therefore now focus on his claims about suspected criminal operations. However, the underlying allegation is that OneCoin is suspected to be a criminal fraud; it may impossible therefore to*

avoid getting into technical areas about the blockchain if we issue and pursue proceedings."

(g) On 9 May 2017, OneCoin provided Ms Gill with a "White Paper" on its blockchain which did not address Mr Bjercke's allegation that no blockchain existed in September 2016.

24. Ms Gill had identified the importance of obtaining expert evidence by the end of 2016. Ms Gill's letter to Frank Schneider, a representative of OneCoin on 21 December 2016 stated:

"Chelgate [PR company] has strongly recommended that we instruct a third party consultant; for example McKinsey, to prepare an independent report into the viability of the OneCoin currency and the blockchain. This will not involve sharing trade secrets about the technology, which we recognise is highly confidential, but will be a report based on correct publicly available information."

25. A third-party report was not commissioned by the Firm or Ms Gill, nor did they insist that OneCoin do so as a condition of continuing to act. In essence the Ms Gill did not seek a report that would have confirmed the correctness of the public criticisms of OneCoin even where she recognised that this was indicated. By way of example of such criticism there is defence solicitor BLM LLP's comprehensive rebuttal of the (sic) Ms Gill's complaint of misconduct and defamation against DC Vaughan on behalf of the City of London Police. In its letter of 27 October 2017, BLM pointed out that:

> *"We have been provided with expert evidence which suggests that the supposed blockchain underpinning your clients' cryptocurrency is flawed and displays few, if any, of the properties which would be expected from cryptocurrencies and blockchain-based platforms. These views are based on the fact that (a) your clients' blockchain is centralised (meaning that your clients can censor transactions and control monetary policy) as opposed to traditional blockchains which are decentralised and involve the generation of a transaction ledger made collectively by a peer-to-peer network (b) there is no evidence to show that your clients' blockchain is resilient. If the blockchain was de-centralised it would be resilient in that it would be stored on the computer of every peer in the network whilst still being accessible even if many peers go offline (c) there is no transparency. It appears that not all transactions are broadcast to all peers and therefore transactions cannot be fully verified or subject to public scrutiny."*

26. In terms of whether or not a blockchain existed before October 2016 Ms Gill and counsel clearly appreciated the potential litigation risk on this issue but did not make inquiries to satisfy themselves that it was appropriate to continue to act and/or to continue to make statements and assertions on the propriety of OneCoin's operations.

30.A solicitor acting with integrity would ensure that adequate due diligence was carried out into their clients' corporate structure, particularly where it was complex and domiciled in various different jurisdictions outside the UK. A solicitor acting with integrity would also ensure that they understood the subject matter of their instructions, particularly where that subject matter was new and involved members of the public investing money as with crypto-currency and blockchains. The evidence suggests that Ms Gill was struggling with these concepts but made only limited efforts to obtain external or technical support or to pursue these issues with her clients when they were not forthcoming with this information despite the issues at stake which included the interests of investors and the public interest more broadly. Ms Gill also did not take adequate steps to establish whether OneCoin's blockchain existed despite being put on notice that this might be the case - with very significant implications for financial investors in terms of risk of loss. The public would expect a solicitor to be diligent about the merits of the case they advancing to ensure that they were acting inside their ethical obligations. Ms Gill always recognised this as an area of risk yet continued to act, including sending out threatening letters which carried with them an obvious and self-evident outcome, that reporting on matters of public interest would be shutdown.

31. For these reasons, Ms Gill failed to adhere to the ethical standards of the solicitors' profession indicating a lack of integrity and therefore a breach of Principle 2 of the SRA Principles 2011.

32. The public would also expect a solicitor to carry out adequate due diligence checks, develop or acquire knowledge of the subject matter context of their instructions and to take adequate steps to address the issues under scrutiny. Without taking these steps Ms Gill could not be sure of the merits of the case she was advancing or properly analyse the risk profile of continuing to act. That Ms Gill was aware of the dangers but continued to act is an aggravating feature of the case. Ms Gill's failure to do so risked undermining public trust and confidence in the legal profession and the provision of legal services, particularly where there were allegations of fraud being raised. For these reasons, Ms Gill breached Principle 6 of the SRA Principles 2011." (Underlining is my emphasis).

29. Allegation 2 is that:

"Between September 2016 and October 2017, Ms Gill [and CR] continued to send correspondence on behalf of OneCoin in circumstances including in contacts with:

Jen McAdam;
the Financial Conduct Authority;
the City of London Police;
DC Kieron Vaughan;
Talon Media Group;
Publika TV.

and in doing so engaged in strategic litigation against public participation (a 'SLAPP') and/or acted in a way that was oppressive and/or abusive."

30. Below are paragraphs from the notices in respect of allegation 2 which are informative as to how the SRA is putting its case:

> "40. It is apparent that the threat of defamation in Ms Gill's letter of 26 April 2017 was not informed by a full assessment of the merits of a claim, but for reasons of being able to publicise the fact that legal action was being taken against her. The inference was that this was to to (sic) deter Ms McAdam and others speaking up in relation to matters of public importance. That full assessment was only conducted in the days following the sending of the *"take down"* letter which then resulted in a decision not to pursue Ms McAdam in defamation.
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> 41. Further, in spite of Ms Gill having confirmed to its clients (sic) by 22 May 2017 that *"we do not advise proceeding with legal action or the threat of legal action here"* Ms Gill continued to send letters alleging defamation in this jurisdiction for example to Publika TV in Moldova on 20 October 2017. This indicates that Ms Gill was threatening legal action for improper purposes, namely, to fulfil public relations objectives and to deter public scrutiny and criticism of its clients' operations as opposed to pursuing an underlying legal claim in good faith.
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> 42. Instructions to leading counsel for the conference on 11 May 2017 concerning claims against Mr Bjerke and Ms McAdam stated:
> *"Counsel will see that the claims as presently formulated are limited to complaints about the most serious allegations – made by Bjercke – concerning allegations of running a criminal network, and not about allegations relating to the blockchain technology or allegations about running an illegal pyramid or "Ponzi" scheme. The rationale behind this strategy can be the subject of further discussion and not rehearsed in present instructions".*
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> 53.Mathew Nicklin QC who was not a public or regulatory lawyer[2] advised in May 2018 that the statement was potentially susceptible to judicial review. This advice was confirmed by specialist junior counsel, Saima Hanif (now Saima Hanif KC).
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> 54. However, no Pre Action Protocol letter of claim was sent to the FCA, but it agreed to Ms Gill's request to remove the statement in circumstances where assets connected with OneCoin which had been seized by the City of London Police had been released by order of District Judge Lucie dated 21 April 2017.
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> 55. Whilst we accept that there may have been some legitimate concerns around the FCA warning and its ability to act as it did, Ms Gill sought the removal of the statement in circumstances where it (sic) was aware that there was an ongoing

[2]Matthew Nicklin QC was a long serving member of the Bar Standards Board (2008-2013) and was appointed a High Court judge in 2017. To my knowledge he has a deep understanding of the duties of lawyers, and in particular of advocates, and their regulatory duties.

police investigation and that there were serious and credible reports that the blockchain did not exist and a risk that the investment promoted by OneCoin was in fact a Ponzi scheme. These were circumstances which should have given Ms Gill pause to consider whether she should continue to pursue the FCA in the manner that she did, given the red flags in the case. Despite this, Ms Gill proceeded to act in a way that was directly contrary to the public interest, in requiring a respected and credible financial institution to take a warning notice down – the risk of this to the public and investors was entirely obvious and the consequences, that investors lost their money, was predictable.

47. Outcome 11.1 of the SRA Code of Conduct 2011 required Ms Gill not to take unfair advantage of third parties. Ms Gill's firm is a prominent one well known for its work on defamation and reputation management. Ms McAdam was an unrepresented lay person who had raised legitimate concerns about possible fraudulent activity by OneCoin and in circumstances where she had personally lost money by investing in the scheme. Ms McAdam was not aware that Ms Gill had no intention of pursuing a claim against her beyond the point of issue. The evidence suggests that Ms Gill had significant reservations about pursuing a defamation claim and was choosing instead to deter criticism and serve a public relations purpose as opposed to pursuing a claim through the courts. For these reasons, Ms Gill took unfair advantage of Ms McAdam and therefore breached Outcome 11.1.

49. A solicitor acting with integrity would not threaten an unrepresented individual with a legal claim for a satellite purpose, namely public relations and to deter criticism. By doing so, Ms Gill acted in breach of Principle 2.

50. Principle 6 of the SRA Principles 2011 required Ms Gill to behave in a way that maintained the trust the public placed in her and in the provision of legal services. By threatening an unrepresented lay person with a defamation claim which she had no intention of pursuing but was instead aimed at fulfilling PR goals and deterring criticism of possible fraudulent activity, Ms Gill undermined public trust and confidence. This is because the public would not expect a solicitor to make threats of litigation against an unrepresented person which she did not intend to pursue and instead was intended to deter Ms McAdam and others from raising further concerns on a matter of public interest.

65.Any suggested claim in libel was comprehensively rebutted as being unarguable, which it was. This had been acknowledged by Ms Gill on 12 April 2017 in an email exchange with a PR specialist instructed by OneCoin who had asked whether the police enjoyed immunity in terms of defamation law. Ms Gill had responded that statements made, whether by investigators or informants in the context of a police investigation were protected by absolute privilege. This gave the makers of the statements immunity from a defamation claim, although the privilege did not preclude the possibility of there being other claims, for example for malicious

prosecution. This shows that Ms Gill was well aware that a defamation claim against DC Vaughan was likely to be unarguable and without merit.

68.Principle 2 of the SRA Principles required Ms Gill to act with integrity. In *Wingate v Solicitors Regulation Authority v Malins* [2018] EWCA Civ 366, it was said that integrity connotes adherence to the ethical standards of one's own profession. A solicitor acting with integrity (i.e. with moral soundness, rectitude and steady adherence with (sic) an ethical code) would not threaten a possible defamation claim where she had already advised her clients not to take such action or with the intention of disrupting a police investigation into possible fraud, in particular where she was aware of increasing concerns in the UK and internationally about its client's operations.

69. Principle 6 of the SRA Principles 2011 required Ms Gill to behave in a way that maintains the trust the public placed in her and in the provision of legal services. The public would not expect a solicitor to threaten a possible defamation claim when she had already advised her client in the strongest possible terms not to pursue one. The public would also not expect a solicitor to engage in abusive litigation and to threaten or intimate the possibility of a claim which she knew was meritless and unarguable and where the purpose of its correspondence was to obstruct a police investigation into her clients. Ms Gill's actions risked undermining public trust and confidence and were therefore in breach of Principle 6.

73.Although the Talon Media Group was an organisation, it was based overseas. Overseas journalists and organisations are aware of the high costs of defamation litigation in London and that defendants are required to show that their publications are true, an expression of honest opinion, covered by qualified privilege or in the public interest rather than vice versa as in other jurisdictions. The Firm was well known internationally for its work on reputation management. Indeed, the Firm's website states that it has a *'global reputation'*. By threatening litigation which she had already advised her clients against, Ms Gill misled and took unfair advantage of the Talon Media Group and so failed to achieve Outcome 11.1 of the SRA Code of Conduct 2011.

74. Ms Gill threatened an abusive legal claim against the Talon Media Group despite having advised her clients against pursuing a defamation action. The threat to the media organisation was aimed at stifling scrutiny of matters in the public interest. A solicitor acting with integrity would not threaten a meritless claim especially where she had no intention of pursuing it and had advised her client against such litigation. A solicitor acting with integrity would also not make such threats in order to stifle public debate and scrutiny of matters in the public interest. For these reasons, Ms Gill's conduct lacked integrity.

75. In addition, Ms Gill breached Principle 6 which required it (sic) to maintain public confidence and trust in the legal profession and provision of legal services. This is because the public would not expect a solicitor to make oppressive and unmeritorious threats of litigation in the UK.

81.As set out at above, Ms Gill had previously advised her clients against pursuing a defamation claim in the UK between October 2016 and May 2017. Ms Gill's implied threat of such a claim was therefore pursued for a satellite purpose which was to stifle debate on a matter of public importance.

82. As also noted above, overseas journalists and organisations are aware of the high costs of defamation litigation in the English High Court and that defendants are required to show that their publications are true or in the public interest rather than vice versa as in other jurisdictions. Ms Gill's firm has an international reputation for its work on reputation management. Furthermore, Publika TV was not aware that Ms Gill had advised her clients not to pursue defamation actions in the UK. By threatening litigation which she had already advised her client against, Ms Gill misled and took unfair advantage of Publika TV and so failed to achieve Outcome 11.1 of the SRA Code of Conduct 2011.

83. Ms Gill's action in threatening potential litigation against Publika TV also demonstrated a lack of integrity. A solicitor acting with integrity would not threaten legal action which she had no intention of following through with and indeed had previously advised her clients against in the strongest possible terms as is the case here. Ms Gill's letter was intended to deter Publika TV from making further investigations or broadcasting concerns about OneCoin. On this basis, Ms Gill breached Principle 2 of the SRA Principles 2011.

84. Furthermore, Ms Gill's letter was a breach of Principle 6. This was because the public would not expect a solicitor to make an empty albeit implied threat of a defamation claim in circumstances where she had no intention of pursuing such a claim and had advised her clients and obtained their agreement not to raise such an action. As such, Ms Gill's conduct had the potential to undermine public trust and confidence in the legal profession and the provision of legal services."

(Underlined passages are my emphasis).

Points which underpin the SRA's allegations 1and 2

31. It is I think helpful to distil from the notices the fundamental points which appear to underpin the SRA's case against both CR and CG. The following are the essentials:

(i) A solicitor instructed by client/s that false allegations are being made against the client that the client has been acting fraudulently, should not advance in correspondence to the parties

making or publishing such allegations that they are false and defamatory unless (a) the solicitor has conducted "due diligence" investigations into the allegations, and (b) the solicitor believes the client's case to be credible.

(ii) Where a solicitor advances a claim in correspondence on behalf of such client/s without complying with principle (i) above, the solicitor puts him/herself at risk of being in breach of Principles 2 (integrity), 6 (good repute) and Outcome 11.1 of the SRA Code of Conduct 2011. In this case the SRA says that each of these regulatory requirements was breached.

(iii) Whether or not points (i) and (ii) apply in general circumstances, they apply (the SRA contends) in situations where the persons alleging that the clients are acting fraudulently are raising matters "of public interest". It is for this reason that those complaining about the conduct of solicitors, and the SRA, have adopted the phrase "Strategic Lawsuit Against Public Participation (SLAPP)".

(iv) I have also noted that allegation 1 (a) is premised upon the basis that the firm had an obligation to undertake due diligence enquiries so as to understand the corporate structure of OneCoin. However, there is no allegation that the firm acted without the requisite authority for each of the corporate entities which it represented. This allegation therefore presupposes that a law firm, which was not bound by the MLRs 2007[3], and even though authorised to act on behalf of the relevant corporate entities it represented, nevertheless owed duties to investigate and understand the group structure within which those corporate entities operated, before it could act. I am not aware of any regulatory or other principle which underpins the SRA's premise for allegation 1(a).

32. I have referred in the foregoing paragraphs to various extracts from the notices which lead to the first three SRA propositions which I have set out in paragraph 31. I ought to make it clear that I have read both of the notices with considerable care and it should not be considered that the passages quoted above are the only ones which I have in mind in order to determine what are the fundamental points which underpin allegations 1 and 2. I have considered both notices in their entirety.

[3] The firm was operating outside of the regulated sphere for the purposes of the MLRs because it was retained in respect of potential litigation.

33. The question as to whether the SRA is right or wrong in its approach to solicitor duties is answered by undertaking an examination of what duties were and are owed by solicitors undertaking a retainer such as occurred in the present case, on the basis of established legal principle.

Duties owed by solicitors in the position of the firm: Analysis of the principles.

34. A solicitor undertaking a retainer to represent a client owes duties (a) under the contract of retainer, (b) under the common law in tort and equity as a fiduciary or deriving from constitutional rights and obligations, and (c) as a regulated person (or entity) under the Solicitors Act 1974 (or other primary legislation such as the Administration of Justice Act 1985), and the SRA Code of Conduct 2011 (now 2019). Whilst there may be overlap between these categories of duty, it is helpful to understand each.

35. Under the contract of retainer, a solicitor either expressly or by necessary implication owes a duty of care to the client. A solicitor will not breach the duty of care unless the solicitor's conduct falls outside the range of that expected of reasonably competent solicitors. For this proposition see for example *Bolam v Friern Hospital Management Committee* [1957] 1WLR 583, and for recent discussion in the context of solicitors' duties see the judgment of Jackson LJ in *SRA v Wingate and Evans* [2018] EWCA Civ 366.

36. Since solicitors now almost invariably are acting pursuant to a contract of retainer there is no need for separate consideration to be given as to the duty of care owed by a solicitor under the common law in tort. However, for the avoidance of doubt, a solicitor owes a duty of care to the client in tort, the scope of which will be the same as the contractual duty of care, and co-extensive with it.

37. Some contracts of retainer require the solicitor to act in the best interests of the client. Thus, there may be a contractual obligation under the contract of retainer which requires the solicitor to achieve a higher standard through an express contractual term than the standard of reasonable care. As a general rule a solicitor who enters into a contract to represent a client in the making of claim/s is bound to continue acting for the client until the conclusion of the claim or claims in respect of which the solicitor is instructed. Solicitors' contracts of retainer tend to be "entire" contracts such that the solicitor is not entitled to withdraw from the contract unless circumstances have arisen

under the contractual terms of the retainer, or as a matter of regulatory duty, which enable or require the solicitor to cease acting. See paragraph 42 below for further explanation of this point.

38. In any event, a solicitor acting for a client in respect of a matter where the solicitor is a fiduciary will owe the client the fiduciary duty of loyalty. This duty requires the solicitor to act with single-minded loyalty to the client, maintaining confidentiality in confidential information pertaining to the retainer, and not to act with a conflict of interest and duty. For this proposition see the judgment of Millet LJ in *Bristol and West v Mothew* [1998] Ch 1 at 17.

39. It is to be noted that these private law duties (paragraphs 36 – 38 above) are owed to the client. The SRA does not suggest in the notices that the firm was in breach of any of the duties which it owed to its clients.

Public facing constitutional and common law duties.

40. Over the course of the past four centuries or so, various constitutional and common law duties have developed relating to solicitors and advocates. The rights of potential litigants, and the duties of advocates relating to them, form an essential part of the constitutional arrangements which it is necessary to understand in the context of the SRA's notices.

41. From and after the prosecution of Charles I the cab rank rule developed in English law. The prosecutor of Charles I (Cooke) accepted the brief to prosecute Charles I because he felt duty bound to do so. Years later, and after restoration of the monarchy, Cooke was prosecuted and convicted, hanged, drawn, and quartered because he had committed the "crime" of prosecuting the monarch. By the time of the prosecution in 1792 of Thomas Paine for seditious libel, it was considered right and appropriate for the barrister Erskine to act for Thomas Paine where barristers and attorneys may have been unwilling to act. The cab rank principle developed after the trial of Thomas Paine and was well established by the early 19th century[4].

[4] See the article by Watson: the Origins and Development of The Cab Rank Rule (2022), to be found here: https://shura.shu.ac.uk/30515/3/Watson-OriginsAndDevelopmentOfTheCabBankRule%28AM%29.pdf

42. The cab rank rule is now to be found in C30 of the Bar Code of Conduct. The rule requires a barrister to accept instructions to act on behalf of a client if the barrister is available, not conflicted, and will be paid a proper fee. Solicitors have never been subject to the cab rank rule. Although a solicitor is not bound by the cab rank rule, he does nevertheless owe duties when conducting a claim to act in accordance with the duty of care, his regulatory and his fiduciary duties. These duties do not compel a solicitor to accept the case but, one cannot find anywhere within the duties on the part of a solicitor an obligation to cease acting where the duty of care may require further investigation which the solicitor has not undertaken. Further:

42.1 It would be very odd if a solicitor were compelled to cease acting for a client on the basis that the solicitor did not believe the client's case to be factually credible, in circumstances where the barrister, whose ability to act rests upon the solicitor's instructions, was bound to continue to act under the Bar Code of Conduct, but where a solicitor was (as I understand the SRA's case) bound to withdraw from acting. Such an unwelcome prospect from the point of view of the proper administration of justice requires careful scrutiny.

42.2 A solicitor who ceases acting simply because he or she does not believe the client's instructions may find himself to be in breach of his or her fundamental obligations under the SRA Code 2011 and Principles (and perhaps in breach of contract, depending on the terms of the retainer). A solicitor who doubts the client's instructions, may be under positive obligations to continue with the retainer. See for example:

a. O1.1 ("you treat your clients fairly"),
b. O1.2 ("you provide services to your clients in a manner which protects their interests in their matter, subject to the proper administration of justice"),
c. O1.3 ("when deciding whether to act, or terminate your instructions, you comply with the law and the Code") and
d. IB(1.26)("Acting in the following ways may tend to show that you have not achieved these outcomes and therefore not complied with the Principles … ceasing to act for the client without good reason and without providing reasonable notice").
e. Principle 1 ("you uphold the rule of law and the proper administration of justice"),
f. Principle 2 ("you act with integrity"),
g. Principle 4 ("you must act in the best interests of each client"),

h. Principle 5 ("you must provide a proper standard of service to your clients"),

i. Principle 6 ("you must behave in a way that maintains the trust the public places in you and in the provision of legal services").

42.3 The SRA does not appear to have considered the implications of these Outcomes and Principles. Yet on the face of it, the SRA's case in the notices appears to be contrary to the fundamental obligations owed by solicitors to their clients. The approach advocated by the SRA risks putting solicitors in breach of them. At the very least one would expect the SRA to have grappled with these points and resolved them lawfully and fairly before making allegations against solicitors which appear to run contrary to them. Fundamental questions also arise in relation to the SRA's approach as to the rule of law which I deal with in paras 78-88 below.

43. It should also be noted that lawyers (whether barristers or solicitors) may (perhaps often) not subjectively believe the truth of what their clients are telling them. For example, a solicitor or barrister defending a client charged with a serious crime may be required to act upon the instruction of the client that he/she did not commit the offence in question where the evidence against the client appears to be overwhelming, and the client is unable to find any independent evidence (apart from his own[5]) to support his case. If a solicitor in such a situation were required (a) to conduct "due diligence" enquiries and (b) not to act if those enquiries revealed that the client's defence was factually not credible, considerable difficulties would arise for the proper conduct of cases in the criminal justice system.

44. I do not understand the SRA to be contending that the long established principles by which solicitors and barristers act in criminal cases where they are required to act even though they may disbelieve their clients, to be in doubt. However, the consequence of this is that:

44.1 The SRA must seek some particular principle which applies in so-called SLAPPs cases which does not also apply in other areas (such as criminal cases). It does not seem to me that the SRA

[5] The defendant, particularly with legal advice, may consider that even calling his own evidence is too risky.

have begun to analyse the consequences of their contentions in this case. With all due respect to the SRA, there cannot be a public interest which justifies the imposition of a duty (to conduct due diligence enquiries and not to proceed unless the solicitors have believed the client case to be credible) in so-called SLAPPs cases which would not also apply in other fields of solicitors' practices. For example, there is a public interest that those who have committed criminal offences should be prosecuted, found guilty, and sentenced appropriately. That public interest is as great, if not greater, than the public interest in ensuring that people should not become victims of frauds, or that authorities should be able to investigate such frauds, without the fraudulent party making claims in libel, slander, or other available forms of relief with the assistance of solicitors. A defendant accused of a hate crime (such as inciting racial hatred) may find that the evidence against him is overwhelming. Nevertheless, a solicitor is entitled, and (having accepted the retainer) bound (see para 42), to advance the defendant's interests on the instructions of the defendant, including as to the facts. It could well be that the initial instructions for a solicitor in such a situation would be to advance libel/slander claims against the person who has been publishing allegations that the defendant is a racist. The logic of the SRA's case would be that it would be improper for the solicitor to write letters claiming that the solicitor's client has been libelled unless the solicitor has conducted a due diligence exercise and is satisfied of the credibility of the client's case.

44.2 Conversely, the same solicitor acting in the defence of the same client charged with the crime of inciting racial hatred, would be able to act in the defence of the same client in the Crown Court on the client's instructions even if the evidential case against the client was overwhelming, and even if the solicitor found the client's factual case to be incredible. I am unable to find any principled basis for the duties which the SRA are asserting in respect of so-called SLAPPs cases which would not apply in other spheres of solicitor activity, with the inevitable problem that the duties which the SRA are seeking to apply for SLAPPs cases seem to suffer from a logic deficit.

44.3 I repeat the point which I have made in paragraph 42 above. Under the SRA Code of Conduct 2011 the solicitor who doubts the truth of the client's factual instructions, or who disbelieves the client, may nevertheless be bound to continue to act for the client under the retainer and the SRA Code of Conduct 2011, and the provisions which I have set out in paragraph 42.

45. There is ample authority for the proposition that a solicitor who receives instructions to act for and make or maintain claims on behalf of a client does not owe a duty under either common law/constitutional provisions to conduct a "due diligence" investigation, and only to continue acting if the solicitor finds the client's case to be credible after such investigation.

46. In *Orchard v South Eastern Electricity Board* [1987] QB 565 the Court of Appeal considered whether solicitors for the plaintiff were liable to pay the successful defendants' costs where the plaintiff's case, funded by legal aid, had failed. The plaintiff alleged that because of defects in the electricity supply, electricity was escaping in the vicinity of his house and heating water in the earth so that it turned to steam or changed into its constituent gases, giving rise to penetration of the concrete floors by water, the appearance of water from electricity sockets, and other physical phenomena such as the movement of objects in the house. The plaintiff's claims were supported by independent expert evidence. In the Court of Appeal Donaldson MR described the plaintiff's claims as "weird in the extreme". Before the hearing of the action the defendants' solicitor wrote to the plaintiff's solicitors saying that if the action continued to trial, they would make an application that the plaintiff's solicitors be ordered to pay the defendants' costs. After a 12-day trial Steyn J dismissed the plaintiff's action, holding that the events complained of were all caused by a member of the plaintiff's family and that the plaintiff and his wife must have realised that from an early stage. He made an order for costs against the plaintiff, not to be enforced without the leave of the court. The defendants applied for an order under R.S.C., Ord. 62, r. 8 that the plaintiff's solicitors pay their costs. The judge (later Lord Steyn) held that the plaintiff's solicitors and counsel had acted entirely properly, and dismissed the application. Moreover, Steyn J indicated in his judgment that a threatened application for what is now a wasted costs order, made prior to trial, might constitute a contempt of court because it might be considered to be seeking to interfere with the duties of solicitors and advocates to act independently and in their client's best interests.

47. On appeal before a strong Court of Appeal presided over by Donaldson MR[6] the Court of Appeal upheld Steyn J's judgment. They found that although solicitors owed a duty to the court to conduct

[6] As Master of the Rolls Lord Donaldson heard appeals on regulatory decisions of the Law Society usually on Fridays of each week. He was therefore familiar with, and expert in, the duties of solicitors.

litigation with "due propriety", it was doubtful whether they owed any such duty to the opposing party. The jurisdiction to order a solicitor to pay the costs of the opposing party under R.S.C., Ord. 62, r. 8 could be exercised only where it was clear that the solicitor was guilty of a serious dereliction of duty or serious misconduct, and should be exercised with care and discretion; that, although a solicitor should not assist a litigant where prosecution of a claim amounted to an abuse of process it was not his duty to attempt to assess the result of a conflict of evidence or to impose a pretrial screen on a litigant's claim or defence. Such a charge of misconduct against a solicitor ought not to depend on inference without direct evidence and that since the plaintiff's claim had been supported by independent witnesses and expert evidence it was impossible to assail the judge's conclusion that legal aid had been properly granted and that the solicitors and counsel had acted properly, see pp. 571D-F, 572c-o, 577D-G, 579G—580c, 581C-D). (Emphasis mine).

48. In the course of his judgment Donaldson MR stated:

> "*In the context of a complaint that litigation was initiated or continued in circumstances in which to do so constituted serious misconduct, it must never be forgotten that it is not for solicitors or counsel to impose a pre-trial screen through which a litigant must pass before he can put his complaint or defence before the court. On the other hand, no solicitor or counsel should lend his assistance to a litigant if he is satisfied that the initiation or further prosecution of a claim is mala fide or for an ulterior purpose or, to put it more broadly, if the proceedings would be, or have become, an abuse of the process of the court or unjustifiably oppressive.*"

49. I am conscious that in the case of *Orchard* the plaintiff had obtained expert evidence which supported his "weird" case. However, the Court of Appeal judgment in its statement of principles is not dependent upon whether or not expert evidence had or had not been obtained to support the client's case. The Court of Appeal's statement of principle, that solicitors and barristers are not required to impose a " pre-trial screen" before a litigant can commence or defend proceedings, is of general application. I would also recommend that the submissions of counsel for the SEEB be read: they bear a remarkable similarity to the language of the SRA in the instant case which was rejected by the Court of Appeal. It is worth noting that the Court of Appeal did not call upon counsel for the plaintiff (in a similar position to the firm in this case) before issuing its judgment.

50. More recently, an authoritative judgment[7] has been handed down by the High Court (Fancourt J) in *El Haddad v Al Rostamani & Ors* [2024] EWHC 448 (Ch). A claim was brought against a group of defendant lawyers who acted in an underlying claim where it was maintained that the defendant lawyers had dishonestly misled the court. The Judge addressed the role of English litigation lawyers and stated:

> *41. Solicitors and barristers owe an overriding duty to the court not to mislead it by presenting a case or asserting facts that they know to be false or which are manifestly false, or to make serious allegations against another person which are unsupported by evidence or instructions from their client. A lawyer may not make an allegation of fraud or of comparably serious misconduct, such as conspiring to cause harm by acting unlawfully, unless they have distinct instructions from their client to make that allegation and there is evidence capable of supporting a finding of fraud or impropriety.*
>
> *42. There is no comparable duty on a lawyer not to make an inadvertent error in presenting the client's case. Even skilled advocates mistake a fact or a legal argument from time to time: the adversarial process provides ample opportunity to the other side to correct any such mistake.*
>
> *43.Subject to the overriding duty to the court, the lawyer's duty is to present the facts as their client alleges them to be and advance arguments based on those facts. Importantly for present purposes, a lawyer does not owe the court or another party to the case any duty to investigate the facts, or to ascertain the truth, before advancing the factual case on behalf of their client. That is so even if they have doubts about the likelihood that what their client tells them is true. What the lawyer advises their client confidentially about the strength or weakness of the evidence is of course privileged, and not something into which the court or another party can inquire.*
>
> *44.The English lawyer's duty to their client is to seek by all proper professional means to advance the client's case, fearlessly, in accordance with the client's instructions, as long as there is a proper argument capable of being advanced. If the client's case is a weak one, the Court will so decide. Although the lawyers are paid by the client and often work closely with the client in preparing for a hearing or trial, they do not become associates of the client or otherwise identified with the client's interests. They remain functionally independent, and their overriding duties to the court are a cornerstone of that independence."*
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> (The emphasis is mine).

[7] The hearing lasted for 3 days, the judge took up to 2 days to read in, and the judgment was reserved. Counsel who are specialist in lawyers' legal duties were involved for the parties.

51. In the period between the judgments referred to in paragraphs 49 and 50 the Court of Appeal heard a series of appeals concerning issues relating to bias and applications for costs orders against lawyers, see *Ridehalgh v Horsefield* [1994] Ch 205. In giving judgment Sir Thomas Bingham MR said at 234C-E:

> "*Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is… for the judge and not the lawyers to judge it*[8].
> *It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court. … It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it.*"

52. The Privy Council in 2001 overturned a judgment of the New Zealand Court of Appeal in a case concerning whether it was appropriate for a costs order to be made against a solicitor and barrister who had brought a hopeless case on behalf of a client: *Harley v McDonald (New Zealand)* [2001] UKPC 18 (10 April 2001). The Court and the Privy Council had to decide whether the solicitor and barrister were guilty of a serious dereliction of duty such as to justify costs orders being made against them. The Privy Council adopted Sir Thomas Bingham MR's reasoning in *Ridehalgh v Horsefield*, and stated:

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[8] This part of the judgment by Sir Thomas Bingham MR (a historian before becoming a barrister and eminent jurist) reflects the passages in Boswell's the Life of Samuel Johnson LLD [1791]: *Boswell:* "But what do you think of supporting a cause which you know to be bad?" *Johnson:* "Sir, you do not know it to be good or bad until the judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, Sir, that is not enough. An argument which does not convince yourself, may convince the Judge to which you urge it; and if it does convince him, why, then, Sir, you are wrong and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the Judge's opinion."*Boswell:* "But, Sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion, when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life, in the intercourse with friends?" *Johnson:* "Why no, Sir. Everybody knows you are paid for affecting warmth for your client; and it is, therefore, properly no dissimulation: the moment you come from the bar you resume your usual behaviour. Sir, a man will no more carry the artifice of the bar into the common intercourse of society, than a man who is paid for tumbling upon his hands will continue to tumble on his hands when he should walk on his feet."

> *"57. Their Lordships agree with the Court of Appeal's conclusion in [1999] 3NZLR 545 at para [59] that a duty rests on officers of the court to achieve and maintain appropriate levels of competence and care and that, if he is in serious dereliction of such duty, the officer is properly amenable to the costs jurisdiction of the court. But care must be taken not to assume that just because it appears to the court that the case was hopeless there was a failure by the barrister or solicitor to achieve the appropriate level of competence and care. As Sir Thomas Bingham MR said in Ridehalgh v Horsefield [1994] Ch 205, 234C-E [see quotation above]*
>
> *67. Then there is the proposition that a barrister who pursues a hopeless case not appreciating it to be hopeless displays such a degree of incompetence as to amount to a serious dereliction of her duty to the court. Their Lordships consider this proposition, without more, to be unsound. Without attempting to provide a precise definition of what amounts to a serious dereliction of duty, they are of the opinion that it is open to the court to penalise incompetence which leads to a waste of the court's time or some other abuse of its process resulting in avoidable cost to litigants. But it will almost always be unwise for the court, in the exercise of this jurisdiction, to treat the pursuit of hopeless cases as a demonstration of incompetence. As a general rule litigants have a right to have their case presented to the court and to instruct legal practitioners to present them on their behalf. Although exceptional steps may have to be taken to deal with vexatious litigants, the public interest requires that the doors of the court remain open. And on the whole it is in the public interest that litigants who insist on bringing their cases to court should be represented by legal practitioners, however hopeless their cases may appear. For these reasons something more than the mere fact that the case is hopeless is required. The absence of anything more than that in this case for which Mrs Harley can reasonably be criticised is striking. Their Lordships have concluded that the Court of Appeal were wrong to hold that she was in serious breach of her duty to the court. It follows that they were also wrong to make the same finding against Glasgow Harley with regard to their conduct of the case as Mr McDonald's solicitors."*

53. It is necessary when considering the contractual/common law/constitutional duties of solicitors to keep in mind the regulatory duties which apply to solicitors, principally pursuant to section 31 of the Solicitors Act 1974 and (in the context of this case) the SRA Code of Conduct 2011 made pursuant to section 31. There are four cases in particular where appellate courts have given judgments about the duties of solicitors where the court defined the scope of such duties by reference to the regulatory context in which they arise. These cases are *Brett v Solicitors Regulation Authority* [2014] EWHC 2974, *SRA v Day and Others* 2018 EWHC 2726 (Admin), *Wingate Evans v SRA* [2018] EWCA Civ (Admin) 366 , *and Beckwith v SRA* [2020] EWHC 3231 (Admin). I will deal with each under the heading of "relevant regulatory duties" below, because

these cases connect the contractual/common law/constitutional duties which I refer to above with the statutory /regulatory obligations of solicitors.

Relevant Regulatory Duties

54. The SRA in the notices relies on three provisions of the 2011 Code:

(i) Principle 2, the duty to act with integrity. (A breach of Principle 2 is alleged in relation to allegations 1 and 2)

(ii) Principle 6, to behave in a way that maintains the trust the public places in you and in the provision of legal services. (A breach of Principle 6 is alleged in relation to allegation 1)

(iii) Outcome 11.1 that you do not take unfair advantage of third parties in either your professional or personal capacity (a breach of outcome 11.1 is alleged in relation to allegation 2).

Overview of Principles 2 and 6

55. The scope of Principles 2 and 6 is shaped by the detailed provisions of the Code. See SRA v *Beckwith* [2020] EWHC 3231 (Admin). As to Principle 2, see in particular para 33 of *Beckwith* which states

> "the standard of conduct required by the obligation to act with integrity must be drawn from and informed by appropriate construction of the contents of the Handbook, because that is the legally recognised source for regulation of the profession".

56. As to Principle 6, see para 43 of *Beckwith*:

> "We consider the same general approach must also apply when determining the scope of Principle 6. The content of Principle 6 must be closely informed by careful and realistic consideration of the standards set out in the 2011 Code of Conduct. Otherwise, Principle 6 is apt to become unruly. There is a qualitative distinction between conduct that does or may tend to undermine public trust in the solicitor's profession and conduct that would be generally regarded as wrong, inappropriate, or even for the person concerned, disgraceful. Whether that line between personal opprobrium on the one hand and harm to the standing of the person as a provider of legal services or harm to the profession per se on the other hand has been crossed, will be a matter of assessment for the Tribunal from case to case, but where that line lies must depend on a proper understanding of the standards contained in the Handbook."

Principle 6

57. If a solicitor commits a breach of the duty of integrity (Principle 2) the breach of duty is regarded as very serious, and may well result in an order by the SDT of suspension or strike off from the roll: see the judgment of Sir Thomas Bingham MR in *Bolton the Law Society* 1994 1WLR 512 at 517 – 519. A breach of Principle 6, while serious, does not necessarily lead to the same result. Logically, therefore, one should start on the facts of this case with Principle 6. It seems to me highly unlikely that the SRA would be able to establish a breach of principle 2 if it cannot establish a breach of Principle 6. It is necessary to start by determining how a breach of Principle 6 may arise where, as in this case, solicitors are acting for a potential claimant in libel or related proceedings. A solicitor in the position of the firm owed the private law duties which I have set out in paragraphs 34-39 above.

58. If a solicitor conducting a potential claim for libel, slander or *Norwich Pharmacal* relief is complying with the duty of care owed to the client, is acting in accordance with his client's instructions, and is not putting forward a claim which the solicitor knows is vexatious or an abuse of the court's process, no breach of the Principle 6 duty will arise. This is because a solicitor acting in the course of a retainer for the client will not be bringing disrepute upon himself or the profession unless his conduct is not just negligent but falls so far beyond negligence as to constitute manifest incompetence. See paragraphs 52-57 above. See also the judgment of the Court of Appeal in *Wingate Evans v SRA*, [2018] EWCA Civ (Admin) 366 and the judgment of Jackson LJ at 105-106:

> "105. Principle 6 is aimed at a different target from that of Principle 2. Principle 6 is directed to preserving the reputation of, and public confidence in, the legal profession. It is possible to think of many forms of conduct which would undermine public confidence in the legal profession. Manifest incompetence is one example. A solicitor acting carelessly, but with integrity, will breach Principle 6 if his careless conduct goes beyond mere professional negligence and constitutes "manifest incompetence"; see Iqbal and Libby.
> 106. In applying Principle 6 it is important not to characterise run of the mill professional negligence as manifest incompetence. All professional people are human and will from time to time make slips which a court would characterise as negligent. Fortunately, no loss results from most such slips. But acts of manifest incompetence engaging the Principles of professional conduct are of a different order."

59. The Divisional Court in *SRA v Leigh-Day and others* 2018 EWHC 2726 (Admin) gave a judgment which adopted similar principles to those set out in the judgment of the Court of Appeal in *Wingate Evans the SRA*..See in particular paras 156-157:

> "156….As we have had cause to ask rhetorically before in this judgment: what was this particular allegation doing before the Tribunal if it was not a matter of professional misconduct? In truth, if such an allegation under Principle 5 is to be pursued before a tribunal then it ordinarily needs to have some inherent seriousness and culpability. It no doubt can be accepted that negligence may be capable of constituting a failure to provide a proper standard of service to clients. But even so, questions of relative culpability and relative seriousness surely still come into the equation under this Principle if the matter is to be the subject of disciplinary proceedings before a tribunal. We do not, we emphasise, say that there is a set standard of seriousness or culpability for the purposes of assessing breaches of the core principles in tribunal proceedings. It is a question of fact and degree in each case. Whether the default in question is sufficiently serious and culpable thus will depend on the particular core principle in issue and on the evaluation of the circumstances of the particular case as applied to that principle. But an evaluation of seriousness remains a concomitant of such an allegation.
>
> 157. If authority be needed for such an approach, then it can be found not only in the observations of Jackson LJ (in the specific context of Principle 6) in Wingate and Evans (cited above) but also in the decision of the Court of Session in Sharp v The Law Society of Scotland [1984] SC 129. There, by reference to the applicable Scottish legislation and rules, it was among other things held that whether a breach of the rules should be treated as professional misconduct depended on whether it would be regarded as serious and reprehensible by competent and responsible solicitors and on the degree of culpability: see the opinion of the court delivered by the Lord President (Lord Emslie) at page 134. We consider that, though the statutory schemes are by no means the same, the like approach is generally appropriate and required for the English legislative and regulatory regime in the treatment of alleged breaches of the core principles. We appreciate that there may be some breaches of some rules - for instance, accounts rules: see, for example, Holden v Solicitors Regulation Authority [2012] EWHC 2067 (Admin) - which can involve strict liability. But that cannot be said generally with regard to all alleged breaches of the core principles coming before the Tribunal; which in our view ordinarily will involve an evaluative judgment and an assessment of seriousness to be made."

60. Likewise, for the same reasons, a solicitor will not be taking unfair advantage of a lay opponent (Outcome 11.1[9]) if, when writing to the lay opponent the solicitor robustly sets out the client's case and does so in a way which is not manifestly incompetent, and which does not misrepresent to the recipient the nature of the claim, or the actions which the client is prepared to take in pursuit of the claim. The fact that under the English jurisdiction claims for libel and slander, or breach of privacy, may be easier to advance than in other jurisdictions, and that there may be serious costs

[9] "You do not take unfair advantage of third parties in either your professional or personal capacity".

consequences for the recipient of such claims does not give rise to a duty on the part of the solicitor advancing the claim on behalf of his client which is any different from the duties as I have set them out above.

61. The scope of the duties which apply to solicitors as I have set them out above is informed and reinforced by both Chapters 1 and 5 of the SRA Code of Conduct 2011. The Outcomes and Indicative Behaviours set out in these chapters are calibrated in such a way as to be consistent with the duties as courts have set out in the judgments to which I refer above.

62. Chapter 1 of the 2011 Code contains client – facing duties. It requires inter alia:

O1.1 You treat your clients fairly; you provide services to your clients in a manner which protects their interests in their matter, subject to the proper administration of justice;

O1.2 When deciding whether to act, or terminate your instructions, you comply with the law and the Code;

O1.3 You have the resources, skills and procedures to carry out your clients' instructions; O1.4 The service you provide to clients is competent, delivered in a timely manner and takes account of your clients' needs and circumstances;

63. For the purposes of this case the following duties under Chapter 5 of the SRA Code 2011 are also relevant:

Chapter 5: Your client and the court

This chapter is about your duties to your client and to the court if you are exercising a right to conduct litigation or acting as an advocate. The outcomes apply to both litigation and advocacy but there are some indicative behaviours which may be relevant only when you are acting as an advocate.

The outcomes in this chapter show how the Principles apply in the context of your client and the court. You must achieve these outcomes:

5.1 You do not attempt to deceive or knowingly or recklessly mislead the court;

5.2 You are not complicit in another person deceiving or misleading the court;

5.3 You comply with court orders which place obligations on you;

5.4 You do not place yourself in contempt of court;

5.5 Where relevant, clients are informed of the circumstances in which your duties to the court outweigh your obligations to your client;

5.6 You ensure that evidence relating to sensitive issues is not misused;

5.7 You do not make or offer to make payments to witnesses dependent upon their evidence or the outcome of the case.

Indicative behaviours

Acting in the following way(s) may tend to show that you have not achieved these outcomes and therefore complied with the Principles:

(IB) 5.7 Constructing facts supporting your client's case or drafting any documents relating to any proceedings containing:

(a) any contention which you do not consider to be properly arguable; or
(b) any allegation of fraud, unless you are instructed to do so and you have material which you reasonably believe shows, on the face of it, a case of fraud;

64. There are a number of points about these chapters which merit attention. First, nowhere in these chapters is there an obligation that a solicitor must not proceed with a claim if he or she does not find the claim or the client's instructions to be factually credible. The touchstone for whether a claim can be brought is that it should be considered by the solicitor to be "properly arguable". As I have set out from the authorities above a claim will be properly arguable even if it is likely to fail provided it does not constitute an abuse of process or a vexatious claim (see *Orchard v SEEGB,* and *Ridehalgh v Horsefield*). Furthermore, the solicitor, even if he finds the claim not to be factually credible, may nevertheless be bound pursuant to the duties as I have set them out above to continue with the retainer in order to comply with his duties both under the retainer and under the SRA Code of Conduct 2011. It should also be noted that it is a matter for the solicitor's judgment as to whether he/she considers the claim to be properly arguable.

65. Second, it is only in claims of fraud or dishonesty (or similar such allegations such as criminal allegations or the bringing of professional misconduct claims) where a solicitor has a dual obligation requiring him/her to have not just client instructions, but also material which supports the allegation of fraud/dishonesty. In all other cases a solicitor is entitled, if not bound, to act upon the client's instructions. The 2011 Code reflects the common law principles in this respect, as does the Bar Code of Conduct. See *Medcalf v Mardell* 2002 UKHL 27, and BSB Handbook

Guidance to C3-6 at GC6-7[10]. If a solicitor disbelieves his/her client on the facts, that does not give rise to an obligation to discontinue. The obligation to discontinue only arises if the solicitor knows that the claim which the client wishes to advance is an abuse of process or vexatious[11].

66. Third, I have noted that in the notices the SRA does not contend that there has been a breach of any of the obligations set out in chapters 1 or 5 of the 2011 Code. Nor does the SRA grapple with the points of principle which I refer to in paragraphs 62 to 65. Indeed, the SRA in the notices does not appear to have considered or attempted to reconcile the duties under Chapters 1 and 5 of the 2011 Code with the allegations which they are making.

Principle 2: the duty of integrity

67. A solicitor will act with a lack of integrity if for example he or she acts not only in breach of a duty, but also with deliberate or reckless disregard to such duty. In the context of professional duties there must be a failure on the part of the solicitor to comply with a duty which is owed by him/her which is so serious as to give rise to a breach of the duty of integrity.

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[10] **"gC6** You are obliged by CD2 to promote and to protect your *client's* interests so far as that is consistent with the law and with your overriding duty to the *court* under CD1. Your duty to the *court* does not prevent you from putting forward your *client's* case simply because you do not believe that the facts are as your *client* states them to be (or as you, on your *client's* behalf, state them to be), as long as any positive case you put forward accords with your *instructions* and you do not mislead the *court*. Your role when acting as an advocate or conducting litigation is to present your *client's* case, and it is not for you to decide whether your *client's* case is to be believed.

gC7 For example, you are entitled and it may often be appropriate to draw to the witness's attention other evidence which appears to conflict with what the witness is saying and you are entitled to indicate that a *court* may find a particular piece of evidence difficult to accept. But if the witness maintains that the evidence is true, it should be recorded in the witness statement and you will not be misleading the *court* if you call the witness to confirm their witness statement. Equally, there may be circumstances where you call a hostile witness whose evidence you are instructed is untrue. You will not be in breach of Rule rC6 if you make the position clear to the *court*."

[11] In this regard knowledge would in my opinion include a solicitor recklessly disregarding the fact that the claim was an abuse of process or vexatious. However, a solicitor who advances a case based on his client's instructions as to the facts, despite suspecting or even believing that his client is not telling the truth, is not acting recklessly (see para 43 - supra). Recklessness could arise if, for example, a solicitor were to advance a case which purports to be the client's case as to the facts without bothering to take instructions from the client as to the facts (thereby being reckless as to whether the client actually supports the case being advanced). The Solicitors Disciplinary Tribunal would adopt the test in *R v G* [2003] UKHL 50, [2004] 1 AC 1034 at [41] per Lord Bingham: "*A person acts recklessly* […] *with respect to—(i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.*"

68. When dealing with the duty of integrity under the Code Rupert Jackson LJ in *Wingate v Evans* [2018] 1 WLR 3969 stated:

> "*[100] Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. To take one example, a solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead. Such a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse.*
>
> *[101] The duty to act with integrity applies not only to what professional persons say, but also to what they do. It is possible to give many illustrations of what constitutes acting without integrity. For example, in the case of solicitors: (i) A sole practice giving the appearance of being a partnership and deliberately flouting the conduct rules: the Emeana case [2014] ACD 14. (ii) Recklessly, but not dishonestly, allowing a court to be misled: the Brett case [2015] PNLR 2. (iii) Subordinating the interests of the clients to the solicitor's own financial interests: the Chan case [2015] EWHC 2659 (Admin). (iv) Making improper payments out of the client account: the Scott case [2016] EWHC 1256 (Admin). (v) Allowing the firm to become involved in conveyancing transactions which bear the hallmarks of mortgage fraud (the Newell-Austin case [2017] Med LR 194. (vi) Making false representations on behalf of the client: the Williams case [2017] EWHC 1478 (Admin)"*

69. In *Brett v SRA* (supra) a solicitor who believed that the instructions which he had received from a journalist were confidential and privileged, and which conflicted with the evidence which the journalist gave to the court, thereby misleading the court, was guilty of breach of the duty not to permit the court to be misled, and recklessly so such that he breached his duty of integrity.

70. Conversely, a solicitor and partner in a firm who had sex with an associate at her home, when the solicitor was married was found by the Divisional Court not to be acting with a lack of integrity because there was no professional rule which he was breaching and upon which the breach of duty giving rise to a lack of integrity could be founded. See *Beckwith v SRA* [2020] EWHC 3231 (Admin).

71. It follows from the foregoing that in circumstances where a solicitor is acting for a client bringing a claim, and is not when pursuing the claim in breach of a professional duty identified in the Code or "Handbook", an allegation of lack of integrity cannot be advanced on the basis that members of the public would deplore the solicitor's conduct. Indeed, the SRA has in the notices approached

the question of integrity the wrong way round. The notices set out what the SRA considers the public would have expected of solicitors in the position of the firm, and then state that because this expectation was not met there was a breach of the duty of integrity. This is not the correct approach: the SRA must first ask (a) has there been a breach of a duty by the firm under the SRA Code 2011? If so, (b) is the breach so serious as to constitute a deliberate or reckless disregard of the duty such as to constitute a breach of Principle 2?

The existence and scope of any obligation to conduct due diligence into the subject matter of the firm's instructions and in particular whether it was at the time of the relevant retainers part of the firm's duty under Principles 2 and 6 of the SRA Principles 2011 to investigate the truth or otherwise of its instructions, and if so, how far did that duty extend.

72. For the reasons discussed above, a solicitor does not have a duty to conduct a due diligence exercise into the subject matter of his/her instructions. There is no duty, nor was there at the relevant time, to investigate the truth of the instructions.

73. In order for a breach of Principle 6 to arise relating to truth of the instructions in the circumstances of this case, it would be necessary for the SRA to establish that the firm fell so far below the standard of competence or reasonable care when advancing the claims as to be manifestly incompetent.

74. Further, an allegation of breach of the duty of integrity cannot be advanced unless the principles which I have set out in paragraphs 67-71 have been met. I note that the SRA in this case have not addressed the question of lack of integrity by reference to such principles.

Whether, if the firm's instructions were that the client did not wish to pursue a claim to trial but might issue a claim, was it proper or improper (having regard to Principles 2 and 6 of the SRA Principles 2011 and Outcome 11.1 of the SRA Code of Conduct 2011) to assert the client's rights, based on their instructions.

75. It follows from all that I have said throughout my opinion above that it is proper for a solicitor to assert a right or a claim on behalf of a client even if the client has no intention to do more than issue a claim in the court, but not to pursue it further, provided that if issued the claim will not offend against the abuse of process or vexatiousness principles which I have explained above.

76. There is no duty upon a solicitor instructed to advance a right or a claim on behalf of the client only to do so if the client wishes, and instructs the solicitor, to issue proceedings and pursue them to trial. There is a strong public interest in claims being settled, or if lacking in merit to be withdrawn before proceedings are issued. The reforms brought in by Lord Woolf in the form of the Civil Procedure Rules 1998 were brought into being with this public interest in mind. Indeed, if a solicitor were bound only to advance claims if the client intended to pursue the claims to trial the Pre-Action Protocol requirements under the CPR would be severely weakened, if not rendered nugatory.

77. However, if a solicitor has instructions that the claim should not be issued, or if issued should not proceed any further, the solicitor is under a duty not to misrepresent the position to the opposing party and the court. To do so may give rise to breach of Outcome 11.1 under the SRA Code 2011. And if the misrepresentation were made recklessly then a breach of Principle 2 is likely to occur. I stress that there is nothing under the SRA Code of Conduct 2011 which prevents a solicitor from advancing a right or claim on behalf, and on the instruction, of the client up to and including the issue of process, provided that the solicitor has complied with the duties as I have set about above.

Constitutional Rights and Access to the Court under Article 6 of the ECHR

78. It follows from what I have said in paragraphs 28 – 77 above that the SRA is proceeding under an error of law in respect of the propositions which it is advancing and which I have summarised in paragraph 31 above. The SRA is proceeding in advancing the case against the firm by making errors of law as to the particular duties owed by the firm on the facts of the case. However, the SRA also may be proceeding unlawfully as a regulator in respect of this matter (and I suspect other SLAPP investigations) having regard to its duties as a regulator. I deal with this in the paragraphs below.

79. There is a constitutional right for individuals and entities to have access to the court. That right is also reflected in article 6 of the ECHR. This proposition is well known, and not in doubt.

80. In order for a person to have access to a court he or she may require access to lawyers and legal advice. See the speech of Lord Hoffmann in *R (ex parte Morgan Grenfell) v Special Inspector of Taxes* [2002] UKHL 21 . The right of an individual to obtain access to a lawyer to receive privileged advice was described by Lord Hoffmann as a substantive right (paras 30-32[12]) which could only be overridden by primary legislation. It follows from this description of legal privilege that a right is enjoyed on the part of an individual, or other entity, to gain access to the lawyer. i.e. there is an anterior right of access to the lawyer so as to enable a person who requires advice or representation to gain access to the court. See the judgment of Teare J in *JSC Bank v Addleshaw Goddard and others* [2012] EWHC 1252 (Comm).

81. An essential part of the principles which underlie legal professional privilege is to enable a person to gain access to a lawyer and, in circumstances of absolute confidentiality, to divulge all the facts to the lawyer so as to receive informed advice on what steps the client may need to take. See the speech of Lord Hoffmann in Morgan Grenfell (supra) and of Baroness Hale in *Three Rivers District Council No 6* [2004] UKHL 48. A helpful summary of English law, and of the importance of legal professional privilege as a constitutional and human right can be found in the recently published paper by Oppenheimer and others "Privilege: The UK Perspective", Global Investigations Review 10 January 2024[13]

82. If a lawyer were to have a duty to conduct due diligence in respect of a client's case so as to prevent him/her from acting for the client and to represent the client before the court either because the lawyer had not conducted due diligence and/or because the lawyer did not believe

[12] The passage in paragraph 32 where Lord Hoffmann states that use by the Law Society of privileged documents for the purposes of investigation would not constitute a breach of privilege, is no longer considered to be good law. (See *Financial Reporting Council v Sports Direct International Plc* [2020] EWCA Civ 177). This is irrelevant for the purposes of this opinion.

[13] The link is here: https://globalinvestigationsreview.com/guide/the-practitioners-guide-global-investigations/2024/article/privilege-the-uk-perspective

in the client's factual case, it seems to me that the constitutional rights to which I refer above, and the right of access to the court and equality of arms under article 6 of the ECHR would be likely to be infringed.

83. The SRA's contentions seem to me to give rise to the very real possibility that a client would be denied his/her constitutional and/or ECHR article 6 rights. This in turn would lead to the prospect that any attempt by the SRA to create a duty (a) that a lawyer must conduct a due diligence exercise into the credibility or merits of a case before taking the client on or continuing to act for the client, or (b) that the lawyer must believe in the client's factual case before continuing to act, would be a breach of the constitutional and ECHR arrangements which apply under English law. The SRA's approach would also lead to clients of solicitors not divulging all relevant facts in absolute confidence to solicitors, for fear that the solicitor would be compelled to cease acting for the client because a solicitor did not believe in the case. This too would fundamentally erode the constitutional and human right of legal privilege.

84. The SRA's duties as a regulator are now embodied by statute in the regulatory objectives and professional principles set out in section 1 of the Legal Services Act 2007. The SRA has a duty to promote the regulatory objectives, see section 28 of the LSA.

85. The regulatory objectives are (a) protecting and promoting the public interest; (b) supporting the constitutional principle of the rule of law; (c) improving access to justice; (d) protecting and promoting the interests of consumers; (e) promoting competition in the provision of services within subsection (2); (f) encouraging an independent, strong, diverse and effective legal profession; (g) increasing public understanding of the citizen's legal rights and duties; (h) promoting and maintaining adherence to the professional principles.

86. Under S1(3) of the LSA the "professional principles" are— (a) that authorised persons should act with independence and integrity, (b) that authorised persons should maintain proper standards of work, (c) that authorised persons should act in the best interests of their clients, (d) that persons who exercise before any court a right of audience, or conduct litigation in

relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and (e) that the affairs of clients should be kept confidential.

87. A policy adopted by the SRA bound by the duties which I have set out in paragraphs 85 and 86, whereby the regulator requires those it regulates to comply with the requirements set out in paragraph 31 above could well be acting in breach of the regulatory principles set out in section 1 (1) (a) – (c), and the professional principles set out in section 1 (3) (a) and (c) of the LSA 2007.

88. Given the legal error being made by the SRA on the facts of this case, it is not necessary for the purposes of this opinion to reach a final conclusion as to whether the SRA's position is unlawful on the additional basis that the SRA is acting in breach of the Regulatory Objectives and the Professional Principles under the Legal Services Act 2007. However, it seems to me that the arguments being put forward by the SRA which I have set out in paragraphs 28 – 32 above would give rise not just to an error of law in this particular case, but to a breach of the constitutional law provisions now embodied in sections 1 (1) (a) – (c) and 1 (3) (a) and (c) of the LSA, and of article 6 of the ECHR.

Conclusions

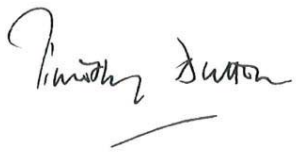
89. For all of the reasons set out above, in my opinion:

(i) A solicitor is not bound by a duty of due diligence, such as to prevent the solicitor from acting for the client in pursuit of a defamation (or any other short of fraud/dishonesty) claim if a due diligence process has not been undertaken, or if the solicitor does not find the claim or the client's instructions to be factually credible. Principles 2 and 6 of the SRA Code 2011 did not impose such duties. A solicitor's duty in the context of the current case is to act upon the client's instructions, but not to advance a case which he/she knows to be an abuse of process or vexatious (see paragraph 64 above). I do not understand the SRA to be contending in the notices that

the firm knew that the claims were not based upon the client's instructions or that the firm knew them to be an abuse of process or vexatious.

(ii) There is no duty imposed upon a solicitor (under Principle 2 or Outcome 11.1 the SRA Code of Conduct 2011), instructed to advance a right or claim in correspondence on behalf of a client only to do so if the client wishes, and instructs the solicitor, to issue proceedings and pursue the claim to trial. The solicitor in possession of such instructions must of course not misrepresent the position to the recipient of his /her correspondence as to the client's true intentions.

90. If there are any matters arising those instructing me should not hesitate to make contact.



Timothy Dutton CBE, KC

10th May 2024

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