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Case No: CO/265/2023
AC-2023-LON-000475

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
ON APPEAL FROM THE SOLICITORS DISCIPLINARY TRIBUNAL
(Case No. 12320-2022)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2023

Before :

Mr Justice Calver

- -

Between :

DAVID DAVIES — **Applicant**

- and -

DAVID GREENE — **Respondent**

- -
- -

Elaine Banton (instructed by **Kilgannon Law**) for the **Applicant**
Ben Hubble KC (instructed by **Kingsley Napley)** for the **Respondent**

Hearing dates: 12 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 21st December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Calver:

Introduction

1. The Appellant ("**Mr Davies**") appeals against the decision of the Solicitors Disciplinary Tribunal ("**SDT**"), made on 12 December 2022 and set out in Written Reasons dated 21 December 2022, which dismissed the disciplinary proceedings brought by Mr Davies against the Respondent[1] ("**Mr Greene**"), with no order as to costs.

The correct appellate approach

2. The correct appellate approach in this case is agreed between the parties. The task for this court is to assess whether the Tribunal was "wrong": CPR 52.21 (3).

3. Section 49 of the Solicitors Act 1974 provides a statutory right of appeal to the High Court, which will have the power to make any such order on appeal it may think fit. On hearing an appeal under section 49 the court will only allow an appeal if the SDT misdirected itself as to the law or the court concludes that the SDT, despite having seen and heard the evidence, and after according the SDT an appropriate measure of respect, reached a decision which was wrong: see *Langford v the Law Society* [2002] EWHC 2802 at paragraphs 14 and 15 and *Salsbury v the Law Society* [2009] 1WLR 1286 at paragraph 30.

4. The court in *SRA v Day* [2018] EWHC 2726 (Admin) (at paragraphs 64 to 68) and in *SRA v Good* [2019] EWHC 817 (Admin) (at paragraphs 29 to 32) referred to the fact that the correct approach to follow when assessing whether a decision of the SDT is wrong is set out in the Supreme Court's decision in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41. At paragraph 62 of his judgment Lord Reed stated that an appellate court may only interfere where the trial judge was "plainly wrong". He stated:

> "*The adverb "plainly" does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached*." (emphasis added)

And at paragraph 67 Lord Reed went on to state:

> "*It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified*."

[1] Mr Davies had been certified by the Tribunal as being entitled to prosecute the proceedings against Mr Greene.

The material factual background to the appeal

5. Mr Greene is a partner at Edwin Coe LLP ("**Edwin Coe**"). In March 2008 Edwin Coe was retained, in the first instance, by Mr Davies' company Eco-Power.co.uk Ltd ("**Eco-Power**") to act in respect of a judicial review claim against Transport for London ("**TFL**") and the Public Carriage Office ("**PCO**") as confirmed by Edwin Coe's Terms of Business which were signed by Edwin Coe on 31 March 2008. Accordingly, the first retainer entered into was between Edwin Coe and Eco-Power. Mr Greene was the partner with conduct of the matter ("**the Judicial Review File**"). He dealt throughout with Mr Davies on behalf of Eco-Power.

6. On 23 April 2008 HH Judge Hickinbottom (sitting as a Deputy Judge of the High Court) dismissed the main ground of judicial review, which was the decision of TFL to withdraw approval for the modified Eco-Power system (although two of the TFL's decisions were ruled unlawful). Permission to appeal was refused by Laws LJ on 29 July 2008. The ultimate terms of the dismissal left open the possibility that Eco-Power might be able to pursue a claim in damages against TFL in respect of the first two decisions which were ruled unlawful. Accordingly, by Order of HH Judge Hickinbottom dated 24 November 2008, Eco-Power's claim for damages was stayed but with permission to apply to lift the stay and seek directions in the claim.

7. On 6 October 2008 Edwin Coe had sent Mr Davies an "interim invoice" for work done for Eco-Power on its judicial review case. The letter accompanying the interim invoice stated that "*our work in progress on this is considerably higher but we have reduced it by 10%*".

8. On 27 November 2008 Mr de Bono of Edwin Coe emailed Mr Davies, Andrew Butler of counsel and Mr Greene. He referred to the stay of the damages claim and he stated that *"[t]o press on with it we need to update the submissions which he will then hear. We would need to define more clearly what the damages are. I think we would need some fresh evidence that the systems work well before embarking on that course*."

9. On 23 December 2008 Mr Greene emailed Mr Davies. Under the heading "Costs and Damages" he stated as follows:

> "*I turn now to the question of damages… In theory… you should be able to recover the damages that Eco power suffered as a result [of the decision of TFL]. You would need to quantify the damages and to prove them.*
>
> *This would ordinarily involve an accountant or similar expert… the difficulty we have at the moment is that we do not have any idea from you as to what the damages are. I appreciate that your view is that it is impossible to quantify the loss, but in order to move forward you must try to put some figures together.*
>
> *…*
>
> *We do not have any figures to base such a claim on as things stand. We have discussed this. I have said that the delay in finalising figures will prejudice you in any application to the court.*

> …
>
> *If we are to do further work I am going to need a payment towards the outstanding account*." (emphasis added)

10. This was, submitted Mr Hubble KC on behalf of Mr Greene, simply a case of Mr Greene explaining what was required *if* the damages claim was going to be pursued by Eco-Power. Ms Banton for Mr Davies on the other hand argued that this email and those which followed in the period November 2008 - November 2009 show substantive work being undertaken on the case by Edwin Coe.

11. On 4 March 2009 Mr Greene sent a further email to Mr Davies. He stated as follows:

> "*it looks as though the court wants to proceed quite quickly in relation to any damages claim because we have entered the warned list which means that we could be called on for the hearing.*
>
> …
>
> *In relation to the damages, we would need to have a closer look at the sales figures and profit margins, and we would also want to discuss with Andrew Butler the way in which the claim in damages should be pleaded. As I see it, your claim would be for the loss of sales of the unmodified system which you would have continued to sell if the PCO had not given approval for the modified system.*" (emphasis added)

12. On 17 March 2009 Mr Greene told Mr Davies that "*we are of course willing to take the damages claim forward but we need to sort out past and future costs*."

13. On 6 April 2009 Mr Davies' accountant, Guy Robinson of Moore Stephens, sent an email to Mr Greene and Mr Davies in which he set out an "analysis of sales". He also sent another email on the same date apparently attaching a letter concerning Eco-Power's claim for "lost sales and damages", although that letter was not before the court.

14. There appear to have been other communications between Mr Greene and Mr Robinson which were also not before the court, because on 17 April 2009, Mr Greene emailed Mr Robinson and stated:

> "*Dear Guy*
>
> *Thank you for your letter 03 April…*
>
> *I am pleased to see that we are now establishing a consequential loss claim from the wrongdoing of Transport for London. I just*

> *wanted to touch base with you in relation to the foundation for your calculations.*
>
> *…*
>
> *The question for damages therefore is what damages flow from the unlawful removal of permission for the earlier system that was not then being fitted? As I understand it [Mr Davies] was only fitting the new system with the approval of September 2007 and not the earlier system… we need to tie the damages to the wrongful removal of permission for the old, unmodified system and not for the modified system…*
>
> *I'm not sure if you have addressed that question but that needs some consideration I wonder if I could ask you to do that and perhaps consider those issues."*

15. *On 21 May 2009 Mr Greene emailed Mr Davies. After referring to a GLA briefing paper, he stated:*

> *"… All that we are entitled to do now is pursue the damages for the wrongdoing. As previously, the damages have to flow from the wrongdoing. We are of course pursuing that part of the claim."* (emphasis added)

16. It is unclear what Mr Greene meant by this last sentence. The damages claim could not be pursued until the stay was lifted. He maintained in evidence before the Tribunal that this was a reference to pursuing a claim against TFL by writing to it on 6 May 2009 at the insistence of Mr Davies and putting figures to it[2]; but that in order to pursue a damages claim the stay would first have to be lifted. That seems a reasonable explanation. The letter of 6 May was not before the Tribunal and was not before me, although a follow up letter to TFL of 29 May 2009 was, in which Edwin Coe made some observations on inaccuracies in a GLA briefing paper.

17. The Tribunal did however have TFL's response dated 1 June 2009 to these two letters of 6 May and 29 May, in which it stated as follows:

> "*Turning to your clients claim, can you please clarify the basis in law for seeking compensation? You refer only to the PCO's "unlawful action". Of course the law does not recognise a right to claim damages for losses caused by unlawful administrative action.*
>
> *Accordingly, our client has no offer to make. If your client intends to pursue the claim then an application to lift the stay*

[2]Mr Greene's email to Mr Davies dated 28 May 2009 refers to the fact that he has "*put to [TFL] the damages figures that were prepared by the accountant*." He added that if as he expected TFL rejected the damages claim, then detailed figures from the accountant would be required and there would then need to be a discussion with counsel "*with a view to issuing an application*", presumably to lift the stay.

> *will be required. It is likely that, at that stage, we will apply to strike out the claim.*"

18. On 3 June 2009 Mr Greene emailed Mr Davies and stated:

> "*I attach a letter we have had from TF L. You will see that they deny any liability for damages. We certainly do not agree that you cannot claim damages. The court was specifically dealing with this subject…*
>
> *If we are to pursue this, we are going to need to instruct Andrew [Butler]. We need to sort out the costs position, both for the past and going forward. He will certainly need some funds to pursue the matter because there will be disbursements along the way.*" (emphasis added)

19. This reflected the fact that all of the cost of the failed judicial review had not yet been paid and there would now be costs incurred going forwards *if* the stay on the damages claim were lifted.

20. Mr Greene followed this up with a further email to Mr Davies on 8 June 2009 in which he stated:

> "*Dave [Davies]*
>
> *We spoke last week about pursuit of the damages claim. As I said to you pursue to the damages claim is clearly going to incur costs including the costs of the expert and counsel. The first move would be to get the expert and counsel together in order to establish quantification and what we could prove and the way forward. You are going to consider that because you lack ready funds. I said to you that you could not leave it too long because we have these outstanding proceedings and we must decide what to do with them.*"

21. It is significant that this email, which refers to the "first move" being to get the expert and counsel together to establish quantification, comes after the "claim" was put to TFL and rejected by it. It is consistent with Mr Greene's account that his earlier "settlement" letter to TFL was sent at the insistence of Mr Davies and he was not surprised that it was rejected by TFL because Mr Davies/Eco-Power had not yet properly quantified any claim. That work would begin once Mr Davies had decided whether to apply to lift the stay.

22. On 30 July 2009, Mr Davies emailed Mr Greene to inform him that he had spoken to Mr Robinson and he was happy to work on a more detailed report and provide evidence. He asked Mr Greene to send him details of what he required and to let him know his thoughts.

23. On 3 August 2009 Mr Greene emailed Mr Davies and stated:

> "*I said to you that we are now receiving pressure from the court to get on with things. They want us to list the hearing. If we do not do so shortly, then they will list it automatically, possibly for dismissal. If you are going to pursue the damages claim then we need to give it attention as soon as possible.*
>
> *I appreciate that funds are not moving freely at the moment that's why I fear that if the damages claim is to be pursued, there are costs that are going to have to be paid. In particular, we have the outstanding fees for Andrew, our outstanding bill and the future costs of the process… You will of course also have to pay the expert.*" (emphasis added)

24. Mr Greene followed this up with a further email dated 28 August 2009 in which he stated that *"[as] far as the expert is concerned, we need a full and detailed report of the damages which can then be defended in front of the court*."

25. On 10 November 2009 Mr Greene emailed Mr Davies and asked him:

> "*What we are doing in relation to the hearing in December?" He added that "I have told Transport for London that we are pursuing the claim but obviously we need to decide what our role is and whether counsel is to be instructed. If counsel is to be instructed then we have discussed the payment that we require.*
>
> *I appreciate that payment is difficult for you but if we are not to proceed and you are to handle the matter in person then we would need to make the change to the court record.*"

26. The next day, on 11 November 2009, Mr Davies informed Mr Greene by email that "*I can confirm that I definitely want to proceed*" and that he could make some part payments of costs. Mr Greene responded by email the next day, on 12 November 2009, in which he urged Mr Davies "*to deal with the money immediately*."

27. As a result of Mr Davies' confirmation that he wished to proceed, on 16 November 2009 Mr Greene emailed him and informed him that *"[w]e are opening a new file for the damages claim. I attach our standard terms of business"*. The attached terms of business named the Client as "*David Davies*", not Eco-Power, and the "*Matter*" as being "*Damages*". The commercial rationale for this new retainer was, according to Mr Hubble KC, that Mr Davies then became personally liable for the fees thereafter, even though the damages claim belonged to the company.

28. I consider that these exchanges between November 2008 and November 2009 show the following:

(1) There was plainly contact throughout that period between Mr Greene and Mr Davies;

(2) The damages claim was stayed and Mr Greene repeatedly informed Mr Davies that if the stay was to be lifted he would require funds for counsel, the expert accountant and his firm in order to pursue the claim.

(3) The bare minimum was done in terms of any ongoing work, and the most that was done was the putting together of a proposed settlement letter with TFL, which letter was sent at Mr Davies' insistence on 6 May 2009 but roundly rejected by TFL, with the concomitant threat to strike out any damages claim should Eco-Power apply to lift the stay.

(4) No instructions were received from Mr Davies to lift the stay and pursue the damages claim until 11 November 2009.

29. On 3 December 2010 Edwin Coe issued an invoice to Mr Davies in the sum of £7,218.74 in respect of their professional charges. Mr Davies refused to pay it, maintaining that he was not personally liable for the fees, rather Eco-Power was the client.

30. In March 2012 Edwin Coe accordingly began proceedings against Mr Davies for payment of these fees. There was then a trial in the Winchester County Court before District Judge Stewart. For the purposes of that trial, Mr Greene served a witness statement. In paragraphs 8, 9 and 10 he said this:

> "*8… On instruction an appeal of the decision on the judicial review was pursued but the Court of Appeal refused permission to appeal*[3].
>
> *9. I did not hear from Mr Davies for some considerable time. In the meantime the invoices delivered by my firm in relation to the judicial review remained in part undischarged.*
>
> *10. On or about 16 November 2009 I spoke to Mr Davis. He asked if we would be willing to act to pursue the damages claim identified on the judicial review against Transport for London, the PCO and the Energy Savings Trust. I had not been in contact with him for some time. He explained what had happened in the meantime. He was at the time in negotiation with Transport for London in relation to a modified emission system. He was keen to issue a claim in damages.*" (emphasis added)

[3] Permission to appeal was refused by Laws LJ on 29 July 2008.

31. Taken at face value, the passages underlined were false, as can be seen from the summary of the email traffic between November 2008 and November 2009 set out above.

32. The County Court trial took place on 12 December 2012. The email traffic between November 2008 and November 2009 was not disclosed in the County Court claim by either party. Edwin Coe disclosed its damages claim file (not its judicial review file for Eco-Power, where these documents were located) and sued on the documents (what it called its damages retainer) referred to in paragraph 27 above.

33. In giving evidence under cross-examination at the trial before the County Court Judge, Mr Greene said as follows:

> "*A…We'd closed our file in relation to Eco-power because you'd stopped instructing us in relation to the judicial review. It was an application for… it was an appeal. There was an appeal lodged. We lodged an appeal against the judicial review finding and permission was refused. So that was the end of that matter as far as we were concerned.* ***You came back to us a year, or sometime later, in relation to a potential damages claim****."*

> *Q…Well, surely if this case is about whether the representation was for Eco-power or David Davies it would be extremely pertinent to include a letter saying we have now terminated the Eco-power account and any further representation would be a new claim as David Davies. You have not got that, have you?*

> *A.* ***Well… I don't want to enter into argument [inaudible], but I think if there had been continuous instructions and we had been continuously instructed with Eco-power and then we'd said, right, okay, from now on it's going to be you personally that I could understand****, but the fact is we had finished the Eco-power file some time considerably earlier and, as I say in my statement,* ***you approached us again I think 12 months later saying could we do a damages claim****.*

> *Q. Right. So you are saying that the email… the ongoing emails… there is no gap in representation here. There is continuous emails throughout. There was no break of a year and then I came back to you and you have got nothing to demonstrate that, have you?*

A. ***It is a break of a year.***" (emphasis added)

34. The cross-examination became confusing because Mr Davies and Mr Greene were at cross purposes. Mr Davies was referring to there being no break in *representation*, whereas Mr Greene was suggesting that there was a 12 month break *in the giving of instructions* to progress the judicial review by way of the damages claim (which required the lifting of the stay):

> "*Q… You cannot just say it is a break in representation without a letter saying we have now closed your account, we have terminated representation. There was never any break.*
>
> *A. Our work finished for Eco-Power in relation to the judicial review. After the judicial review we launched an appeal. Permission wasn't given by the Court of Appeal. That was the end of the judicial review.*
>
> *Q. That is not what you said at the time and there was no break of 12 months or gap in representation in my view the representation was continuous. You have not provided today any documentation saying the representation finished. In fact your emails are continuous and it is improper to suggest that it was not. It is factually incorrect to suggest that it was not. There was no break in representation. You continued with the judicial review then there was the appeal and then there was contention about the appeal afterwards and there was also the ongoing damages claimed. There was no break in representation whatsoever –*
>
> *…*
>
> *A. What I have set out in my statement … is that there was a break in representation. You came back to us in November 2009.*"

35. Whilst there had plainly not been a break of a year in communication between Mr Davies and Mr Greene / Edwin Coe, there *had* been a break of year between the final dismissal of Eco-Power's judicial review challenge and Mr Davies instructing Mr Greene that he did indeed wish to pursue the damages claim (and accordingly to apply to lift the stay).

36. Judge Stewart gave judgment in favour of Edwin Coe on 12 December 2012. In paragraph 11 of his judgment he held that the documents showed that a separate retainer was entered into as set out in paragraph 27 above, with Mr Davies as the client. It followed that none of the discussion about a break in representation or instructions mattered.

37. On 29 June 2015 Mr Davies made an application to set aside the judgment of Judge Stewart on the ground that Mr Greene had deliberately misled the court in asserting that

there had been a break in representation of a year which was material to the Judge's reasoning.

38. That application came on for hearing before the same judge, Judge Stewart. In his judgment dismissing the application, he held that:

> "*9. What [Mr Davies] is saying is that Mr Green, who gave evidence on behalf of the Claimants in the original action, Edwin Coe, had misled the Court and it is said that so material was the misleading that it was really, effectively, tantamount to giving fraudulent representations to the Court as to what exactly was going on between the parties in the widest sense, that is Mr David Davis, Eco Power and Edwin Coe, between 2008 and 2009.*
>
> *10. That does seem to be the pivotal date and I am asked, should the Court of its own initiative set aside this judgment in the light of the fact that Mr David Davis has now put before the Court some very important, he says, emails that exist between the period July 2008 and November 2009 … what he says is, that there is significant dialogue between Edwin Coe, notably Mr Greene and himself when the tenor of the evidence of Mr Greene seemed to be suggesting that they had not heard, Edwin Coe, that is, from Mr David Davis, or for that matter Eco Power for some significant time. The time period being about July 2008 to November 2009 …*
>
> *11. … even if these emails*[4] *were before me, that does not dislodge the second agreement, the terms and conditions of which reach Mr David Davis, clearly citing he was to be the client and he was then at his election to accept those terms and conditions or to reject them.*
>
> *12. By virtue of his conduct, he decided to accept them, Nothing in these emails displaces that. All it shows is there was some dialogue. But that is a million miles away from suggesting that Mr Greene had actually misled the Court. I cannot find anything in those emails that, (a) would have made any difference if they had been before me and secondly, anything in them that suggests that the evidence that Mr Greene gave me, either in writing or in the witness box, any way shows him to be anything other than*

[4] The email traffic between November 2008 and November 2009

> *truthful and I have to say that they do not displace the primary evidence that he gave me …*
>
> *16. … I cannot be satisfied or even begin to allow a plane to leave the runway, so to speak, that there had been any allegation of fraud. In other words, deliberately misleading this Court by Mr Green. In my judgment, Mr Greene did nothing of the sort …*
>
> *17. … this is a million miles from any fraudulent activity or deliberate misleading of the Court….*"

39. Mr Davies' next line of attack was to make a complaint of dishonesty against Mr Greene in respect of the same matter to the Solicitors Disciplinary Tribunal ("SDT"). On 21 June 2019 the SDT certified that there was a case for Mr Greene to answer and allowed Mr Davies' Lay Application to proceed.

40. On 13 August 2019 a differently constituted SDT struck out the Lay Application as an abuse of process and in lacking merit. However, in its judgment dated 12 January 2021 the Divisional Court allowed Mr Davies' appeal against the striking out of his Lay Application. At paragraph 74 the Court stated that:

> "*In our judgment, it is at least arguable that the disparity between what Mr Greene said in evidence and the position revealed by the correspondence is capable of supporting a case that the former was not only misleading but deliberately so, and not such as to be explained as a product of mistaken recollection due to the passage of time. Mr Greene was personally involved in regular discussions over this period in relation to a damages claim which was part of the judicial review proceedings and was Eco-Power's claim.*"

41. On 29 March 2022 the Court of Appeal dismissed Mr Greene's appeal against the judgment and order of the Divisional Court (save that it allowed his appeal in respect only of the suggestion that Judge Stewart was misled by Mr Greene and would otherwise have reached a different decision in 2012).

42. It follows that Mr Davies' Lay Application continued and it came before the SDT for a three day hearing in September 2022.

43. Mr Davies' complaint pursued before the SDT, and maintained on this appeal, was that Mr Greene[5]:

[5] See paragraphs 1.1, 1.2, 2 and 3 of the Written Reasons of the SDT.

a. Lied in his witness statement dated 2 November 2012 and in so doing he breached Principles 1, 2 and 6 of the SRA Principles 2011;

b. Lied during the course of giving evidence at the court hearing on 12 December 2012 and in so doing he breached Principles 1, 2 and 6 of the Principles;

c. In misleading the Court as alleged above, Mr Greene's conduct was dishonest;

d. Alternatively to dishonesty, Mr Greene's conduct, in misleading the Court as alleged above, was reckless[6]. (underlining added)

44. It follows that each of the allegations of a breach of SRA Principles depended upon Mr Davies establishing that Mr Greene lied. If he did not, the complaint was bound to fail.

45. At the hearing, Ms Banton (for Mr Davies) cross-examined Mr Greene extensively. Mr Greene, consistently with his evidence before Judge Stewart, explained that he meant a 12 month break in *substantive instructions*. In particular he gave the following evidence under cross-examination:

> *10 ELAINE BANTON: So paragraph 9 of your statement when you say 'I did not hear from Mr Davies*
>
> *11 for some considerable time' Mr Greene, that's untrue isn't it?*
>
> *12 DAVID GREENE: Well it's… it's my… it's my… it was my recollection at the time, er, that er, we*
>
> *13 hadn't heard in any substantive way for some considerable time.*
>
> *14 ELAINE BANTON: You don't say 'not heard in… in a substantive way' in your statement do you?*
>
> *15 'I did not hear from Mr Davies for some considerable time'.*
>
> *16 DAVID GREENE: No, I'll take that criticism of it but, er, as far as I was concerned we hadn't had*
>
> *17 any substantive, er, discussions, um, for some considerable time.*
>
> *18 ELAINE BANTON: And what's the considerable time mean to you, what does that mean?*
>
> *19 DAVID GREENE: Well I think… I think the… the, er, as… as… as we see in, um, in 2009, um, we*

[6]This formulation of the complaint was also set out at paragraphs 2 to 4 of Mr Davies' Skeleton Argument for the final hearing.

20 wrote, er, Mr Davies wanted us to write to the TFL to assert his damages claim. I think that was in

21 April/May 2009, he wanted us to write to… to, er, TFL er, and he had his accountant prepare a

22 report, um, the background of which I think Mr Davies had prepared, er, and, er, we submitted that

23 to TFL, er, it wasn't… it seemed to me that it wasn't, um, a good claim, it's not the way that a claim

24 of that sort should be made. Er, but, er, Mr Davies was insistent that we submitted it, er, and so

25 we did. The result of that was that TFL sent a very short letter the beginning of June, um, er that

26 you don't have a damages claim and if you apply, er, we'll apply to strike it out. Subsequent to

27 that, um, Mr Davies, as I understand it wrote to, er, TFL to say that, er, he er, would come back to

28 the damages claim in due course, er, but in the meantime he wanted to go to the Metropolitan

29 Police, er, the local government ombudsman and I think the Mayor.

…

6 DAVID GREENE: So that was… that was really, um, our involvement in the damages claim, er,

7 and, um, until… until November 2009.

8 ELAINE BANTON: You say in paragraph 9 'I did not hear from Mr Davies for some considerable

9 time'. What do you say was the considerable time?

10 DAVID GREENE: Er, well I'd say…

11 ELAINE BANTON: How long was it, from when to when, what was it?

12 DAVID GREENE: <u>In relation to the substantive damages claim as I say it is we hadn't heard really</u>

<u>13 from the beginning of June as to what was going to happen in relation to it, er, and he was going to</u>

14 pay the costs for it.

15 ELAINE BANTON: Paragraph 10 of your statement, Mr Greene, you say in the centre of the

16 paragraph, 'I had not been in contact with him for some time'. Do you stand by that statement?

17 DAVID GREENE: Yes I think it's a… a generally, um, true statement that, um, we hadn't had

18 substantive instructions, er, in relation to the damages claim, er, and, er, they didn't come until

19 November 2009. I think even in… on 10th November 2009 I… I was saying if… if you want to take

20 this forward on your own then we'll have to come off the record.

21 ELAINE BANTON: But that's not what your statement says, is it? Because you say I had not been

22 in contact with him for some time. You don't qualify that, Mr Greene.

23 DAVID GREENE: I… I agree with that, the statement is as it is but from my point of view that was,

24 er, in relation to substantive contact that we were going to take forward the damages claim.

…

1 DAVID GREENE: It… it, what it was saying was there weren't substantive instructions or contact

2 in relation to the pursuit of the damages claim.

3 ELAINE BANTON: So where does it say not substantive instructions?

4 DAVID GREENE: It doesn't say that. [underlining added]

46. Ms Banton referred Mr Greene to his email of 6 April 2009 and confusingly she referred to "substantial communication regarding the instruction". The following exchange took place:

14 ELAINE BANTON: So then I would suggest to you that there is, um, we can see substantial

15 communication regarding the instruction during this period.

16 DAVID GREENE: Well I think... I think that what this was is me saying, er, that er, what you have

17 produced is not going to go, is not going to fly. So I said as I explained we need an accountant to

18 properly assess the damages that flow from the unlawful action on the part of Transport for

19 London. They can address that to us but it must be a reasoned argument and they will have to be

20 able to justify it in front of the Court and should be able to go through into some depth about the

21 way in which damages flow from the unlawful action.

47. Mr Greene then gave evidence that the Eco-Power judicial review file was "*closed for work*" after November 2008, as "*judicial review had completed*"; "*All that was outstanding was the collection of the bill on it*." It wasn't until 16 November, he said, that he knew that Edwin Coe was going to be instructed on the damages claim and so he opened a new file on it.

48. Mr Greene was asked by the Tribunal about his email dated 21 May 2009 (referred to in paragraph 15 above). To add to the confusion, the Tribunal Member referred to "substantively pursuing" the damages claim. He said this:

1 DAVID GREENE: Well I think… I think, um, timing-wise, I think that is, um, after we had submitted

2 the, um, figures that had been given to us by Jeffrey Robinson to the TFL.

3 TRIBUNAL MEMBER: Yes they were submitted on 6th May.

4 DAVID GREENE: 6th May, and I think we were awaiting a response to that and I think I just had in

5 mind is that, um, that… that's where we are at the moment.

6 TRIBUNAL MEMBER: So it wasn't substantively pursuing?

7 DAVID GREENE: No we had… I mean all we had done is submit to TFL, um, what we had been

8 provided with, and, er, Mr Davies was insistent that we should do so, um, I personally didn't think

9 actually they added up to much but there we are he wanted us to do it so we put them in.

10 TRIBUNAL MEMBER: And that work was pro bono?

11 DAVID GREENE: It was, we didn't… we didn't charge for it.

12 TRIBUNAL MEMBER: Thank you.

13 DAVID GREENE: I think I say some… somewhere that in order to pursue the… to actually pursue

14 the damages claim we'd need Counsel, expert, we'd need new Particulars of Claim, um, and we'd

15 have to have an application in front of the Court for directions and usually those directions for

16 judicial review are to move the… move the damages claim into a sort of substantive action in

17 another court. I think in this case we applied for the TCC, um, I personally was not convinced

18 about that because I think it could have been done all in the QB but… but that's the way one would

19 do it. Um, and it… and it… to me it's important that when you're making a damages claim it's

20 properly prepared, er, and… and it's substantive and its' something that can be justified because

21 that's… that's the document you're going to be relying upon all the way through, er, and to me

22 what we were submitting to the TFL simply didn't mean that.

49. Mr Davies asked to be allowed to make a closing speech to the SDT but the SDT considered it unnecessary: see paragraphs 7.1 – 7.4 of its judgment.

Findings of the SDT

50. The findings of the SDT begin at paragraph 17.76 of its judgment. The SDT found in particular as follows.

51. The SDT rejected the allegation that Mr Greene deliberately failed to disclose the email exchanges and letters between November 2008 and November 2009:

> "*17.83 As detailed, Mr Davies was in possession of the documents now relied upon, but not produced during the County Court proceedings. In those circumstances, it was not accepted that Mr Greene had deliberately concealed them; documents could not be concealed from someone who was already in possession of them.*
>
> *17.84 Having determined that there was no evidence to support the contention that Mr Greene had prepared the List of Documents, or that documents were selectively disclosed, the Tribunal found that Mr Greene had not deliberately omitted the communications in order to create the false impression that there had been no contact, communication or representation at all between November 2008 November 2009, so as to support the false impression that the Eco-Power file had closed and a new damages file had been opened.*
>
> *17.85 Accordingly, the Tribunal found that Mr Greene had not misconducted himself as regards the List of Documents.*"

52. I consider that that conclusion cannot be said to be wrong, let alone plainly wrong.

53. The SDT did find, however, that Mr Davies evidence that there was a gap of a year in contact between him and Mr Davies was "inaccurate". At 17.87 the SDT stated:

> "*The Tribunal considered the communications relied upon by Mr Davies and whether they demonstrated that he had lied in his oral and written evidence as alleged. It was plain that there had been ongoing contact throughout the period in which it was said that Mr Davies had not been in contact for some time and that there was a gap of about a year. The Tribunal thus found that his evidence to that effect was inaccurate*".

54. In my judgment, the SDT was plainly right to find that. However, whilst this aspect of Mr Greene's evidence (at the County Court in 2012) was inaccurate, the SDT held that it did not reflect anything other than his genuine belief at the time and it was not deliberately inaccurate:

> "*17.93 The Tribunal whilst finding that Mr Greene's evidence at the County Court was inaccurate, did not find that it reflected anything other than his genuine belief at the time. It was accepted that Mr Greene had not reviewed the Judicial Review file, and that he considered the Judicial Review file to have been at an end when permission to appeal HHJ Hickinbottom's decision was refused.*
>
> *17.94 As detailed, the Tribunal did not find that the giving of inaccurate evidence meant that such evidence was deliberately inaccurate.*"

55. Importantly, the SDT referred to the fact that Mr Greene had made it plain in his evidence before the County Court, that he was giving evidence in the absence of the Judicial Review file and from his best recollection [17.95]. The Tribunal accordingly went on to find:

> "*He did not have the Judicial Review file, had not reviewed the Judicial Review file, and was not taken by Mr Davies to the now relied upon communications. It had been suggested that Mr Greene had failed in his obligations by failing to review the Judicial Review file. The Tribunal did not accept that assertion. The issues to be determined in the County Court was whether or not a new retainer had been entered into which placed a personal liability of Mr Davies. The documents in that regard were on the damages file. The Tribunal thus found that there was nothing improper in Mr Greene not reviewing a file that was not relevant to the issues to be determined.*"

56. At paragraphs 17.90 – 17.91 of its judgment, the SDT made the following key findings:

> "*17.90 The Tribunal noted that as regards any proceedings, the damages claim had been stayed, during the period where Mr Greene had said there was a one year gap, but when there were ongoing and continuous communications between Mr Davies and Mr Greene. When considering the communications, the Tribunal remained cognisant of the fact that the damages claim had been stayed.*
>
> *17.91 The Tribunal considered the communications with care. It found that there was no substantive work being undertaken during from November 2008 until the new retainer on 16 November 2009. Whilst there had been many discussions about what was necessary in order to pursue the damages claim, no work in order to progress that claim had happened. The general tenor of the communications was about what was required, however, it was clear that substantive work would not be undertaken due to the outstanding fees.*"

57. The SDT then referred to each of the written communications set out in paragraphs 5, 6, 8, 13, 15, 17 and 23 above.

58. It followed that, the SDT reasoned at 17.96:

> "*The Tribunal did not find that Mr Greene had intended to mislead the Court, nor had he actually done so. His inaccurate evidence, the Tribunal found, was inadvertent. The Tribunal did not consider that the evidence Mr Greene gave before the Tribunal was significantly different to that given in the County Court. Having been asked to answer the Complaint, Mr Greene had clarified what he meant by a gap of a year and the break in*

> *instructions. That evidence had not been given at the County Court as it was not relevant to the determination of the issue before that Court.*"

59. The SDT accordingly concluded at 17.97 that:

> "*The case had been brought against Mr Greene on the basis that he had lied to the County Court in his oral and written evidence. The Tribunal determined that once it was established that he had not lied (or been reckless as to the evidence given) the allegations fell away. It followed that having found that Mr Greene had not lied when giving his evidence, the Tribunal did not find him to have been dishonest, reckless or to have been in breach of the Principles as alleged.*"

Analysis

60. Having found that Mr Greene did not lie, I consider that the SDT was undoubtedly correct so to conclude in light of the way in which the complaint was formulated (as described in paragraphs 43-44 above).

61. As I put to Ms Banton during her oral submissions, it follows that there are only two issues which arise for determination by this court:

    (1) Was the finding of the SDT that Mr Greene did not lie plainly wrong?

    (2) Was the SDT guilty of procedural impropriety in refusing to allow Mr Davies an oral closing speech?

Ms Banton agreed with this.

Was the finding of the SDT that Mr Greene did not lie plainly wrong?

62. So far as this question is concerned, the Tribunal stated in paragraph 17.91 of its judgment that "*no substantive work was undertaken between November 2008 and November 2009*." Ms Banton criticised this finding, submitting that it was plain that substantive work was carried out during this period by the writing and sending of the settlement letter to TFL and discussions about what would be needed to progress the damages claim.

63. However, I consider that it is clear from paragraphs 17.90 and 17.91 of the judgment that what the Tribunal meant by "*no substantive work [having been] undertaken*" was that no substantive work to progress a damages claim had taken place because no instructions to lift the stay were given until 11 November 2009. It was only after those instructions were given that then substantive work could begin on pursuing the claim, in particular in terms of counsel's advice, evidence gathering and a report from the accountant. Moreover, unless a payment on account of the costs of this work was made

(and none was forthcoming during the period November 2008 – November 2009), it simply could not begin[7].

64. This finding of the SDT was consistent with the evidence given by Mr Greene at the hearing before it (referred to in paragraphs 45-46 above), and it was accordingly open to the SDT to make that finding. In Mr Greene's evidence to Judge Stewart (see paragraph 30 above), despite the confused use of terminology in the cross-examination discussed above, he was clearly referring to a break of a year *in instructions* to continue with the Judicial Review by way of the damages claim. It is true that in paragraph 10 of his witness statement in that action he did say "*I had not been in contact with him for some time*." That statement on its face was inaccurate, as the SDT held. However, Mr Greene made it clear in giving his evidence that he did not have the judicial review file and had not reviewed it. It was open to the SDT to find, and it did find, that this inaccurate statement was accordingly inadvertent and not dishonest.

65. But there is another reason why the Tribunal was entitled to find that it was not dishonest, which is that when Mr Greene was cross-examined at trial before Judge Stewart, he made it clear that he was meaning to say (as the Tribunal accepted) that there had been no substantive instructions for 12 months because he had received no substantive instructions to lift the stay on the damages claim. There was, he said, a year's break in instructions in the sense that "*we had finished the Eco-power file some time considerably earlier and, as I say in my statement, you approached us again I think 12 months later saying could we do a damages claim*." He explained before the SDT that that was what he was meaning to convey by saying in his witness statement that he had not been in contact with Mr Davies for some time. I consider that in the light of Mr Greene's evidence in cross-examination both before Judge Stewart and the SDT, particularly in the light of the loose and confusing use of language/terminology in the questions put to him, the SDT was fully entitled to find that Mr Greene had not intended to mislead the court and that he did not lie in his witness statement or to the court. Certainly I do not consider that it can be said to have been plainly wrong so to find.

66. Ms Banton rightly accepted that all of the other grounds of appeal (save for that relating to costs) are merely variations on the same theme, namely that the Tribunal ought to have held that Mr Greene lied to the County Court in giving evidence to it in 2012. Since the Tribunal was not plainly wrong in finding that he did not lie (or put another way, it cannot be said that no reasonable Tribunal could have found that he did not lie), it must follow that each of these other grounds of appeal must also fail (including the allegation of recklessness).

67. The ground of appeal so far as costs is concerned is that the Tribunal wrongly refused to make an award of costs to Mr Davies in respect of Mr Greene's earlier unsuccessful strike out application. (I would add that Mr Davies cannot be entitled to the costs of the proceedings as a whole in the light of this judgment, as his complaint has failed).

68. The Tribunal dealt with the costs of the strike out application at paragraphs 18-23 of its judgment. It refused to award Mr Davies his costs of the strike out application but did not explain why it was so refusing, other than to say that the right order was no order as to costs of the proceedings as a whole.

[77] See paragraph 25 of the analysis above.

69. However, I do not consider that the SDT was plainly wrong in making an overall order in the case of no order as to costs. Indeed, that seems to me to be a fair overall order in the exercise of its discretion.

Was the SDT guilty of procedural impropriety in refusing to allow Mr Davies an oral closing speech?

70. So far as this question is concerned, since I have found that the evidence shows that Mr Greene did not lie, it must follow that there was no procedural impropriety as giving Mr Davies another speech would have made no difference to the outcome.

71. But in any event there was no procedural impropriety (or serious procedural irregularity[8]) in this case. Whether to grant a closing speech is context specific and in the present context the SDT's refusal in this case was not unfair[9]. As the SDT itself pointed out (at 7.3), this was only a short hearing of 3 days and the proximity of the evidence to the Tribunal's consideration of the issues was not such that the Tribunal would need to be reminded of the evidence. The SDT had a transcript of Mr Greene's evidence before both the county court and the SDT itself. I consider that it was sufficient in all the circumstances to allow Mr Davies an opening speech, to give evidence, to cross-examine Mr Greene by counsel and then afford him a right of reply on points of law and to correct mistakes. There was accordingly no serious procedural irregularity.

[8] CPR 52.21(1)

[9] I do not consider it would be sufficient for the SDT, in order to justify its refusal to afford Mr Davies a closing speech, simply to rely upon the fact that it was the Tribunal's standard practice to allow the Applicant to open and the Respondent to close. But it did not do so.